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(A) CHRONOLOGICAL CLASSIFICATION.

(WORKS ON THE ENGLISH, SCOTCH AND AMERICAN LAWS OF EVIDENCE)

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2nd Ed., London, 1735

[The anonymous author observes in his Preface that prior to this collection there was nothing of this nature extant besides the 11th Chapter of a Book entitled *Trials per Pais* which was very defective. Ed.]

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[This anonymous work is in substance Part VI of the anonymous first edition (1767) of what afterwards appeared as Buller's *Notes Praes.*, it is found also in all subsequent editions. Thayer's *Cases on Evidence* p. 1028]

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London, 1825

[An early attempt at codification Ed]

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[The papers from which this work was extracted were written by Bentham at various times from the year 1802 to 1814 on all the branches of the Law of Evidence as it was then understood of that branch of law in modern times. Speculations on Judicial Evidence had already been published in a more condensed form by M Dumont of Geneva in the "Traite des Preuves Judiciaires," published in 1823, an English translation of which appeared in 1825 See *ante*, and the Preface of J S Mill. As

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1921 MEDINA (H R)—Summary of the Law of Pleading, Practice and Evidence in the State of New York 4th Edition

U S, 1921.

WORKS ON THE LAW OF EVIDENCE IN INDIA

1858 NORTON—The Law of Evidence applicable to the Courts of the Late East India Company explained in a course of lectures delivered by the Hon'ble John Bruce Norton Barrister at Law Advocate General of Madras

Madras, 1858

[2nd Ed. 1859 3rd *quære* date 4th Ed. 1861 5th Ed. *quære* date, 6th Ed. 1868, 7th Ed. 1869 This book contains the substance of the lectures the author delivered as Professor of Law in the Madras Presidency College]

1862 GOODEVE—The Law of Evidence as administered in England and applied to India, by Joseph Goodeve Barrister at law Acting Master of the Supreme Court of Calcutta and Lecturer on Law and Equity in the Presidency College

Calcutta, 1862

[In the preface the author says — Some progress had been made in the work before
it is trusted that the *practical* character to which at the same time it aspires will
not make it useless to those of more advanced position. The author subsequently, and in
1872 after the passing of the Evidence Act published a Supplement to this book. Ed.]

and character of the two works and the wideness of the field open to both, it was felt that there was still abundant room for each and the author persevered in his original design
it is trusted that the *practical* character to which at the same time it aspires will not make it useless to those of more advanced position. The author subsequently, and in 1872 after the passing of the Evidence Act published a Supplement to this book. Ed.]

- 1907 MONNIER (E R)—The Law of Confessions
Calcutta, 1907
- 1908 JANAKI NATHA PALA—Indian Evidence Act of 1872
1908
- 1908 THIKAMLAL RANCHODLAL DESAI—Law of Evidence, English and
Indian
Bombay, 1908
- 1912 Guide to the principles of the Law of Evidence and the Indian
Evidence Act
Madras 1912.
- 1913 CRANENBURGH (D E)—Criminal Evidence being the Indian
Evidence Act
Calcutta 1913
- 1913 TAPAPADA BANDYOPADHYAYA—Indian Evidence Act as amended
to 1899
Calcutta 1913
- 1914 KINNEY (A P)—Students' Guide to the Law of Evidence in India
Calcutta, 1914
- 1914 NARASIMHACHARI—Law relating to burden of proof in British
India
Madras, 1914
- 1915 EGGAR (A)—A pocket book of Common Sense extracted from
the case law relating to Evidence in British India
Rangoon, 1915
- 1915 MAHIMA CHANDRA SARKAR—The Students' Indian Evidence Act,
1872
Calcutta, 1915
- 1915 PRANASANKARA TIIPUTASANKARA—The Law of Evidence simplified
Surat 1915
- 1916 EGGAR (A) Evidence
Madras, 1916
- 1916 KAMALANANDA—Guide to the Indian Evidence Act, 1872
Gorakhpur 1916
- 1918 DONOGH (W R)—Principles of Circumstantial Evidence applicable
to British India
Calcutta, 1918
- [1911 1922]
- 1918 HARENDRA NATH MAITRA—Case noted Indian Evidence Act, 1872
Siljur, 1918
- 1919 PATANLALA RANCHHODDARA AND DHIPAJLALA KESAVLALA
THAKILA—The Indian Evidence Act
Bombay, 1919

(B) CLASSIFICATION BY NAMES OF AUTHORS

NOTE —For the works of the authors, see the entry given in the previous list against the date mentioned in this

(AUTHORS OF WORKS ON THE ENGLISH, SCOTCH AND AMERICAN LAWS OF EVIDENCE)

- | | |
|------------------------------|----------------------------|
| Abbott, 1891, 1895 | Lawson, 1886 |
| Allen, 1898 | Lockhart, 1915 |
| Anonymous, 1735, 1761 | Lowndes, 1843 |
| Archer, 1919 | Mackhn, 1895 |
| Bentham, 1825, 1827 | Mac Nally, 1802 |
| Best, 1844, 1849, 1880, 1911 | Mac Neal, 1914 |
| Bugelow, 1872 | Maude, 1911 |
| Bodington, 1904 | Maurice, 1921 |
| Bradner, 1898 | Mc Kelvey, 1907 |
| Bro vnc, 1893, 1897 | McKinnon, 1812 |
| Burnell, 1868 | Morgan, 1898 |
| Butterworth, 1898 | Nasmith, 1879 |
| Cababé, 1888 | Nelson, 1744 |
| Camp, 1903 | Norton, 1868 |
| Canadian Act, 1902 | Peale, 1801 |
| Carter, 1916 | Phillimore, 1850 |
| Chadwin, 1906 | Phillips, 1843, 1852, 1908 |
| Chamberlyne, 1911 1919 | Phipson, 1892 |
| Cockle, 1907, 1915 | Powell, 1858, 1910 |
| Davis, 1837 | Pam, 1861 |
| Dickson, 1855 | Rapalje, 1887 |
| Filho, 1904 | Reynolds, 1907 |
| Espinasse, 1825 | Rice, 1892 |
| Garde, 1830 | Richardson, 1912 |
| Gilbert, 1756 | Rogers, 1883 |
| Gillett, 1897 | Roscoe, 1827, 1835, 1908 |
| Glasford, 1820 | Starkac, 1824 |
| Gray, 1885 | Stephen, 1876, 1922 |
| Greenleaf, 1842 | Straker, 1899 |
| Gresley, 1836 | Swift, 1810 |
| Hagan, 1894 | Tait, 1834 |
| Hageman 1889 | Taylor, 1848, 1906, 1920 |
| Hammon, 1907 | Thayer, 1892, 1896, 1898 |
| Harris 1892 | Throckmorton, 1913 |
| Harrison, 1825 | Tremecar, 1902 |
| Hubbert, 1912 | Turner, 1913 |
| Holt, 1917 | Underhill, 1912 |
| Hughes 1906 | Wadsworth, 1865 |
| Hughes, 1917, 1921 | Warner, 1847 |
| Indemur & Thwaites | Watson, 1917 |
| James, 1889 | Wharton 1877, 1880 |
| Jelf, 1898 | Wigmore 1905 1913, 1915. |
| Jones, 1896 | Will, 1896 |
| Joy, 1842 | Williams 1895 |
| Kingsford 1908 | Wills, 1838 1894 1907 |
| Kirkpatrick, 1882 | Wilshire, 1906 |

Wood, 1886.

(AUTHORS OF WORKS ON THE LAW OF EVIDENCE IN INDIA)

- | | |
|-------------------|-----------------------|
| Banerji, 1896 | Kamalnanda 1916 |
| Broughton 1893 | Kanderey, 1862 |
| Caspersz, 1893 | Kunnev, 1914 |
| Cranenburgh 1913 | Le Lanu 1860 |
| Cunningham 1872 | Lewis 1828 |
| Desai, 1908 | Maitra 1918 |
| Eggar 1915 1916 | Markby 1897 |
| Fild 1867 | Mitra (A. C.) 1895. |
| Goolvee 1862 1872 | Mitra and Sircar 1894 |
| Griffiths 1890 | Norton, 1858, 1877 |
| Guile 1911 | Pala, 1908 |
| Hukam Chand, 1894 | Pillai, 1898 |

Pranasankara, 1916
Raha, 1894
Ratanjala, 1919
Sarkar, 1915

Sircar, 1894
Stephen, 1872.
Tarapada, 1913
Whitworth, 1875

(C) CLASSIFICATION BY SUBJECTS TREATED OF.

NOTE—For the works of the authors, see the entry given in the Chronological List against the date mentioned in this

ACCESSORIES AND ACCOMPLICES

Blundell, 1863

Chaudhuri, 1903

Maunsell, 1850

ADVOCACY.

Morison, 1895.

BURDEN OF PROOF (See *Act I of 1892, ss. 101—111*)

Best, 1880

Lawson, 1896

Gulson, 1900

Narasimhachari, 1914

Wigmore, 1913

CIRCUMSTANTIAL EVIDENCE.

Burrill, 1863

Phillips, 1879

Donogh, 1918

Will, 1896

Wills, 1838

COMMENTARIES ON THE INDIAN EVIDENCE ACT (*Act I of 1872*)

Banerji, 1896

Lewis, 1882

Broughton, 1893

Markby, 1897.

Caspersz, 1893

Mitra (A. C.) 1890

Cunningham, 1872

Mitra (B. K.) and Sarkar, 1894

Field, 1873, 1894

Norton, 1873

Goodale, 1872

Sarkar, 1894

Griffiths, 1890

Stephen, 1872

Whitworth, 1875

COMMUNICATION BY TELEGRAPH

Gray, 1885

CONFESSIONS AND CHALLENGE OF JURORS (See *Act I of 1872, ss. 24—30*)

Buddleley (Religious), 1865

Hopwood, 1871

Chaudhuri, 1903

Jay, 1842

Monnier, 1907

Notes—See also works on Criminal Evidence.

CROSS EXAMINATION

Wellman, 1903

Wrottesley, 1915

FSTOPPEL (See *Act I of 1872, ss. 115—117*)

Berglow, 1872

Caspersz, 1893

Broughton, 1893

Everest and Strole, 1884

Calabé, 1888

Fewart, 1900

Hukm Chand, 1894

EVIDENCE IN COURTS OF EQUITY

Gresley, 1836

EVIDENCE IN CRIMINAL CASES

Allen, 1898

Rice, 1892

Burrill, 1868

Roscoe, 1825

Cranenburgh, 1913

Tremear, 1902

Jell, 1898

Underhill, 1910

MacNally, 1892

Wharton, 1890

EVIDENCE ON COMMISSION

Hume Williams & Macklin 1895

EVIDENCE UNDER THE NEW YORK CODE

Warner 1887

EXPERT AND OPINION EVIDENCE (See *Act I of 1879* ss 45—51)

Harris 1897

Lawson 1886

James 1889

Rogers 1883

Stephen 1863

EXTRINSIC EVIDENCE AS AFFECTING DOCUMENTS

(See *Act I of 1872* ss 91—100)

Browne 1893

Wigram 1831

FRENCH LAW OF EVIDENCE

Bolington 1904

GENERAL WORKS ON THE LAW OF EVIDENCE

Anonymous 1735 1761

Phipson 1897

Brainer 1898

Po well 1856

Bentham 1825 1827

Ram 1861

Best 1849

Reynolds 1883

Dickson 185

Pice 1897

Cardie 1830

Starkie 1824

Gilbert 1756

Stephen 1876 1919

Glassford 1870

Straker 1899

Greenleaf 1842

Swift 1810

Harrison 182

Tait 1834

Jones 1896

Taylor 1848

Knowles 1905

Thayer 1897 1896 1898

McKinnon 1812

Wharton 1877 1880

Peake 1801

Wigmore 1904

Phillips 1814

Wills 1804

Wood 1886

HANDWRITING

Carlson 1914

Hagan 1894

HEARSAY EVIDENCE

Tregarthen 1915

HISTORY OF THE LAW OF EVIDENCE

Phillimore 1860

Poland 1893

IDENTIFICATION

Harris 1897

Ram 1861

INTERROGATING

Stephen 1888

Schell 1883

Willis 1916

IN SPRIUS EVIDENCE

Albott 1891 1897

Espinasse 1857

Archbold 1844

Peake 1801

Rice 1897

PRESUMPTIONS (See *Act I of 1877* ss 79—90 101—141)

Best 1844

DeCottar 1911

Burnell 1868

Lawson 1886

Mathews 1877

PRISONERS ON OATH

Stephen 1898

Wales 1861

IRRAWGFD COMMUNICATIONS (See *Act I of 1877* ss 121—177)

Hageman 1887

PSYCHOLOGY APPLIED TO EVIDENCE

Arnold, 1906

REFLEVANCY (See *Act I of 1872*, ss 5—16)

Whitworth, 1875

RIGHT TO BEGIN AND REPLY

Best, 1880

RULES OF EVIDENCE

Holt, 1917

Watson 1917

TESTIMONY

Blundell, 1863

Tozer, 1844

Carlson, 1914

Worsley, 1861

TEXT BOOKS ON INDIAN LAW OF EVIDENCE PRIOR TO ACT I OF 1872

Field 1867

Kindersley, 1862

Goodeve, 1862

Norton 1858

TRIAL EVIDENCE

Abbott, 1918

Henry, 1914

I wbank, 1902

Kennedy, 1906

Reynolds, 1912

WITNESSES (See *Act I of 1872*, ss 118—166)

Best, 1849

Reynolds, 1883

Morison 1895

Sichel, 1887

Ram 1861

Wilks, 1916

Rapalje, 1887

Wrottesley, 1910

THE LAW OF EVIDENCE

APPLICABLE TO

BRITISH INDIA.

GENERAL INTRODUCTION.

PRELIMINARY

The substantive law of this country defines the rights, duties and liabilities, the ascertainment of which is the purpose of every judicial proceeding. The Criminal branch of that law is contained in the Indian Penal Code, as also in various special and local laws dealing with the subject. The substantive Civil law of India has not as yet been codified. Generally speaking, it is to be found in various Acts of the Indian Legislature, in the English Statutes extending to India and in the personal law of the Hindus and Mussalmans. In cases for which no special provision exists, the Courts are enjoined to act according to justice, equity and good conscience. Adjective law defines the pleading procedure and proof by which the substantive law is applied in practice. It is the machinery by which that law is set and kept in motion. The rules relating to pleading and procedure are contained in the Civil and Criminal Procedure Codes. Proof, the remaining branch of adjective law, logically defined is the sufficient reason for assenting to a proposition as true (1). Practically considered, it is the establishment of facts in issue (ascertained in each particular case by the pleadings and settlement of issues) by proper legal means to the satisfaction of the Court (2). This is done by the production of evidence, the law relating to which is to all legal practice what logic is to all reasoning, whatever subject it may be concerned about. Accurately speaking, the terms 'proof' and 'evidence' are distinguished in this: that proof is the effect or result of evidence, while evidence is the medium of proof (3). The facts out of which the rights and liabilities arise must be determined correctly. Facts which come in question in Courts of Justice are enquired into and determined in precisely the same way as doubtful or disputed facts are enquired into and determined by men in general, except so far as positive law has interposed with rules to secure impartiality and accuracy of decision or to exclude collateral mischief likely to result from the investigation (4). Some portions of the law of Evidence, such as those which deal with the relevancy of facts, are intimately connected with the whole theory

Evidence
branch
adjective
law

(1) Wharton Fr. § 1 *id.* Cr. Ev. § 2

(2) Best Ev. § 10

(3) *Ib.*

(4) *Ib.*, § 2. Whether all these rules

are effective for the purpose for which they were enacted or are necessary is of course another question

of human knowledge and with logic as applied to human conduct (1) Other rules are of a technical character designed to secure the objects mentioned or are based on principles of general policy

Meaning of
term 'Evi-
dence'

The ambiguity of the word "evidence" has given rise to varying definitions Bentham used it in its broadest sense when he defined it as "any matter of fact the effect, tendency, or design of which is to produce in the mind a persuasion affirmative or disaffirmative of the existence of some other matter of fact" (2) It is, however, clear, that the term as used in municipal law must have a very much more limited meaning It is manifest that every fact some having, it may be, but the very slightest bearing on the issue, cannot be adduced some limit to the facts which may
nd of litigation (3) The great bulk,
consists of negative rules declaring
vidence" (4) In its legal and most

general acceptation, "evidence" has been defined to include all the means, exclusive of mere argument, by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved to the satisfaction of the Court (5) According to the concise definition of the California Code, "Judicial Evidence is the means, sanctioned by law, of ascertaining in a judicial proceeding the truth respecting a question of fact" (6)

Judicial evidence is thus a species of the genus "evidence," and is for the most part nothing more than natural evidence, restrained or modified by rules of positive law (7) A law of evidence properly constructed would be nothing less than an application of the practical experience acquired in Courts of law to the problem of enquiring into the truth as to controverted questions of fact (8) The law of evidence (which is contained mainly in Act I of 1872) (9) determines how the parties are to convince the Court of the existence of that state of facts which according to the provisions of the substantive law, would establish the existence of the right or liability which they allege to exist (10) This law, in so far as it is concerned, unded,
in the words of Rolfe, B what,
abstractedly considered is c ispute,
and of what is practicable years,
instead of sixty or seventy, t came
into dispute if all matters v verally
gone into, and enquiries carried on from month to month as to the truth of

(1) Steph Introd 1 2 The same learned author (Dig xi) stated that Chief Baron Gilbert's work on the Law of Evidence (1756) the first of the recognised English text books on the subject is founded on Locke's Essay much as his own work is founded on Mill's Logic

(2) Benth Jud. Ev. 17

(3) Pur Jones Ev., § 1

(4) Steph Introd these rules are closely connected with the institution of trial by jury see Thayer's Cases on Evidence 4 and Thayer's Preliminary Treatise on Evidence at the Common Law Part I Development of Trial by Jury, and per Lord Mansfield in the *Eckley Leverage Case* 4 Camp 414

(5) 1 Greenleaf Ev., § 1 Best Ev., 11 p 19; Steph Introd 7 as to the definition of the word as used in the Act

see Notes to s 3 post See also Steph Dig Art 1 Taylor Ev. § 1 and the definition given by Lord Thayer in his Cases on Evidence p 2

(6) Cal Code s 1823 See observations on the definitions given in the California Code (which are said to express and typify the judicial sentiment of the American Judiciary) in Rees General Principles of the Law of Evidence p 9

(7) Best Ev. §§ 34 79

(8) Speech in Council of the Hon. Mr Stephen *Gazette of India* 18th April 1871 p 42 (Extra Supplement)

(9) Other Acts also contain provisions relating to evidence as to this see s 2 post

(10) Steph Introd 10

(11) In the *Attorney General v Hitchcock* 7 L. Ch. 91 105

everything connected with it I do not say how that would be, but such a course is found to be impossible at present' (1)

Rules respecting judicial evidence may be generally divided into those to be proved, and those relating to the It has been said that there is but one the nature of the case will admit (3)

What the law of Evidence determines

This rule does not require the production of the greatest possible quantity of evidence, but is framed to prevent the introduction of any evidence which raises the supposition that there is better evidence behind, in the possession, or under the control, of the party, by which he might prove the same fact The two chief applications of this principle are as follows (a) With regard to the *quid probandum*, the law requires as a condition to the admissibility of evidence (either direct or circumstantial) an open and visible connection between the principal and evidentiary facts (1) If the belief in the principal fact which is to be ascertained is to be after all, an inference from other facts, those facts must at all events be closely connected with the principal fact in some of certain specific modes (5) This connection must be reasonable and proximate not conjectural and remote Thus, which is the theory of relevancy, is dealt with in the first Part of the Evidence Act (6) The first question therefore which the law of evidence should decide is what facts are relevant and may be proved (b) With regard to the *modus probandi*, the law rejects derivative evidence such as the so called 'hearsay evidence' (7) and exacts original evidence, prescribing that no evidence shall be received which shows on its face, that it only derives its force from some other which is withheld (8) In other words, the best evidence must be given If a fact is proved by oral evidence it must be direct, that is to say, things seen must be deposed to by some one who says he saw them with his own eyes things heard by some one who says he heard them with his own ears (9), and original documents must be produced or accounted

In addition to ion of the law of allegations, but it will be sufficient if the substance of the issues be proved The rights of parties litigating must be determined *secundum allegata et probata* (according to what is averred and proved) This rule has not been incorporated in the Act, as it is one, strictly speaking, rather of the law of procedure proper than of evidence (11)

(1) See also *R v Parbhudas* 11 Bom H C R 91 (1874) per West J One of the objects of a law of evidence is to restrict the investigations made by Courts within the bounds prescribed by general convenience As to the utility of the rules see Best Ev §§ 35 et seq Field Ev 13 et seq sanctions Best Ev §§ 16 et seq securities for insuring veracity and completeness of evidence ib §§ 54 et seq 100

(2) Best Ev § 111 Mr Stephen said in his above mentioned speech of the 18th April 1871 — The main feature of the Bill consists in the distinction drawn by it between the relevancy of facts and the mode of proving relevant facts

(3) *Per Lord Hardwicke* Ch J *Omychund v Barker* 1 Atk 71 49 See *Raolakhshy v Sitanatha* 14 M I A 570 588 (1872) *Baboo Bodhnara v Baboo Omrao* 13 M I A 519 527 (1870) s c, 15 W P 11 C *Baboo Gunga Pershad*

v Baboo Inderjit 23 W R 390 P C (1875) *Moleema Chunder v Poorno Chunder* 11 W R 165 167 (1869), *D nomoy Deb v Luchmiput* 7 I A 8 As to the meaning of the rule see Norton Ev 69 Best Ev pp 70 73 87 88 91 93 96 215 216 89 431 434 416 275 489 251 252 Steph Introd 3 7

(4) Best Ev §§ 90 38
(5) *Gazette of India* 18th April 1871.

supra

(6) *v post* Introduction to Ch II
(7) See Steph Introd 4 6, Best Ev, §§ 495 112

(8) Best Ev § 9 *Doe d Helsh v Langfield* 16 M & W, 497, *Doe d Gilbert v Ross* 7 M & W, 107 106, *Ma donnell v Evans* 11 C B 930 942

(9) t ss. 59 60 post

(10) t ss 59 61, 64, post

(11) See cases cited in Field Ev, 3 - 369

The law of evidence thus determines —(a) The relevancy of facts(1) or what sort of facts may be proved in order to establish the existence of the right, duty, or liability defined by substantive law (b) The proof of facts(2) that is what sort of proof is to be given of those facts (c) The production of proof of relevant facts(3), that is, who is to give it and how it is to be given, and the effect of improper admission or rejection of evidence(4) (*see post*)

The sufficiency of evidence must be distinguished from its competency. By competent evidence is meant that which the very nature of the thing to be proved requires as the fit and appropriate proof in the particular case such as the production of a writing where its contents are the subject of enquiry. If satisfactory, or, as it is also called, sufficient, evidence is intended that amount of proof which ordinarily satisfies an unprejudiced mind beyond reasonable doubt. The circumstances which will amount to this degree of proof can never be previously defined, the only legal test of which they are susceptible is their sufficiency to satisfy the mind of an ordinary man, and so to convince him that he would venture to act upon that conviction in matters of the highest concern and importance to his own interests(5). The effect of evidence, considered from the point of view of the weight which should be attached to it, cannot be regulated by precise rules as the admissibility of evidence may be(6). For these reasons considerations upon the sufficiency of evidence have no place in the Act

Sufficiency
of Evidence

The weight of evidence cannot be regulated by precise rules as the admissibility of evidence may be(7) it depends on rules of common sense(8) and the weight of the aggregate of many such pieces of evidence taken together is very much greater than the sum of the weight of each such piece of evidence taken separately(9). The Draft Bill contained the following section which though it was not thought necessary

‘when any fact is hereinafter indicate in any way the weight being a matter solely for the discretion of the Commissioners, in the second paragraph of their Draft Bill said “Whenever any evidence is said to be admissible, it is not meant that it is to be regarded as conclusive but only that the weight, if any, which the deciding authority may consider due, shall be allowed to it” In this connection a few dicta of general application may be here cited. When one witness deposes to a certain fact having occurred, and another witness stating that he was present at the same time denies that any such fact took place greater weight other things being equal is to be attached to the witness alleging the affirmative (10) Upon

(1) Evidence Act Part I *v post* s 3 and Introduction to Chapter II

(2) Evidence Act Part II *v post* and Introduction to Part II

(3) Evidence Act Part III *see* Introduction to this Part *post*

(4) *Steph* Intro II

(5) *Greenleaf* Ev § 2

(6) *See Farquharson v Drarkana* 8 B L R. 501 503 (1871) *Lord Advocate v Lord Blantyre* L R. 4 App Cas 792 *R v Madhub G r* 21 W R. Cr. 13 19 (18 4) *Townsend v Strangroom* 6 Ves. 333 334 *O'Horne v Dolngbroke* L R 2 H L. 837 *Iest* Ev. § 81

(7) *Farquharson v Drarkana* 8 B L R. 501 503 (1871) *Best* Ev. § 81

(8) *Lord Advocate v Lord Blantyre* L R. 4 App Cas 792 *per* Lord Blackburn “For weighing evidence and drawing inferences from it there can be no canon

Each case presents its own peculiarities and common sense and shrewdness must be brought to bear upon the facts elicited in every case—whch a Judge of fact in this country discharge the function of a jury in England has to weigh and decide upon” *R v Madhub G r* 21 W R. Cr. 13 19 (1874) This inconvenience says Lord Eldon in *Townsend v Strangroom* (6 Ves. 333 334) belongs to the administration of justice that the minds of different men will differ upon the result of the evidence which may lead to different decisions upon the same case. See also remarks of Lord Blackburn in *O'Rourke v Dolngbroke* L R 2 H L. 837

(9) *Lord Advocate v Lord Blantyre* *supra* 792

(10) *De v Jerald v Doria Singh* 3 M L A 347 357 (1844), s.c. 6 W R. (P C.) 55 *Willis* Cr. Ev. 290

general principles affirmative is better than negative evidence. A person deposing to a fact which he states he saw, must either speak truly, or must have invented his story, or it must be sheer delusion. Not so with respect to negative evidence, a fact may have taken place in the very sight of a person who may not have observed it, and if he did observe may have forgotten it" (1) As a general rule, should be attached to words which are numbered (2) More weight acts than of their alleged cannot properly weigh evidence who starts with an assumption of the general bad character of the prisoners (4) nted (3) A Judge, however,

The Act in many of its sections leaves matters dealt with thereby to the Judicial discretion of the Court (5) "Discretion, when applied to a Court of law, means discretion guided by law. It must be governed by rule and not by humour. It must not be arbitrary, vague, and fanciful, but legal and regular" (6) "In using a judicial discretion, the Courts have to bear in mind not only the Statutes, but also the great rules and maxims of the law, such, for example, as those of logic or evidence, or public policy. The right discretion is not *scire quid sit justum*, but *scire per legem*, as Coke insisted (7) 'discretion

The English system of Judicial evidence is comparatively of very modern date (8) Its progress is marked by the discarding of those restrictions of scholastic jurisprudence which firstly compelled much that was material to be excluded from the issue and then when the issue was thus arbitrarily narrowed shut out much evidence that was relevant and attached to the evidence received certain arbitrary valuations which the Courts were required to apply (9) The progress has, as in all cases of legal reform, been a slow one (10) But it has been said in England, where the traditional theories still possess some strength, that artificial rules upon matters of evidence are better avoided as much as that, with a few exceptions on the ground v light on the disputed transaction is ad- be regarded as being itself an application of these principles "Under the Evidence Act admissibility is the rule and exclusion the exception, and circumstances which under other systems might operate to exclude are, under the Act, to be taken into consideration only in judging of the value to be allowed to evidence when admitted" (13) Accordingly, where a Judge is in doubt as to the admissibility of a particular piece The English system

(1) The passage in quotation marks is per Sir H Jenner in *Chambers v The Queen's Proctor* 2 Curt 415 434 see also *Williams v Hall* 1 Curt 606

(2) See notes to s 134 post

(3) *Meer Usdoollah v Beeby Isaman* 1 M L A 42 43 (1836)

(4) *R v Kulu Mal* 7 W R Cr 103 (1867) see further notes to s 165 post
(5) See ss 32 33 39 58 60 66 73 86 88 90 114 118 135 136 142 148 150 151 154 156 159 162 164 166

(6) Per Lord Mansfield in *Hilke's case* 4 Burroughs Rep 2539 cited in *Harbans Sahai v Bhairu Pershad* 5 C 259 265 (1879)

(7) *R v Chagan Dasaram* 14 B 331 344 352 per Jardine J (1890) Best Ex § 86

(8) Best Ex §§ 109 110 See Phillimore's History and Principles of the Law of Evidence (1850) pp 122 et seq

(9) Wharton P. § 5

(10) See remarks of Lord Coleridge

C J in *Blake v Albion Life Assurance Co* 4 C P D 109 (1878)

In any but an English Court and to the mind of any but an English lawyer the controversy whether this evidence is or is not evidence which a Court of Justice should receive would seem I think supremely ridiculous because every one would say that the evidence was most cogent and material to the plaintiff's claim

(11) Per Wills J in *Hennessey v Wright* L R 21 Q B D 518 (1883)

(12) Per Lord Coleridge C J in *Blake v Albion Life Assurance Co*, L R 4 C P D 109 (1878) adding — "Not of course matters of mere prejudice not anything open to real moral or sensible objection but all things which fairly throw light on the case"

(13) *R v Mona Pura* 16 B 111 (1888) (1892) per Jardine J, cited in *Harbans Sahai v Bhairu Pershad* (1892) per Jardine J, and see cases cited post

of evidence, he should declare in favour of admissibility rather than of non admissibility (1) The principle of exclusion enacted by the fifth section of this Act should not be so applied as to shut out matters which may be essential for the ascertainment of truth (2) The Privy Council in *Ameeroonissa Khatoon v. Abedoonissa Khatoon* (3) said "Objections made with the view of excluding evidence are not received with much favour at this Board" But it must not be assumed either that all technical rules are unnecessary, or that all the rules of evidence are technical It may be safely asserted that the enforcement of most of such technical rules as are contained in this Act is necessary, and that many other rules possess no element of technicality whatever Thus as the Judicial Committee have also observed "It is a cardinal rule of evidence, not one of technicality but of substance, that where written documents exist, evidence of their own contents" (4) than those covered by what is technically known as 'the best evidence' rule The Act would have been better had it not attempted to define what is Evidence and had limited itself to a declaration of what is not admissible In that case all that was probative would go in without discussion unless the objector could show that it was forbidden by the provisions of the Act

History of
the law of
evidence in
this country

The English rules of evidence were always followed in the Courts established by Royal Charter in the Presidency Towns of Calcutta Madras and Bombay Such of these rules as were contained in the Common and Statute law which prevailed in England before 1726 were introduced by the Charter of that year, some others were rules to be found in subsequent Statutes expressly extended to India, while others, again had no greater authority than that of use and custom (5) In the Courts outside the Presidency Towns no complete rules of evidence were ever laid down or introduced by authority (6) The law on this subject rested in a state of great indefiniteness In the Full Bench decision of the Calcutta High Court in the case of the *Queen v. Akhyroolah* (7) decided in 1866, it was held that the English law of evidence was not the law of the Mofussil, that at that time the Mahommedan criminal law, including the Mahommedan law of evidence, was no longer the law of the country, and that by the abolition of the Mahommedan law, the law of England was not established in its place The Mofussil Courts were thus not required to follow the English law, although they were not debarred from following it where they regarded it as the most equitable

The first Act of the Governor General in Council which dealt with evidence strictly so called, was Act X of 1835, which applied to all the Courts in British India and dealt with the proof of Acts of the Governor General in Council (8) This was followed by eleven enactments passed at intervals during the next twenty years, which effected various small amendments of the law and applied

(1) *The Collector of Corakhpur v. Palakdhari* 12 A 26 (1889)

(2) *R v. Abdullah* 7 A 40 (1885)
see observations of the Hon Mr Maine in moving the reference of the Evidence Bill to Committee Anything like a capricious administration of the law of evidence was an evil but it would be an equal or perhaps even a greater evil that such strict rules of evidence should be enforced as practically leave the Court without the materials for a decision

(3) 23 W R., 208 209 P C (1853)

(4) *Dhoomass Deb v. Roy Luchmipur* 7 I A., 8 15 (1879)

(5) Field L., 15 Whitley Stokes

Anglo Indian Codes Vol II 812 See Report of Law Commissioners Appendix

(6) Regulations made between 1793 and 1834 contained a few rules others were derived from a vague customary law of evidence partly drawn from the Hedaya and the Mahommedan Law Officers, others from English text books Whitley Stokes II 812 813 and see Act XIX of 1853

(7) H L R Sup Vol App II s c., 6 W I Cr., 21 11el I v 16 18 Whitley Stokes *supra* and see *R v. Hamirams* 6 Bom II C R Cr 49 (1879)

(8) Whitley Stokes, II 813

to the Courts in India several of the reforms in the law of evidence made in England (1) In 1855, an Act was passed (2) for the further improvement of the law of evidence, which contained many provisions applicable to all Courts in British India (3) These provisions were repealed and re-enacted with certain modifications and alterations by the present Act While, therefore, within the Presidency Towns the English law of evidence was in force, modified by certain Acts of the Indian Legislature of which Act II of 1855 was the most important, the Mofussil Courts on the other hand, had, down to 1872 hardly any fixed rules of evidence save those contained in Acts XIX of 1853 and II of 1855 (4) Before and even for some time after 1872 the lax character of the evidence in the Mofussil Courts was the subject of frequent judicial comment (5) To remedy this unsatisfactory (6) state of the law a Draft Bill was drawn up by Her Majesty's Commissioners and introduced by Sir Henry Summer Maine then the Legal Member in Council This first Draft Bill did not, however meet with approval A new Bill was therefore prepared by Sir James Fitzjames Stephen which was ultimately passed as Act I of 1872 (The Indian Evidence India (7)

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that law (8) Together with certain Acts saved by (9) or enacted subsequent to it, this Act contains the law on the subject of evidence now in force in British India (10)

It has been said that with some few exceptions the Indian Evidence Act was intended to, and did, in fact consolidate the English law of evidence (11),

(1) *Ib* Act XIX of 1837 (abolished incompetency by reason of conviction) Act V of 1840 (affirmations) see also Acts XVIII of 1863 s 9 VI of 1872, X of 1873 Acts IX of 1840 VII of 1844 (incompetency by reasons of crime or interest) XV of 1852 (competency of parties and other matters) Act XIX of 1853 extended several of these reforms to the Civil Courts of the East India Company in the Bengal Presidency

(2) Act II of 1855 As to this Act see *R v Gopal Dass* 3 M 271 282

(3) The following Acts were subsequently passed \ of 1855 (Attendance of Witnesses) VIII of 1859 (Civil Procedure contained like the present Code provisions as to witnesses) XXV of 1861 (Criminal Procedure contained provisions as to witnesses confessions police-diaries examination of accused and Civil Surgeon reports of Chemical officers and dying declarations which have been re-enacted in the present Act or in the present Code), XX of 1869 (evidence of prisoners) see Whitley Stokes 817.

(4) Whitley Stokes 817 Field Ev 17 18 19 See Report of Law Commis s oners

(5) See other citations in *Unide Rajala v P. P. S. S. S.* 7 M I A 128, 137 (1858) s c 4 W R P C 121, *Hurce hur Mojumdar v Clurn Majhee* 22 W R 355 356 357 (18 4) *Naragunty v Lurgana* 9 M I A 90 (1861) s c 1 W R P C 30 *Gujju Lall v Fattah Lall* 6 C 193 (1880)

Even as late as 1881 Stuart C J had cause to complain *Phul Kuar v Surjan Pandey* 4 A 249 250

(6) See remarks of Privy Council in *Bunaree Lal v Malorajah Hetnaram*, 7 M I A 148 168 (1858) s c 4 W R, P C 148 *Unide Rajala v Pemmasamy*, 7 M I A 128 137 (1858) s c 4 W R, P C 121, *Ajoodhya Proshad v Baboo Or Rao* 13 M I A 519 (1870), s c 15 W R P C 1

(7) Report of Select Committee It is little more than an attempt to reduce the English law of evidence to the form of express propositions arranged in their natural order with some modifications rendered necessary by the peculiar circumstances of India. Steph Introd 2 The differences between the Indian and English law will be found hereafter noted in the Commentary to the sections see also Whitley Stokes p 827, Vol II and Wilson's Comparative Tables English and Indian Law 1890 p 1 pointed out later f exist in the mode of English and Ind an law

(8) See last note *Krishnadas v Bapu* 442 (1886) Collector *Palakdhari Singh* 12 *R v Abdullah* 7 A.

(9) S 2 post

(10) See note to s.

(11) *Gujju Lall v* 6 C, 171 188 (1880) per

that the Act itself is little more than an attempt to reduce the English law of evidence to the form of express propositions arranged in their natural order with some modifications rendered necessary by the peculiar circumstances of India(1), and that it was drawn up chiefly from Taylor on Evidence (2) It

the lines of the English intended to be a servile n certain respects differ from English law Moreover these dicta do not recognise the undoubted original character of sections (5 16) dealing with the relevancy of facts

Although as all rules of evidence which were in force at the passing of the Act are repealed, the English decisions cannot be regarded as binding authorities, they may still serve as valuable guides, though of course English authorities upon the meaning of particular words are of little or no assistance when those words are very different from the ones to be considered (4)

Even where a matter has been expressly provided for by the Act recourse may be had to English or American decisions if as is not infrequently the case, the particular provision be of doubtful import owing to the obscurity or incompleteness of the language in which it has been enacted Authority abounds for the use of the extraneous sources to which reference has been made in cases such as these (5) As was observed by Edge C J in *The Collector of Gorakhpur v Palakdhar Sugl* (6) No doubt cases frequently occur in India in which considerable assistance is derived from the consideration of the law of England and of other countries In such cases we have to see how far such law was founded on common sense and on the principles of justice between man and man and may safely afford guidance to us here

It must not, however be forgotten that the Indian Evidence Act is a Code which not only defines and amends but also consolidates the Law of Evidence repealing all rules other than those saved by the last portion of its second section (7) The method of construction to be adopted in the case of such a Code

(1) *Sith Ludla Ghella* 17 B 129 141 (1892) per Bayley C J adopting the words of Sir James F Stephen Introductory Act 2

(2) *Maclersia Beasji v Ae o Dhurmsey Spinning & Weaving Company* 4 B 576 581 (1880) per West J see remarks of Jackson J in *R v Aslootosh Chuckerbitty* supra 491 Taylor on Ev referred to in *R v Pyari Lall* 4 C L R 508 509 *Gujju Lal v Fateh Lall* 6 C, 179 P v *Rani Reddi* 3 M 52 R v *Ra a Birapa* 3 B 17 (1878) R v *Fakirapa* 15 B 502 (1890) *Fraji v Molais ngi* 18 B 279 (1893) and numerous other cases Mr Norton however at p iv of the Preface to his Edition of the Act says that in his opinion it is a mere figure of speech to assert that the 167 sections of the Act contain all that is applicable in India of the two volumes of Taylor on Evidence and that a great mass of the principles and rules which Mr Taylor's work contains will have to be written back between the lines of the Code

(3) *Ranchoddas Krishnadas v Bapu Lalal* 10 B 439 442 (1886) per Sargent C J see *The Collector of Gorakhpur v Palakdhar* 12 A 1 37 (1889) R v *Abd Hal* 7 A 400 401 (1885)

(4) *Re Pyari Lall* 4 C L R 508 509 R v *Ghulst* 7 A 44 (1884) English cases irrelevant when Indian Legislature has not followed English law

(5) See *R v Vajira* 16 B 433 (1892) *Pershad Singh v Ran Pertab* 22 C 8 (1894) and the cases cited post

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has been expounded by Lord Herschell(1) in terms which have been adopted by the Privy Council(2) and cited and applied in other cases in this country (3)

A similar rule had been previously laid down in this country with reference to the construction of this Act. In the case of the *R v Ashootosh Chucker butty*(4) it was said "Instead of assuming the English Law of Evidence and then inquiring what changes the Evidence Act has made in it, the Act should be regarded as containing the scheme of the law, the principles and the application of these principles to the cases of most frequent occurrence, but in respect of matters expressly provided for in the Act we must, so to speak start from the Act and not deal with it as a mere modification of the law of evidence prevailing in England."

Questions, however may arise as regards matters not expressly provided for in the Act. It has been held that the second section in effect prohibits the employment of any kind of evidence not specifically authorised by the Act itself(5) and that a person tendering evidence must show that it is admissible under some one or other of the provisions of this Act (6). It is to be regretted that the Act was not so framed as to admit other rules of evidence on points not specifically dealt with by it as was in effect done by the Commissioners in the second section of their Draft. In that case whenever omissions occur (and some do in fact occur) in the Act recourse might be had to the present or previous law on the point existing in England or the previous rules if any, in this country.

(1) In *Bank of England v Vagliano Brothers* L R App Cas (1891) 107 (at pp 144 145)

(2) In *Narendra Nath v Kamalbasini* 23 I A 18 26 (1896)

(3) *Dagdu v Panchom Singh* 17 B 382 (1892) *Damodara Mudaliar v The Secretary of State for India* 18 M 91 (1894) *Kondayya Chetti v Narasimulu Chetti* 20 M 103 (1896) *Lala Suraj v Golab Chand* 28 C 517 (1901). This subject will be found fully discussed in the Author's Civil Procedure Code

(4) 4 C 941 (1881) per Jackson J

(5) *K v Abdullah* 7 A 385 399 (1885) *Muhammad Allahdad v Muhammad Ismail* 10 A 325 (1886) *R v Pitamber Jina* 2 B 64 (1876) and in next note

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that the Act itself is little more than an attempt to reduce the English law of evidence to the form of express propositions arranged in their natural order, with some modifications rendered necessary by the peculiar circumstances of India(1), and that it was drawn up chiefly from Taylor on Evidence(2) It is true that, although the Code is in the main, drawn on the lines of the English law of evidence, there is no reason to suppose that it was intended to be a servile copy of it(3); and indeed, as already stated, it does in certain respects differ from English law. Moreover these dicta do not recognise the undoubted original character of sections (5-16) dealing with the relevancy of facts.

Although as all rules of evidence which were in force at the passing of the Act are repealed, the English decisions cannot be regarded as binding authorities, they may still serve as valuable guides, though of course English authorities upon the meaning of particular words are of little or no assistance when those words are very different from the ones to be considered (4).

Even where a matter has been expressly provided for by the Act, recourse may be had to English or American decisions if as is not infrequently the case, the particular provision be of doubtful import owing to the obscurity or incompleteness of the language in which it has been enacted. Authority abounds for the use of the extraneous sources to which reference has been made in cases such as these (5). As was observed by Judge C. J. in *The Collector of Gorakhpur v Palakdhar Singh* (6) "No doubt, cases frequently occur in India in which considerable assistance is derived from the consideration of the law of England and of other countries. In such cases we have to see how far such law was founded on common sense and on the principles of justice between man and man and may safely afford guidance to us here."

It must not, however, be forgotten that the Indian Evidence Act is a Code which not only defines and amends but also consolidates the Law of Evidence, repealing all rules other than those saved by the last portion of its second section (7). The method of construction to be adopted in the case of such a Code

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CHAPTER I *

GENERAL DISTRIBUTION OF THE SUBJECT

Technical and general elements of law

Almost every branch of law is composed of rules of which some are grounded upon practical convenience and the experience of actual litigation, whilst others are closely connected with the constitution of human nature and society. Thus the criminal law contains many provisions of no general interest, such as those which relate to the various forms in which dishonest persons tamper with or imitate coin, but it also contains provisions, such as those which relate to the effect of madness on responsibility, which depend on several of the most interesting branches of moral and physical learning. This is perhaps more conspicuously true of the law of evidence than of any other branch of the law. Many of its provisions, however useful and necessary, are technical, and the enactments in which they are contained can claim no other merit than those of completeness and perspicuity. The whole subject of documentary evidence is [2]† of this nature. Other branches of the subject, such as the relevancy of facts, are intimately connected with the whole theory of human knowledge and with logic, as applied to human conduct. The object of this introduction is to illustrate these parts of the subject by stating the theory on which they depend and on which the provisions of the Act proceed. As to more technical matters the Act speaks for itself, and I have nothing to add to its content.

Relation of Evidence Act to English law of evidence

The Indian Evidence Act is little more than an attempt to reduce the English law of Evidence to the form of express propositions arranged in their natural order, with some modifications rendered necessary by the peculiar circumstances of India.

English law of evidence

Like almost every other part of English law, the English law of evidence was formed by degrees. No part of the law has been left so entirely to the discretion of the Legislature till very recently began to interfere, it has done so in a manner which excluded the testimony of the parties but it has not attempted to deal with the main principle of the subject.

Its want of arrangement

It is natural that a body of law thus formed by degrees and with reference to particular cases, should be destitute of arrangement, and in particular that its leading terms should never have [3] been defined by authority, that general rules should have been laid down with reference rather to particular circumstances than to general principles, and that it should have been found necessary to qualify them by exceptions inconsistent with the principles on which they proceeded.

Difficulties of amendment

When this confusion had once been introduced into the subject it was hardly capable of being remedied either by Courts of Law, or by writers of

* This and the following chapters down to p 78 are Sir James Fitzjames Stephen's introduction to the Evidence Act.

† This and the following numbers indicate the paging of the original book (Ed 1893) as referred to in this commentary.

text-books. The Courts of Law could only decide the cases which came before them, and books could only collect, doubt, have remedied questions of law has since, though it has in several well known cases been attended with signal success in India.

That part of the English law of evidence which professes to be founded upon anything in the nature of a theory on the subject may be reduced to the following rules —

Fundamental rules of English law of evidence

- (1) Evidence must be confined to the matters in issue
- (2) Hearsay evidence is not to be admitted
- (3) In all cases the best evidence must be given

Each of these rules is very loosely expressed. The word evidence which is the leading term of each, is undefined and ambiguous.

It sometimes means the words uttered and things exhibited by witnesses before a court of justice.

[4] At other times, it means the facts proved to exist by those words or things, and regarded as the groundwork of inferences as to other facts not so proved.

Again, it is sometimes used as meaning to assert that a particular fact is relevant to the matter under inquiry.

The word 'issue' is ambiguous. In many cases it is used with reference to the strict rules of English special pleading, the main object of which is to define, with great accuracy, the precise matter which is affirmed by the one party to a suit, and denied by the other.

In other cases it is used as embracing generally the whole subject under inquiry.

Again, the word 'hearsay' is used in various senses. Sometimes it means whatever a person is heard to say, sometimes it means whatever a person declares on information given by some one else, sometimes it is treated as being nearly synonymous with 'irrelevant'.

If the rule that evidence must be confined to the matters in issue were constructed strictly, it would run thus: 'No witness shall ever depose to any fact, except those facts which by the form of the pleadings are affirmed on the one side and denied on the other.' So understood, the rule would obviously put a stop to the whole administration of justice, as it would exclude evidence of decisive facts.

Ambiguity of rule as to confining evidence to issue

A sues *B* on a promissory note. *B* denies that he made the note.

A has a letter from *B* in which he admits that he made the note and promises to pay it. This admission could [5] not be proved if the rule referred to were constructed strictly, because the issue is whether *B* made the note, and not whether he admitted having made it.

This absurd result is avoided by using the word 'evidence' as meaning not testimony but any fact from which any other fact may be inferred. Thus interpreted the rule that evidence must be confined to matters in issue will run thus: 'No facts may be proved to exist, except facts in issue or facts from which the existence of the facts in issue can be inferred', but if the rule is thus interpreted it becomes so vague as to be of little use, for the question naturally arises from what sort of facts may the existence of other facts be inferred? To this question the law of England gives no explicit answer at all though partial and confused answers to parts of it may be inferred from some of the exceptions to the rules which exclude hearsay.

For instance, there are cases from which it may be inferred that evidence may sometimes be given of a fact from which another fact may be inferred although the fact upon which the inference is to be founded is a crime, and although the fact to be inferred is also a crime for which the person against whom the evidence is to be given is on his trial

The full answer to the question, 'what facts are relevant,' which is the most important of all the questions that can be asked about the law of evidence, has thus to be learnt partly by experience, and partly by collecting together such crooked and narrow illustrations of it as the one just given

[6] The rule that 'hearsay is no evidence' is vague to the last degree as each of the meanings of which the word 'hearsay' is susceptible is sometimes treated as the true one. As the rule is nowhere laid down in an authoritative manner, its meaning has to be collected from the exceptions to it, and these exceptions, of which there are as many as twelve or thirteen, imply at least three different meanings of the word 'hearsay'

Thus it is a rule that evidence may be given of statements which accompany and explain relevant actions. As no rule determines what actions are relevant, this is in itself unsatisfactory, but as the rule is treated as an exception to the rule excluding hearsay, it implies that 'hearsay' means that which a man is heard to say. If this is the meaning of hearsay, the rule which excludes it would run thus: 'No witness shall ever be allowed to depose anything which he has heard said by any one else.' The result of this would be that no verbal contract could ever be proved, and that no one could ever be convicted of using threats with intent to extort money, or of defamation by words spoken, except in virtue of exceptions which stultify the rule.

Most of the exceptions indicate that the meaning of the word 'hearsay' is that which a person reports on the information of some one else, and not upon the evidence of his own senses. This, with certain exceptions, is no doubt a valuable rule, but it is not the natural meaning of the words 'hearsay is no evidence' and it is in [7] practice almost impossible to divest words of their natural meaning.

The rules that documents which are admitted as evidence between persons who are not to the rule excluding hearsay. This is not quite equivalent to the word nothing which approaches to a definition of relevancy.

The rule which requires that the best evidence of which a fact is susceptible should be given, is the most distinct of the three rules referred to above, and it is certainly one of the most useful. It is simply an amplification of the obvious maxim that if a man wishes to know all that he can know about a matter his own senses are to him the highest possible authority. If a hundred witnesses of a sealed letter, and found that its intervention of any conscious process of reasoning at all, that they had sworn what was not true.

The ambiguity of the word 'evidence' is the cause of a great deal of obscurity apart from that which it gives to the rules above mentioned. In scientific inquiries, and for popular and general purposes, it is no doubt convenient to have one word which includes —

- (1) the testimony on which a given fact is believed,
- (2) the facts so believed, and
- (3) the arguments founded upon them

For instance, in the title of "Paley's Evidences of Christianity," the word is used in this sense. The nature of the work was not such as to give much

Ambiguity
of the rule
excluding
hearsay

Rules as to
best evi-
dence

Ambiguity
of the word
evidence

importance to the distinction which the word overlooks. So, in scientific inquiries it is seldom necessary (for reasons to which I shall have occasion to refer hereafter) to lay stress upon the difference between the testimony on which a fact is believed and the fact itself. In judicial inquiries however the distinction is most important, and the neglect to observe it has thrown the whole subject into confusion by causing English lawyers to overlook the leading distinction which ought to form the principle on which the whole law should be classified. I mean the distinction between the relevancy of facts and the mode of proving relevant facts.

The use of the one name 'evidence' by which it is to be proved has given which the word occurs. Thus for ins sometimes means a relevant fact, and sometimes the original of a document as opposed to a copy. Circumstantial evidence is opposed to direct evidence. But circumstantial evidence usually means a fact from which some other fact is inferred whereas direct evidence means testimony given by a man as to what he has himself perceived by his own senses. It would thus be correct to say that circumstantial evidence [9] must be proved by direct evidence—a clumsy mode of expression which is in itself a mark of confusion of thought. The evil however goes beyond mere clumsiness of expression. People have naturally enough supposed that circumstantial and direct evidence admit of being contrasted in respect of their cogency and that different canons can be laid down as to the conditions which they ought to satisfy before the Court is convinced by them. This I think confuses the theory of proof and is an error due entirely to the ambiguity of the word 'evidence'.

It would be a mistake to infer from the unsystematic character and absence of arrangement which belongs to the English law of evidence that the substance of the law itself is bad. On the contrary, it possesses in the highest degree the characteristic merits of English case law. English case law as it is is to what it ought to be and might be if it were properly arranged what the ordinary conversation of a very clever man on all sorts of subjects written down as he uttered it, and as passing circumstances furnished him with a text would be to the matured and systematic statement of his deliberate opinions. It is full of the most vigorous sense and is the result of great sagacity applied to past and varied experience.

The manner in which the law of evidence is related to the general theories which give it its interest can be understood only by reference [10] to the natural distribution of the subject which appears to be as follows —

All rights and liabilities are dependent upon and arise out of facts.

Every judicial proceeding whatever has for its purpose the ascertaining of some right or liability. If the proceeding is Criminal the object is to ascertain the liability to punishment of the person accused. If the proceeding is Civil the object is to ascertain some right of property or of status or the right of one party and the liability of the other to some form of relief.

In order to effect this result provision must be made by law for the following objects — *First* the legal effect of particular classes of facts in establishing rights and liabilities must be determined. This is the province of what has been called substantive law. *Secondly* a course of procedure must be laid down by which persons interested may apply the substantive law to particular cases. The law of procedure includes amongst others two main branches (1) the law of pleading which determines what in particular cases are the questions in dispute between the parties and (2) the law of evidence which determines how the parties are to convince the Court of the existence of that state of facts which according to the provisions of substantive law, would establish the existence of the right or liability which they allege to exist.

of
nbl

Merits of
English law
of evidence*

Natural
distribu-
tion of the
subject

The following is a simple illustration - *A* sues *B* on a bond for Rs 1,000, *B* says that the execution of the bond was procured by coercion

[11] The substantive law is that a bond executed under coercion cannot be enforced.

The law of procedure lays down the method according to which A is to establish his right to the payment of the sum secured by the bond. One of its provisions determines the manner in which the question between the parties is to be stated.

The question stated under that provision is whether the execution of the bond was procured by coercion.

The law of evidence determines—

(1) What sort of facts may be proved in order to establish the existence of that which is defined by the substantive law as coercion?

(2) What sort of proof is to be given of those facts?

(3) Who is to give it ?

(1) How it is to be given ?

Thus, before the law of evidence can be understood or applied to any particular case, it is necessary to know so much of the substantive law as determines what, under given states of facts, would be the rights of the parties, and so much of the law of procedure as is sufficient to determine what questions it is open to them to raise in the particular proceeding.

Thus in general terms the law of evidence consists of provisions upon the following subjects —

(1) The relevancy of facts

(2) The proof of facts

(3) The production of proof of relevant facts

The foregoing observations show that this account of [12] the matter is exhaustive. For if we assume that a fact is known to be relevant, and that its existence is duly reflected in the existence of the fact, then how it affects the existence of the fact is certain of the Court has to do.

The matter must, however, be carried further. The three general heads may be distributed more particularly as follows —

I *The Relevancy of Facts*—Facts may be related to rights and liabilities in one of two ways—

(1) They may by themselves, or in connection with other facts, constitute liability would
eldest son of B,
ingland the heir

at law of *B*, and that he has such rights as that status involves. From the fact that *A* caused the death of *B* under certain circumstances, and with a certain intention or knowledge there arises of necessity the inference that *A* murdered *B*, and is liable to the punishment provided by law for murder.

Facts thus related to a proceeding may be called facts in issue, unless their existence is undisputed.

(2) Facts which are not themselves in issue in the sense above explained, may affect the [13] probability of the existence of facts in issue, and be used as the foundation of inferences respecting them, such facts are described in the Evidence Act as relevant facts

All the facts with which it can in any event be necessary for Courts of Justice to concern themselves, are included in these two classes.

The first great question, therefore, which the law of evidence should decide is, what facts are relevant. The answer to this question is to be learnt from the general theory of judicial evidence explained in the following chapter.

What facts are in issue in particular cases is a question to be determined by the substantive law or in some instances by that branch of the law of procedure which regulates the forms of pleading. Civil or Criminal.

II *The Proof of Relevant Facts*—Whether an alleged fact is a fact in issue or a relevant fact, the Court can draw no inference from its existence till it believes it to exist, and it is obvious that the belief of the Court in the existence of a given fact ought to proceed upon grounds altogether independent of the relation of the fact to the object and nature of the proceeding in which its existence is to be determined. The question is whether *A* wrote a letter. The letter may have contained the terms of a contract. It may have been a libel. It may have constituted the motive for the commission of a crime by *B*. It may supply proof of an *alibi* in favour of *A*. It may be an admission or a [14] confession of crime, but whatever may be the relation of the fact to the proceeding the Court cannot act upon it unless it believes that *A* did write the letter and that belief must obviously be produced in each of the cases mentioned by the same or similar means. If the Court requires the production of the original when the writing of the letter is a crime there can be no reason why it should be satisfied with a copy when the writing of the letter is a motive for a crime. In short, the way in which a fact should be proved depends on the nature of the fact and not on the relation of the fact to the proceeding.

Some facts are too notorious to require any proof at all, and of these the Court will take judicial notice, but if a fact does require proof the instrument by which the Court must be convinced of it is evidence, by which I mean the actual words uttered, or documents, or other things actually produced in Court, and not the facts which the Court considers to be proved by those words and documents. Evidence in this sense of the word must be either (1) oral or (2) documentary. A third class might be formed of things produced in Court, not being documents, such as the instruments with which a crime was committed or the property to which damage had been done but this division would introduce needless intricacy into the matter. The reason for distinguishing between oral and documentary evidence is that in many cases the existence of the latter excludes the employment of the former, but [15] the condition of material things, other than documents is usually proved by oral evidence, so that there is no occasion to distinguish between oral and material evidence.

It may be said that in strictness all evidence is oral as documents or other material things must be identified by oral evidence before the Court can take notice of them. It is unnecessary to discuss the justice of this criticism as the phrase 'documentary evidence' is not ambiguous, and is convenient and in common use. The only reason for avoiding the use of the word 'evidence' in the general sense in which most writers use it, is that it leads in practice to confusion as has been already pointed out.

III *The Production of Proof*—This includes the subject of the burden of proof the rules upon which answer the question, by whom is proof to be given. The subject of witnesses the rules upon which answer the question, who is to give evidence and under what conditions? The subject of the examination of witnesses the rules upon which answer the question, how are the witnesses to be examined and how is their evidence to be tested? Lastly, the effect upon the subsequent proceedings of mistakes in the reception and rejection of evidence, may be included under this head.

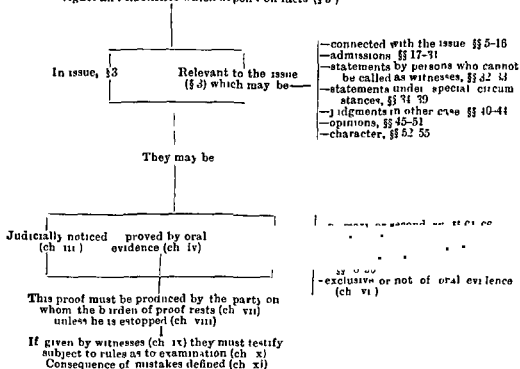
Proof of relevant facts

1 Judicial notice
2 Oral evidence
3 Documentary evidence

Production of proof

The following tabular scheme of the subject may be an assistance to the reader. The figures refer to the sections of the Act which treat of the matter referred to —

[16] The object of legal proceedings is the determination of rights and liabilities which depend on facts (§ 3)



[17] CHAPTER II

A STATEMENT OF THE PRINCIPLES OF INDUCTION AND DEDUCTION, AND A COMPARISON OF THEIR APPLICATION TO SCIENTIFIC AND JUDICIAL INQUIRIES

The general analysis given in the last chapter of the subjects to which the law of evidence must relate sufficiently explains the general arrangement of the Indian Evidence Act. To understand the substance of the Act it is necessary to have some acquaintance with the general theory of judicial evidence. The object of the present chapter is to explain this theory and to compare its application to physical science with its application to judicial inquiries.

Mr Huxley remarks in one of his latest works— The vast results obtained by science are won by no mystical faculties by no mental processes other than those which are practised by every one of us in the humblest and meanest affairs of life. A detective policeman discovers a burglar from the marks made by his shoe by a mental process identical with that by which Cuvier restored the extinct animals of Montmartre from fragments of their bones, nor does that process of induction and deduction by which a lady finding [18] a stain of a particular kind upon her dress concludes that somebody has upset the inkstand thereon differ in any way from that by which Adams and Leverrier discovered a new planet*. The man of science in fact, simply uses with scrupulous exactness the methods which we all habitually and at every moment use carelessly.

Mr Huxley on physical science and judicial inquiries

These observations are capable of an inverse application. If we wish to apply the methods in question to the investigation of matters of everyday occurrence with a greater degree of exactness than is commonly needed, it is necessary to know something of the theory on which they rest. This is specially important when as in judicial proceedings it is necessary to impose conditions by positive law upon such investigations. On the other hand when such conditions have been imposed it is difficult to understand their importance or their true significance unless the theory on which they are based is understood. It appears necessary for these reasons to enter to a certain extent upon the general subject of the investigation of the truth as to matters of fact before attempting to explain and discuss that particular branch of it which relates to judicial proceedings.

Application of his remarks to law of evidence

First then what is the general problem of science? It is to discover, collect and arrange true propositions about facts. Simple as the phrase appears, it is necessary to enter upon some illustration of its terms namely, (1) facts, (2) propositions, (3) the truth of propositions.

First then what are facts?

[19] During the whole of our waking life we are in a state of perception. Indeed consciousness and perception are two names for one thing according as we regard it from the passive or active point of view. We are conscious of everything that we perceive and we perceive whatever we are conscious of. Moreover our perceptions are distinct from each other some both in space and time as is the case with all our perceptions of the external world, others, in time only as is the case with our perceptions of the thoughts and feelings of our own minds.

Facts

* Lay Sermons, p. 78.

External facts

Whatever may be the objects of our perceptions, they make up collectively the whole sum of our thoughts and feelings. They constitute, in short, the world with which we are acquainted for without entering upon the question of the existence of the external world, it may be asserted with confidence that our knowledge of it is composed, *first*, of our perceptions, and, *secondly*, of the inferences which we draw from them as to what we should perceive if we were favourably situated for that purpose. The human body supplies an illustration of this. No one doubts that his own body is composed not only of the external organs which he perceives by his senses, but of numerous internal organs, most of which it is highly improbable that either he or any one else will ever see or touch, and some of which he never can, from the nature of things, see or touch as long as he lives. When he affirms that he has a brain or a heart, what he has been told by other people, or other human bodies, that if his skull and chest were laid open, those organs would be perceived by the senses of persons who might direct their senses towards them.

Internal facts

There is another class of perceptions, transient in their duration, and not perceived by the five best marked senses, which are nevertheless distinctly perceptible and of the utmost importance. These are thoughts and feelings, love, hatred, anger, intention, will, wish, knowledge, opinion, are all perceived by the person who feels them. When it is affirmed that a man is *angry*, that he *intends* to sell an estate, that he *knows* the meaning of a word that he struck a blow *voluntarily* and not by accident, each proposition relates to a matter capable of being as directly perceived as a noise or a flash of light. The only difference between the two classes of propositions is this. When it is affirmed that a man has a given intention, the matter affirmed is one which he, and he only, can perceive, when it is affirmed that a man is sitting or standing, the matter affirmed is one which may be perceived not only by the man himself, but by any other person able to see, and favourably situated for the purpose. But the circumstance that either event is regarded as being or as having been capable of being, perceived by some one or other, is what we mean, and all that we mean when we say that it exists or existed, or when we denote the same thing by calling it a fact. The word 'fact' is sometimes [21] opposed to theory, sometimes to opinion, sometimes to feeling, but all these modes of using it are more or less rhetorical. When it is used with any degree of accuracy it implies something which exists, and it is as difficult to attach any meaning to the assertion that a thing exists which neither is, nor under any conceivable circumstances, can be perceived, as to attach any meaning to the assertion that a thing exists which can be so perceived does not, or at the

Definition of facts in Evidence Act

It is with reference to this that the word 'fact' is defined in the Evidence Act (§ 3) as meaning and including—

- (1) Any thing, state of things, or relation of things capable of being perceived by the senses, and
- (2) Any mental condition of which any person is conscious

It is important to remember with respect to facts, that as all thought and language contains a certain element of generality, it is always possible to describe the same facts with greater or less minuteness, and to decompose every fact with which we are concerned into a number of subordinate facts. Thus we might speak of the presence of several persons in a room at one time as a fact, but if the fact were doubted, or if other circumstances rendered it doubtful, their respective positions, their occupations, the position of the furniture, and many other particulars might have to be specified.

Such being the nature of facts, what is the meaning of a proposition? A proposition is a [22] collection of words so related as to raise in the minds of those who understand them a corresponding group of images or thoughts Propositions

The characteristic by which words are distinguished from other sounds is their power of producing corresponding thoughts or images. I say thoughts or images, because though most words raise what may be intelligibly called

of words which qualify others, like 'although,' 'whereas,' and other adverbs, prepositions and conjunctions

The statement that a proposition, in order to be entitled to the name, must raise in the mind a distinct group of thoughts or images, may be explained by two illustrations. The words 'that horse is *niger*' form a proposition to everyone who knows that *niger* means black, but to no one else. The words 'I see a sound' form a proposition to no one unless some signification is attached to the word sound (for instance, an arm of the sea), which would make the words intelligible Illustrations

Such being a proposition, what is a true proposition? A true proposition is one which excites in the mind, thoughts or images, corresponding to those which would be excited in the mind of a person so situated as to be able to perceive the facts to which the proposition relates. The words 'a man is riding down the road on a white horse' form a proposition because they raise in the mind [23] a distinct group of images. The proposition is true if all persons favourably situated for purposes of observation did actually perceive a corresponding group of facts True propositions

The next question is, How are we to proceed in order to ascertain whether any given proposition about facts is true, and in order to frame true propositions about facts? This, as already observed, is the general problem of science which is only another name for knowledge so arranged as to be easily understood and remembered How true propositions are to be framed

The facts in the first place, must be correctly observed. The observations made must, in the next place, be recorded in apt language, and each of these operations is one of far greater delicacy and difficulty than is usually supposed, for it is almost impossible to discriminate between observation and inference, or to make language a bare record of our perceptions instead of being a running commentary upon them. To go into these and some kindred points would extend this inquiry beyond all reasonable bounds, and I accordingly pass them over with this slight reference to their existence. Assuming, then, the existence of observation and language sufficiently correct for common purposes, how are they to be applied to inquiries into matters of fact? Facts must be correctly observed and properly recorded

An answer to these questions, sufficient for the present purpose, will be supplied by what is said on the [24] subject by Mr Mill in the course of that part of it which bears upon the first great lesson learnt from the observation of the world in which we live, that a fixed order prevails amongst the various Mr Mill's theory of logic — a fixed order prevails in the world

turns wood,
and so on.
the — and
...
e of a cer-
of the force

of gravitation the influence of any equal or greater force acting in an opposite direction, and the maintenance by the water of its properties as a fluid, are conditions necessary to the sinking of lead in water, that the maintenance by the

heavenly bodies of their respective positions, and the persistency of the various forces by which their paths are determined, are the conditions under which day and night succeed each other

Induction
and deduc-
tion

The great problem is to find out what particular antecedents and consequents are thus connected together, and what are the conditions of their connection? For this purpose two processes are employed, namely, induction and deduction. Deduction assumes and rests upon previous inductions, and derives a great part at least of its value from the means which it affords of carrying on the process of thought from the point at which induction stops. The questions—What is [25] the ultimate foundation of induction? Why are we justified in believing that all men will die because we have reason to believe that all men hitherto have died? Or that every particle of matter whatever will continue to attract every other particle of matter with a force bearing a certain fixed proportion to its mass and its distance, because other particles of matter have hitherto been observed to do so? are questions which lie beyond the limits of the present inquiry. For practical purposes it is enough to assume that such inferences are valid, and will be found by experience to yield true results in the shape of general propositions, from which we can argue downwards to particular cases according to the rules of verbal logic.

Mere obser-
vation of
facts
insufficient

True general propositions, however, cannot be extracted directly from the observation of nature or of human conduct as every fact which we can observe, however apparently simple, is in reality so intricate that it would give us little or no information unless it were connected with and checked by other facts. What, for instance, can appear more natural and simple than the following facts? A tree is cut down. It falls to the ground. Several birds which were perched upon it fly away. Its fall raises a cloud of dust which is dispersed by the wind and splashes up some of the water in a pond. Natural and simple as this seems, it raises a host of questions. Why does the tree fall? Why do the birds fly away? What became of the water? [26] In all these facts so many illustrations of the rules by which we can calculate the force of gravity, and the action of fluids on bodies immersed in them is the problem of science in general, and of induction and deduction in particular.

Proceeding
of induc-
tion

Con. " " " " " " " "

The nature of these methods is as follows —

All events may be regarded as effects of antecedent causes

Every effect is preceded by a group of events one or more of which are its true cause or causes, and all of which are possible causes

The problem is to discriminate between the possible and the true causes

[27] If whenever the effect occurs one possible cause occurs the other possible causes varying the possible cause which is constant is probably the true cause, and the strength of this probability is measured by the persistency with

Methods of
agreement
and differ-
ence

* 1 The method of agreement 2—The method of difference 3—The joint method of agreement and difference 4—The method of residues 5—The method of concomitant variation

which the one possible cause recurs, and the extent to which the other possible causes vary. Arguments founded on such a state of things are arguments on the method of agreement.

If the effect occurs when a particular set of possible causes precedes its occurrence and does not occur when the same set of possible causes co-exist, one only being absent the possible cause which was present when the effect was produced, and was absent when it was not produced is the true cause of the effect. Arguments founded on such a state of things are arguments on the method of difference.

The following illustration makes the matter plain. Various materials are mixed together on several occasions. In each case soap is produced, and in each case oil and alkali are two of the materials so mixed. It is probable from this that oil and alkali are the causes of the soap, and the degree of the probability is measured by the number of the experiments and the variety of the ingredients other than oil and alkali. This is the method of agreement.

Various materials of which oil and alkali are two, are mixed, and soap is produced. The same materials with the exception of the oil and alkali, are mixed and soap is not produced. The mixture of the oil and alkali is the cause of the soap. This is the method of difference. The case [28] would obviously be the same if oil and alkali only were mixed. Soap was unknown, and upon the mixture being made other things being unchanged, soap came into existence.

These are the most important of the rules of induction, but induction is only one step towards the solution of the problems which nature presents. In the statement of the rules of induction it is assumed for the sake of simplicity that all the causes and all the effects under examination are separate and independent facts and that each cause is connected with some one single effect. This however is not the case. A given effect may be produced by any one of several causes. Various causes may contribute to the production of a single effect. This is peculiarly important in reference to the method of agreement. If that method is applied to a small number of instances its value is small. For instance other substances might produce soap by their combination besides oil and alkali, say for instance that the combination of *A* and *B* and that of *C* and *D* could do so. Then if there were two experiments as follows

Difficulties
—Several causes producing the same effect —result as to method of agreement

(1) oil and alkali *A* and *B* produce soap,

(2) oil and alkali *C* and *D* produce soap,
soap would be produced in each case, but whether by the combination of oil and alkali or by the combination of *A* and *B* or by that of *C* and *D*, or by the combination of oil or of alkali with *A*, *B*, *C* or *D*, would be altogether uncertain.

[29] A watch is stolen from a place to which *A*, *B* and *C* only had access. Another watch is stolen from another place to which *A*, *D* and *E* only had access.

In each instance *A* is one of three persons, one of whom must have stolen the watch but this is consistent with it having been stolen by any of the other persons mentioned.

This weakness of the method of agreement can be cured only by so great a multiplication of instances as to make it highly improbable that any other antecedent than the one present in every instance could have caused the effect present in every instance.

Weakness of the method of agreement —how cured

For the statement of the theory of chances and its bearing on the probability of events I must refer those who wish to pursue the subject to the many works which have been written upon it, but its general validity will be inferred by every one from the common observation of life. If it was certain that

either *A* or *B*, *A* or *C*, *A* or *D*, and so forth, up to *A* and *Z*, had committed one of a large number of successive thefts of the same kind no one could doubt that *A* was the thief

It is extremely difficult, in practice, to apply such a test as this, and the test when applied is peculiarly liable to error, as each separate alternative requires distinct proof. In the case supposed, for instance, it would be necessary to ascertain separately in each of the cases relied upon, first, that a theft had been committed, then, that one of two persons must have committed it, and [30] lastly, that in each case the evidence bore with equal weight upon each of them

Inter-
mixture of
effects and
interference
of causes
with each
other

The intermixture of effects and the interference of causes with each other is a matter of much greater intricacy and difficulty

It may take place in one of two ways, viz —

(1) "In the one, which is exemplified by the joint operation of different forces in mechanics, the separate effects of all the causes continue to be produced, but are compounded together, and disappear in one total

(2) "In the other, illustrated by the case of chemical action the separate effects cease entirely and are succeeded by phenomena altogether different and governed by different laws

In the second case the inductive methods already stated may be applied, though it has difficulties of its own to which I need not now refer

In the first case viz where an effect is not the result of any one cause but the result of several causes modifying each other's operation the results cease to be separately discernible. Some cancel each other. Others merge in one sum and in this case there is often an insurmountable difficulty in tracing by observation any fixed relation whatever between the causes and the effects. A body for instance is at rest. This may be the effect of the action of two opposite forces exactly counteracting each other but how are such causes to be inferred from such an effect?

A balloon ascends into the air. This appears if it is [31] treated as an isolated phenomenon to form an exception to the theory of gravitation. It is in reality an illustration of that theory, though several concomitant facts and independent theories must be understood and combined together before this can be ascertained

The difficulty of applying the inductive methods to such cases arises from the fact that they assume the absence of the state of things supposed. The subsequent and antecedent phenomena must be assumed to be capable of specific and separate observation before it can be asserted that a given fact invariably follows another given fact, or that two sets of possible causes resemble each other in every particular with a single exception

Deductive
method

It is necessary of which is as follows as a premiss from as to what must drawn is compared

with the deduction from the inductive premiss the inference is that the phenomenon is explained. The complete method inductive and deductive thus involves three steps —

causally Establishing the premiss by induction, or what, in practice comes to the same thing by a previous deduction resting ultimately upon induction,

*1 reasoning according to the rules of logic to a conclusion, of agreement variation

[32] (3) Verification of the conclusion by observation

The whole process is illustrated by the discovery and proof of the identity of the central force of the solar system with the force of gravity as known on the earth's surface. The steps in it were as follows — Illustration

(1) It was proved by deductions resting ultimately upon inductions that the earth attracts the moon with a force varying inversely as the square of the distance

This is the first step the establishment of the premiss by a process resting ultimately upon induction

(2) The moon's distance from the earth and the actual amount of her deflexion from the tangent being known it was ascertained with what rapidity the earth's attraction would cause the moon to fall if she were no further off and no more acted upon by extraneous forces than terrestrial bodies are

This is the second step the reasoning regulated by the rules of logic

(3) Finally this calculated velocity being compared with the observed velocity with which all heavy bodies fall by mere gravity towards the surface of the earth (sixteen feet in the first second forty eight in the second and so forth in the ratio of the odd numbers) the two quantities are found to agree

This is the verification. The facts observed agree with the facts calculated, therefore the true principle of calculation has been taken

This paraphrase for it is no more of Mr Mill—is I hope [33] sufficient to show, in general the it aims at framing truth to the present purposes illustrate the general

their application to scientific inquiry. Before inquiring into the application of these principles to judicial investigations it will be convenient to compare the conditions under which judicial and scientific investigations are carried on

In some essential points they resemble each other. Inquiries into matters of fact of whatever kind and with whatever object are in all cases whatever, inquiries from the known to the unknown from our present perceptions or our present to what had been Judicial and scientific inquiries compared—resemblances

proceed upon the supposition that there is a general uniformity both in natural events and in human conduct that all events are connected together as cause and effect and that the process of applying this principle to particular cases and of specifying the manner in which it works, though a difficult and delicate operation can be performed

There are however several great differences between inquiries which are commonly called scientific inquiries that is into the order and course of nature and inquiries into isolated matters of fact whether [34] for judicial or historical purposes or for the purposes of every-day life. The differences must be carefully observed before we can undertake with much advantage the task of applying to the one subject the principles which appear to be true Differences

The first difference is that in reference to isolated events we can never or very seldom perform experiments but are tied down to a fixed number of relevant facts which can never be increased First difference as to amount of evidence

The great object of physical science is to invent general formulas (perhaps unfortunately called laws) which when ascertained sum up and enable us to understand the present and predict the future course of nature. These laws are ultimately deduced by the method already described from individual facts, but any one fact of an infinite number will serve the purpose of a scientific In scientific inquiries uniformity

inquirer as well as any other, and in many, perhaps in most cases it is possible to arrange facts for the purpose. In order, for instance, to ascertain the force of terrestrial gravity, it was necessary to measure the time occupied by different bodies in falling through given spaces and every such observation was an isolated fact. If however, one experiment failed or was interfered with if an observation was inaccurate or if a disturbing cause as for instance the resistance of the atmosphere had not been allowed for, nothing could be easier than to repeat the process, and inferences drawn from any one set of experiments [35] were obviously as much to be trusted as inferences drawn from any other set. Thus with regard to inquiries into physical nature relevant facts can be multiplied to a practically unlimited extent and it may by the way be observed that the ease with which this has been assumed in all ages is a strong argument that the course of nature does impress mankind as being uniform under superficial variations. For many centuries before the modern discoveries in astronomy were made the motions of the heavenly bodies were carefully observed and inferences as to their future course were founded upon those observations. Such observations would have been useless and unmeaning but for the tacit assumption that what they had done in times past they would continue to do for the future.

In judicial
inquiries
limited

In inquiries into isolated events this great resource is not available. Where the object is to decide what happened on a particular occasion we can hardly ever draw inferences of any value from what happened on similar occasions because the groups of events which form the subject of historical or judicial inquiry are so intricate that it can scarcely ever be assumed that they will repeat or that they have repeated themselves. If we wish to know what happened two thousand years ago when specific quantities of oxygen and hydrogen were combined under given circumstances we can obtain complete certainty by repeating the experiment but the whole course of human history must recur before we could witness a second assassination of Julius Caesar.

cannot be
cashed

[36] With reference to such events we are tied down inexorably to a certain limited amount of evidence. We know so much of the assassination of Caesar as has been told us by the historians who are to us ultimate authorities and we know no more. Their testimony must be taken subject to all the deductions which experience shows to be necessary in receiving as true statements made by historical writers on subjects which interest their feelings and upon the authority of materials which are no longer extant and therefore cannot be weighed or criticized. Unless by some unforeseen accident new materials on the subject should come to light a few pages of general history will for ever comprise the whole amount of human knowledge upon this subject and any doubts about it whether they rise from inherent improbabilities in the story itself from differences of detail in the different narratives or from general considerations as to the untrustworthy character of historians writing on hearsay and at a considerable distance of time from the events which they relate are and must remain for ever unsolved and insoluble.

Object of
scientific
inquiries

Besides this difference and historical inquiries inquiries are directed fold—the satisfaction of a form of curiosity which to those who feel it at all is one of the most powerful and which happens also to be one of the most generally useful elements of human [37] nature and the attainment of practical results of very various kinds. Neither of these ends can be attained unless and until the problems stated by nature have been solved partially it may be but at all events truly as far as the solution goes. On the other hand there is no pressing or immediate necessity for their solution. Every scientific question is always open and the answer to it may be discovered after vain attempts to discover it have been made for thousands of years or an answer long accepted may

be rejected and replaced by a better answer after an equally long period. In short, in scientific inquiries, absolute truth, or as near an approach to it as can be made, is the one thing needful, and is the constant object of pursuit. So one ascertained querer neither is, g the possibility of error, he is bound, to the extent, at least, of that possibility, to suspend his judgment

In judicial inquiries (I need not here notice historical inquiries) the case is different. It is necessary for urgent practical purposes to arrive at a decision which after a definite process has been gone through, becomes final and irreversible. It is obvious that, under these circumstances the patient suspension of judgment, and the high standard of certainty required by scientific inquirers, cannot be expected. Judicial decisions must proceed upon imperfect materials and must be made at the risk of error.

Object of
Judicial
Inquiries

[38] Finally inquirers into physical science have an additional advantage over those who conduct judicial inquiries, in the fact that the evidence before them in so far as they have to depend upon oral evidence is infinitely more trustworthy than that which is brought forward in Courts of Justice. The reasons of this are manifold. In the first place, the facts which a scientific observer has to report do not affect his passions. In the second place, his evidence about them is not taken at all unless his powers of observations have been more or less trained and can be depended upon. In the third place he can hardly know what will be the inference from the facts which he observes until his observations have been combined with those of other persons so that if he were otherwise disposed to misstate them he would not know what misstatement would serve his purpose. In the fourth place, he knows that his observations will be confronted with others so that if he is careless or inaccurate and *a fortiori* if he should be dishonest, he would be found out. In the fifth place, the class of facts which he observes are, generally speaking simple, and he is usually provided with means specially arranged for the purpose of securing accurate observations and a careful record of its results.

Evidence in
scientific
inquiries
trust-
worthy

The very opposite of all this is true as regards witnesses in a Court of Justice. The facts to which they testify are as a rule facts in which they are more or less interested and which in many cases excite their strongest passions to the highest degree. [39] The witnesses are very seldom trained to observe any facts or to express themselves with accuracy upon any subject. They know what the point at issue is and how their evidence bears upon it so that they can shape it according to the effect which they wish to produce. They are generally so situated that a large part at least of what they say is secure from contradiction and the facts which they have to observe being in most instances portions of human conduct are so intricate that even with the best intention on the part of the witness to speak the truth he will generally be inaccurate and almost always incomplete in his account of what occurred.

Evidence
in Judicial
inquiries
less trust-
worthy

So far it appears that our opportunities for investigating and proving the existence of isolated facts are much inferior to our opportunities for investigating and proving the formulas which are commonly called the laws of nature. There is however something to be said on the other side. Though the evidence available in judicial and historical inquiries is often scanty and is always lived in amount and though the facts which form the subject of such inquiries are far more intricate than those which attract the inquirer into physical nature, though the judge and the historian can derive no light from experiments, though in a word their apparatus for ascertaining the truth is far inferior to that of which physical inquirers dispose the task which they have to perform is proportionally easier and less arduous. It is attended moreover by some special facilities which are great helps in performing it satisfactorily.

Advantages
of Judicial
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inquirer as well as any other, and in many, perhaps in most, cases it is possible to arrange facts for the purpose. In order, for instance, to ascertain the force of terrestrial gravity, it was necessary to measure the time occupied by different bodies in falling through given spaces, and every such observation was an isolated fact. If, however, one experiment failed, or was interfered with, if an observation was inaccurate, or if a disturbing cause, as, for instance, the resistance of the atmosphere had not been allowed for, nothing could be easier than to repeat the process, and inferences drawn from any one set of experiments [35] were obviously as much to be trusted as inferences drawn from any other set. Thus, with regard to inquiries into physical nature relevant facts can be multiplied to a practically unlimited extent, and it may, by the way, be observed that the ease with which this has been assumed in all ages is a strong argument that the course of nature does impress mankind as being uniform under superficial variations. For many centuries before the modern discoveries in astronomy were made, the motions of the heavenly bodies were carefully observed and inferences as to their future course were founded upon those observations. Such observations would have been useless and unmeaning but for the tacit assumption that what they had done in times past they would continue to do for the future.

In judicial
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limited

In inquiries into isolated events this great resource is not available. Where the object is to decide what happened on a particular occasion, we can hardly ever draw inferences of any value from what happened on similar occasions because the groups of events which form the subject of historical or judicial inquiry are so intricate that it can scarcely ever be assumed that they will repeat, or that they have repeated, themselves. If we wish to know what happened two thousand years ago when specific quantities of oxygen and hydrogen were combined under given circumstances we can obtain complete certainty by repeating the experiment but the whole course of human history must recur before we could witness a second assassination of Julius Caesar.

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[36] With reference to such events we are tied down inexorably to a certain limited amount of evidence. We know so much of the assassination of Caesar as has been told us by the historians who are to us ultimate authorities and we know no more. Their testimony must be taken subject to all the deductions which experience shows to be necessary in receiving as true statements made by historical writers on subjects which interest their feelings and upon the authority of materials which are no longer extant and therefore cannot be weighed or criticized. Unless by some unforeseen accident new materials on the subject should come to light a few pages of general history will for ever comprise the whole amount of human knowledge upon this subject, and any doubts about it whether they rise from inherent improbabilities in the story itself from differences of detail in the different narratives or from general considerations as to the untrustworthy character of historians writing on hearsay, and at a considerable distance of time from the events which they relate are and must remain for ever unsolved and insoluble.

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So far it appears that our opportunities for investigating and proving the existence of isolated facts are much inferior to our opportunities for investigating facts which are commonly called the laws of nature. There are on the other side. Though the evidence available in judicial inquiries is often scanty, and is always fixed in amount and though the facts which form the subject of such inquiries are far more intricate than those which attract the inquirer into physical nature, though the judge and the historian can derive no light from experiments, though in a word their apparatus for ascertaining the truth is far inferior to that of which physical inquirers dispose, the task which they have to perform is proportionally easier and less ambitious. It is attended moreover, by some special facilities which are not at all helpful in performing it satisfactorily.

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Evidence in
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Advantages
of judicial
inquiries
over scientific
inquiries

Maxims
more easily
appreciated

[40] The question whether it is in the nature of things possible that general formulas should ever be devised by the aid of which human conduct can be explained and predicted in the short specific manner in which physical phenomena are explained and predicted has been the subject of great discussion and is not yet decided but no one doubts that approximate rules have been framed which are sufficiently precise to be of great service in estimating the probability of particular events Whether or not any proposition as to human conduct can ever be enunciated approaching in generality and accuracy to the proposition that the force of gravity varies inversely as the square of the distance, no one would feel disposed to deny that a recent possessor of stolen property who does not explain his possession is probably either the thief or a receiver, or that if a man refuses to produce a document in his possession the contents of the document are probably unfavourable to him In inquiries into isolated facts for practical purposes such rules as these are nearly as useful as rules of greater generality and exactness though they are of little service when the object is to interpret a series of facts either for practical or theoretical purposes If for instance the question is whether a particular person committed a crime in the course of which he made use of water knowledge of the facts that there was a pump in his garden and that water can be drawn from a well by working the pump handle is as useful as the most perfect knowledge of hydrostatics But if the question were as to the means by which water [41] could be supplied for a house and field during practice of hydrostatics the more extensive the u required

Their limitations
more easily
perceived

To this it must be added that the approximate rules which relate to human conduct are warranted principally by each man's own experience of what passes in his own mind corroborated by his observation of the conduct of other persons which every one is obliged to interpret upon the hypothesis that their mental processes are substantially similar to his own Experience appears to show that the results given by this process are correct within narrower limits of error than might have been supposed though the limits are wide enough to leave room for the exercise of a great amount of individual skill and judgment

This circumstance invests the rules relating to human conduct with a very peculiar character They are usually expressed with little precision and stand in need of many exceptions and qualifications but they are of greater practical use than rough generalizations of the same kind about physical nature because the personal experience of those by whom they are used readily supplies the qualifications and exceptions which they require Compare two such rules as these heavy bodies fall to the ground the recent possessor of stolen goods is the thief The rise of a balloon into the air would constitute an unexplained

truth
do not
with
out having stolen them Every one would see at once that such a case formed one of the many unstated exceptions to the rule The reason is that we know external nature only by observation of a neutral unsympathetic kind whereas every man knows more of human nature than any general rule on the subject can ever tell him

Judicial
problems
are simpler
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To these considerations it must be added that to inquire whether an isolated fact exists is a far simpler problem than to ascertain and prove the rule according to which facts of a given class happen The enquiry falls within a smaller compass The process is generally deductive The deductions depend which
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deductions, too are as a rule of various kinds and so cross and check each other and thus supply each other's deficiencies

For instance from one series of facts it may be inferred that *A* had a strong motive to commit a crime say the murder of *B*. From an independent set of facts it may be inferred that *B* died of poison and from another independent set of facts that *A* administered the poison of which *B* died. The question is whether [43] *A* falls within the small class of murderers by poison. If he does various propositions about him must be true no two of which have any necessary connection except upon the hypothesis that he is a murderer. In this case three such propositions are supposed to be true viz (1) the death of *B* by poison (2) the administration of it by *A* and (3) the motive for its administration. Each separate proposition as it is established narrows the number of possible hypotheses upon the subject. When it is established that *B* died of poison innumerable hypotheses which would explain the fact of his death consistently with *A*'s innocence are excluded when it is proved that *A* administered the poison of which *B* died every supposition consistent with *A*'s innocence except those of accident justification and the like are excluded when it is shown that *A* had any one of the difficulty of establishing increased and the number of suppositions crowded in a corresponding

Illustrations

This suggests another remark of the highest importance in estimating real weight of judicial inquiries. It is that such inquiries in all civilized countries are or at least ought to be conducted in such a manner as to give every person interested in the result the fullest possible opportunity of establishing the conclusion which he wishes to establish. In the illustration just given *A* would have at once the strongest motive to explain the fact that he had administered the poison to [44] *B* and every opportunity to do so. Hence if he failed to do it he would either be a murderer or else a member of that infinitesimally small class of persons who having a motive to commit murder and having administered poison to the person whom they have a motive to murder are unable to suggest any probable reason for supposing that they did administer it innocently.

In judicial inquiries parties interested have opportunities to be heard

The results of the foregoing inquiry may be shortly summed up as follows — Summary of results

I The problem of discovering the truth in relation to matters which are judicially investigated is a part of the general problem of science—the discovery of true propositions as to matters of fact

II The general solution of this problem is contained in the rules of induction and deduction stated by Mr Mill and generally employed for the purpose of conducting and testing the results of inquiries into physical nature

III By the due application of these rules facts may be exhibited as standing towards each other in the relation of cause and effect and we are able to argue from the cause to the effect and from the effect to the cause with a degree of certainty and precision proportionate to the completeness with which the relevant facts have been observed or are accessible

IV The leading differences between judicial investigations and inquiries into physical nature are as follows —

1 In physical inquiries the number of relevant facts is generally unlimited and is capable of indefinite increase by experiments

[45] In judicial investigations the number of relevant facts is limited by circumstances and is incapable of being increased

2 Physical inquiries can be prolonged for any time that may be required in order to obtain full proof of the conclusion reached, and when a conclusion has been reached, it is always liable to review if fresh facts are discovered, or if any objection is made to the process by which it was arrived at

In judicial investigation it is necessary to arrive at a definite result in a limited time, and when that result is arrived at, it is final and irreversible with exceptions too rare to require notice

3 In physical inquiries the relevant facts are usually established by testimony open to no doubt, because they relate to simple facts which do not affect the passions which are observed by trained observers who are exposed to detection if they make mistakes, and who could not tell the effect of misrepresentation, if they were disposed to be fraudulent

In judicial inquiries the relevant facts are generally complex. They affect the passions in the highest degree. They are testified to by untrained observers who are generally not open to contradiction, and are aware of the bearing of the facts which they allege upon the conclusion to be established

4 On the other hand approximate generalizations are more useful in judicial than they are in scientific inquiries because in the case of judicial inquiries every man's [46] individual experience supplies the qualifications and exceptions necessary to adjust general rules to particular facts which is not the case in regard to scientific inquiries

5 Judicial inquiries being limited in extent, the process of reaching as good a conclusion as is to be got out of the materials is far easier than the process of establishing a scientific conclusion with complete certainty, though the conclusion arrived at is less satisfactory

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It follows from what precedes that the utmost result that can in any case be produced by judicial evidence is a very high degree of probability. Whether upon any subject whatever more than this is possible—whether the highest form of scientific proof amounts to more than an assertion that a certain order in nature has hitherto been observed to take place and that if that order continues to take place such and such events will happen, are questions which have been much discussed but which lie beyond the sphere of the present inquiry. However this may be the reasons given above show why Courts of Justice have to be contented with a lower degree of probability than is rightly demanded in scientific investigation. The highest probability at which a Court of Justice can under ordinary circumstances arrive is the probability that a witness or a set of witnesses affirming the existence of a fact which they say they perceived by their own senses and upon which they could not be mistaken tell the truth. It is difficult to measure the value of such a probability against those which the theories of physical inquirers produce nor would it serve [47] any practical purpose to attempt to do so. It is enough to say that the process by which a comparatively low degree of probability is shown to exist in the one case is identical in principle with that by which a much higher degree of probability is shown to exist in the other case.

Degrees of
probability
—moral
certainty

The degrees of probability attainable in scientific and in judicial inquiries are infinite and do not admit of exact measurement or description. Cases might easily be mentioned in which the degree of probability obtained in either is so high, that if there is any degree of knowledge higher in kind than the knowledge of probabilities it is impossible for any practical purpose to distinguish between the two. Whether any higher degree of assurance is conceivable than that which may easily be obtained of the facts that the earth revolves round the sun and that Delhi was besieged and taken by the English in 1857, is a question which does not belong to this inquiry. For all practical purposes such conclusions as these may be described as absolutely certain. From these

down to the faintest guess about the inhabitants of the stars, and the faintest suspicion that a particular person has committed a crime, there is a descending scale of probabilities which does not admit of any but a very rough measurement for practical purposes. The only point in it worth noticing is what is commonly called moral certainty, and this means simply such a degree of probability as a prudent man would act upon under the circumstances in which he [48] happens to be placed in reference to the matter of which he is said to be morally certain.

What constitutes moral certainty is thus a question of prudence and not a question of calculation. It is commonly said in reference to judicial inquiries that in criminal cases guilt ought to be proved 'beyond all reasonable doubt', and that in civil cases the decision ought to be in favour of the side which is most probably right. To the latter part of this rule there is no objection though it should be added that it cannot be applied absolutely without reserve. For instance a civil case in which character is at stake partakes more or less of the nature of a criminal proceeding but the first part of the rule means nothing more than that in most cases the punishment of an innocent man is a great evil and ought to be carefully avoided but that on the other hand it is often a rough undefinable degree of uncertainty.

Moral certainty is a question of prudence

The danger of punishing the innocent no doubt the necessity of running some degree of risk of doing so in certain cases is intimated by the word reasonable. The question what sort of doubt is reasonable in criminal cases is a question of prudence. Hardly any case ever occurs in which it is not possible for an ingenious person to suggest hypotheses consistent with the prisoner's innocence. The hypotheses of falsehood on the part of the witnesses can never be said to be more than highly improbable.

[49] Though it is impossible to invent any rule by which different probabilities can be precisely valued it is always possible to say whether or not they fulfil the conditions of what Mr Mill describes as the method of Difference, and if not how nearly they approach to fulfilling it. The principle is precisely the same in all cases however complicated or however simple and whether the nature of the inquiry is scientific or judicial. In all cases the known facts must be arranged and classified with reference to the different hypotheses or unknown or suspected facts by which the existence of the known facts can be accounted for. If every hypothesis except one is inconsistent with one or more of the known facts that one hypothesis is proved. If more than one hypothesis is consistent with the known facts but one only is reasonably probable—that is to say if one only is in accordance with the common course of events that one in judicial inquiries may be said to be proved beyond all reasonable doubt. The word reasonable in this sentence denotes a fluctuating and uncertain quantity of probability (if the expression may be allowed) and shows that the ultimate question in judicial proceedings is and must be in most cases a question of prudence.

Principle of estimating probabilities is that of Mr Mill's method of difference

Let the question be whether A did a certain act the circumstances are such that the act must have been done by somebody but it can have been done only by A or by B. If A and B are equally likely to have done the act the matter cannot be carried further [50] and the question 'Who did it?' must remain undecided. But if the act must have been done by one person if it required great physical strength and if A is an exceedingly powerful man and B a child it may be said to be proved that A did it. If A is stronger than B, but the disproportion between their strength is less it is probable that A did it but not impossible that B may have done it and so on. In such a case as this a nearer approach than usual to a distinct measurement of the probability is possible but no complete and definite statement on the subject can be made.

Illustration

2 Physical inquiries can be prolonged for any time that may be required in order to obtain full proof of the conclusion reached, and when a conclusion has been reached, it is always liable to review if fresh facts are discovered or if any objection is made to the process by which it was arrived at

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4 On the other hand approximate generalizations are more useful in judicial than they are in scientific inquiries because in the case of judicial inquiries every man's [46] individual experience supplies the qualifications and exceptions necessary to adjust general rules to particular facts, which is not the case in regard to scientific inquiries

5 Judicial inquiries being limited in extent the process of reaching as good a conclusion as is to be got out of the materials is far easier than the process of establishing a scientific conclusion with complete certainty, though the conclusion arrived at is less satisfactory

It follows from what precedes that the utmost result that can in any case be produced by judicial evidence is a very high degree of probability Whether upon any subject whatever more than this is possible—whether the highest form of scientific proof amounts to more than an assertion that a certain order in nature has hitherto been observed to take place and that if that order continues to take place such and such events will happen are questions which have been much discussed but which lie beyond the sphere of the present inquiry However this may be, why Courts of Justice have to be contented with a probability than is rightly demanded in scientific investigation in which a Court of Justice can under ordinary circumstances arrive is the probability that a witness or a set of witnesses affirming the existence of a fact which they say they perceived by their own senses and upon which they could not be mistaken tell the truth It is difficult to measure the value of such a probability against those which the theories of physical inquirers produce nor would it serve [47] any practical purpose to attempt to do so It is enough to say that the process by which a comparatively low degree of probability is shown to exist in the one case is identical in principle with that by which a much higher degree of probability is shown to exist in the other case

The degrees of probability attainable in scientific and in judicial inquiries are infinite and do not admit of exact measurement or description Cases might easily be mentioned in which the degree of probability obtained in either is so high that if there is any degree of knowledge higher in kind than the knowledge of probabilities it is impossible for any practical purpose to distinguish between the two Whether any higher degree of assurance is conceivable than that which may easily be obtained of the facts that the earth revolves round the sun and that Delhi was besieged and taken by the English in 1857, is a question which does not belong to this inquiry For all practical purposes such conclusions as these may be described as absolutely certain From these

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certainty

down to the faintest guess about the inhabitants of the stars and the faintest suspicion that a particular person has committed a crime there is a descending scale of probabilities which does not admit of any but a very rough measurement for practical purposes. The only point in it worth noticing is what is commonly called moral certainty, and this means simply such a degree of probability as a prudent man would act upon under the circumstances in which he [48] happens to be placed in reference to the matter of which he is said to be morally certain.

What constitutes moral certainty is thus a question of prudence and not a question of calculation. It is commonly said in reference to judicial inquiries that in criminal cases guilt ought to be proved 'beyond all reasonable doubt' and that in civil cases the decision ought to be in favour of the side which is most probably right. To the latter part of this rule there is no objection though it should be added that it cannot be applied absolutely without reserve. For instance a Civil case in which character is at stake partakes more or less of the nature of a Criminal proceeding but the first part of the rule means nothing more than that in most cases the punishment of an innocent man is a great evil and ought to be carefully avoided but that on the other hand it is often

Moral certainty is a question of prudence

roughly an undefinable degree of uncertainty. The danger of punishing the innocent no doubt the necessity of running some degree of risk of doing so in certain cases is intimated by the word 'reasonable'. The question what sort of doubt is 'reasonable' in Criminal cases is a question of prudence. Hardly any case ever occurs in which it is not possible for an ingenious person to suggest hypotheses consistent with the prisoner's innocence. The hypotheses of falsehood on the part of the witnesses can never be said to be more than highly improbable.

[49] Though it is impossible to invent any rule by which different probabilities can be precisely valued it is always possible to say whether or not they fulfil the conditions of what Mr Mill describes as the method of Difference, and if not how nearly they approach to fulfilling it. The principle is precisely the same in all cases however complicated or however simple and whether the nature of the inquiry is scientific or judicial. In all cases the known facts must be arranged and classified with reference to the different hypotheses or unknown or suspected facts by which the existence of the known facts can be accounted for. If every hypothesis except one is inconsistent with one or more of the known facts that one hypothesis is proved. If more than one hypothesis is consistent with the known facts but one only is reasonably probable—that is to say if one only is in accordance with the common course of events that one in judicial inquiries may be said to be proved 'beyond all reasonable doubt'. The word 'reasonable' in this sentence denotes a fluctuating and uncertain quantity of probability (if the expression may be allowed) and shows that the ultimate question in judicial proceedings is and must be in most cases a question of prudence.

Principle of estimating probabilities is that of Mr Mill's method of Difference

Let the question be whether A did a certain act, the circumstances are such that the act must have been done by somebody but it can have been done only by A or by B. If A and B are equally likely to have done the act the matter cannot be carried further [50] and the question 'Who did it?' must remain undecided. But if the act must have been done by one person if it required great physical strength and if A is an exceedingly powerful man and B a child it may be said to be proved that A did it. If A is stronger than B but the disproportion between their strength is less it is probable that A did it but not impossible that B may have done it and so on. In such a case as this a nearer approach than usual to a distinct measurement of the probability is possible but no complete and definite statement on the subject can be made.

Illustration

2 Physical inquiries can be prolonged for any time that may be required in order to obtain full proof of the conclusion reached, and when a conclusion has been reached, it is always liable to review if fresh facts are discovered, or if any objection is made to the process by which it was arrived at

In judicial investigation it is necessary to arrive at a definite result in a limited time, and when that result is arrived at, it is final and irreversible with exceptions too rare to require notice

3 In physical inquiries the relevant facts are usually established by testimony open to no doubt, because they relate to simple facts which do not affect the passions which are observed by trained observers who are exposed to detection if they make mistakes, and who could not tell the effect of misrepresentation if they were disposed to be fraudulent

In judicial inquiries the relevant facts are generally complex. They affect the passions in the highest degree. They are testified to by untrained observers who are generally not open to contradiction and are aware of the bearing of the facts which they allege upon the conclusion to be established

4 On the other hand approximate generalizations are more useful in judicial than they are in scientific inquiries because in the case of judicial inquiries every man's [46] individual experience supplies the qualifications and exceptions necessary to adjust general rules to particular facts, which is not the case in regard to scientific inquiries

5 Judicial inquiries being limited in extent the process of reaching as good a conclusion as is to be got out of the materials is far easier than the process of establishing a scientific conclusion with complete certainty, though the conclusion arrived at is less satisfactory

It follows from what precedes that the utmost result that can in any case be produced by judicial evidence is a very high degree of probability. Whether upon any subject whatever more than this is possible—whether the highest form of scientific proof amounts to more than an assertion that a certain order in nature has hitherto been observed to take place and that if that order continues to take place such and such events will happen—are questions which have been much discussed but which lie beyond the sphere of the present inquiry. However this may be, why Courts of Justice have to be contented with a probability that is rightly demanded in scientific investigation, in which a Court of Justice can under ordinary circumstances arrive is the probability that a witness or a set of witnesses affirming the existence of a fact which they say they perceived by their own senses and upon which they could not be contradicted. It is difficult to measure the value of such a probability. The theories of physical inquirers produce no purpose to attempt to do so. It is enough to say that the process by which a comparatively low degree of probability is shown to exist in the one case is identical in principle with that by which a much higher degree of probability is shown to exist in the other case.

The degrees of probability attainable in the two cases are as follows:

Judicial
inquiries
usually pro-
duce only
a very high
degree of
probability

Degrees of
probability
—moral
certainty

between the two. Whether any higher degree of assurance is conceivable than that which may easily be obtained of the facts that the earth revolves round the sun and that Delhi was besieged and taken by the English in 1857, is a question which does not belong to this inquiry. For all practical purposes such conclusions as these may be described as absolutely certain. From these

down to the faintest guess about the inhabitants of the stars, and the faintest suspicion that a particular person has committed a crime, there is a descending scale of probabilities which does not admit of any but a very rough measurement for practical purposes. The only point in it worth noticing is what is commonly called moral certainty, and this means simply such a degree of probability as a prudent man would act upon under the circumstances in which he [48] happens to be placed in reference to the matter of which he is said to be morally certain.

What constitutes moral certainty is thus a question of prudence and not a question of calculation. It is commonly said in reference to judicial inquiries that in criminal cases guilt ought to be proved "beyond all reasonable doubt" and that in civil cases the decision ought to be in favour of the side which is most probably right. To the latter part of this rule there is no objection though it should be added that it cannot be applied absolutely without reserve. For instance, a Civil case in which character is at stake partakes more or less of the nature of a Criminal proceeding but the first part of the rule means nothing more than that in most cases the punishment of an innocent man is a great evil and ought to be carefully avoided but that on the other hand it is often impossible to eliminate an appreciable though undefinable degree of uncertainty from the decision that a man is guilty. The danger of punishing the innocent is marked by the use of the expression no doubt the necessity of running some degree of risk of doing so in certain cases is intimated by the word reasonable. The question what sort of doubt is reasonable in Criminal cases is a question of prudence. Hardly any case ever occurs in which it is not possible for an ingenious person to suggest hypotheses consistent with the prisoner's innocence. The hypotheses of falsehood on the part of the witnesses can never be said to be more than highly improbable.

Moral certainty is a question of prudence

[49] Though it is impossible to invent any rule by which different probabilities can be precisely valued it is always possible to say whether or not they fulfil the conditions of what Mr Mill describes as the method of Difference and if not how nearly they approach to fulfilling it. The principle is precisely the same in all cases however complicated or however simple and whether the nature of the inquiry is scientific or judicial. In all cases the known facts must be arranged and classified with reference to the different hypotheses or unknown or suspected facts by which the existence of the known facts can be accounted for. If every hypothesis except one is inconsistent with one or more of the known facts that one hypothesis is proved. If more than one hypothesis is consistent with the known facts but one only is reasonably probable—that is to say if one only is in accordance with the common course of events that one in judicial inquiries may be said to be proved beyond all reasonable doubt. The word reasonable in this sentence denotes a fluctuating and uncertain quantity of probability (if the expression may be allowed) and shows that the ultimate question in judicial proceedings is and must be in most cases a question of prudence.

Principle of estimating probabilities is that of Mr Mill's method of difference

Let the question be whether *A* did a certain act the circumstances are such that the act must have been done by somebody but it can have been done only by *A* or by *B*. If *A* and *B* are equally likely to have done the act the matter cannot be carried further [50] and the question Who did it? must remain undecided. But if the act must have been done by one person if it required great physical strength and if *A* is an exceedingly powerful man and *B* a child it may be said to be proved that *A* did it. If *A* is stronger than *B*, but the disproportion between their strength is less it is probable that *A* did it but not impossible that *B* may have done it and so on. In such a case as this a nearer approach than usual to a distinct measurement of the probability is possible but no complete and definite statement on the subject can be made.

Illustration

Judicial
inquiries
involve two
classes of
inferences

Such being the general nature of the object towards which judicial inquiries are directed, and the general nature of the process by which they are carried on, it will be well to examine the chief forms of that process somewhat more particularly

It will be found upon examination that the inferences employed in judicial inquiries fall under two heads —

(1) Inferences from an assertion, whether oral or documentary, to the truth of the matter asserted

(2) Inferences from facts which, upon the strength of such assertions, are believed to exist to facts of which the existence has not been so asserted

For the sake of simplicity, I do not here distinguish various subordinate classes of inferences, such as inferences from the manner in which assertions are made, from silence, from the absence of assertion, and from the conduct of the parties. They may be regarded as so many forms of assertion, and may therefore be classed [51] under the general head of inferences from an assertion to the truth of the matter asserted

Direct and
circum-
stantial evi-
dence

This is the distinction usually expressed by saying that all evidence is either direct or circumstantial. I avoid the use of this expression, partly because, as I have already observed, *direct evidence* means direct assertion whereas *circumstantial evidence* means a fact on which an inference is to be founded, and partly for the more important reason that the use of the expression favours an unfounded notion that the principles on which the two classes of inference depend are different, and that they have different degrees of cogency, which admit of comparison. The truth is that each inference depends upon precisely the same general theory, though somewhat different considerations apply to the investigation of cases in which the facts testified to are many, and to cases in which the facts testified to are few

The general theory has been already stated. In every case the question is, are the known facts inconsistent with any other than the conclusion suggested? The known facts in every case whatever are the evidence in the narrower sense of the word. The Judge hears with his own ears the statements of the witnesses and sees with his own eyes the documents produced in Court. His task is to infer from what he thus sees and hears the existence of facts which he neither sees nor hears

on
ra

Let the question be whether a will was executed. Three witnesses, entirely above suspicion come [52] and testify that they witnessed its execution. These assertions are facts which the Judge hears for himself. Now there are three things which the Judge has to consider in this case:—
1. The fact that the witnesses testified that they saw the execution of the will —

(1) The witnesses may be speaking the truth

(2) The witnesses may be mistaken

(3) The witnesses may be telling a falsehood

The circumstances may be such that

would be commonly called a case of direct evidence

Identity of
this pro-
cess with
Mr. Mills
theory

Let the question be whether A committed a crime. The facts which the Judge actually knows are that certain witnesses made before him a variety of statements which he believes to be true. The result of these statements is to establish certain facts which show that either A or B or C must have

committed the crime and that neither *B* nor *C* did commit it. In this case the facts before the Judge would be inconsistent with any other reasonable hypothesis except that *A* committed the crime. This would be commonly called a case of circumstantial evidence. Yet it is obvious that the principle on which the [53] investigation proceeds as in the last case is identically the same. The only difference is in the number of inferences but no new principle is introduced.

It is also clear that each case is identical in principle with the method of difference as explained by Mr Mill.

Mr Mill's illustration of the application of that method to the motions of the planets is as follows:—The planets with a central force give areas proportional to the times. The planets without a central force give a different set of motions but areas proportional to the times are observed. Therefore there is a central force.

Similarly in the cases suggested. The assertions of the witnesses give the execution of a will: no other cause can account for those assertions having been made. If the will had not been executed those assertions would not have been made. But the assertions were made. Therefore the will was executed.

Though inferences from an assertion to its truth and inferences from facts taken as true to other facts not asserted to be true rest upon the same principle each inference has its peculiarities.

The inference from the assertion to the truth of the matter asserted is usually regarded as an easy matter calling for little remark.

Though in particular cases it is really easy and though in a certain sense it rightly is by far the most difficult scarrings of justice are almost [54] This requires full explanation.

To infer from an assertion the truth of the matter asserted is in one sense the easiest thing in the world. The intellectual process consists of only one step and that is a step which gives no trouble and is taken in most cases unconsciously. But to draw the inference in those cases only in which it is true is a matter of the utmost difficulty. If we were able to affirm the proposition

All men upon all occasions speak the truth the remaining propositions—This man says so and so. Therefore it is true would present no difficulty. The major premiss however is subject to wide exceptions which are not forced upon the Judge's attention. Moreover if they were the Judge has often no means of ascertaining whether or not and to what extent they apply to any particular case.

How is it possible to tell how far the powers of observation and memory of its difficult motives by any one or more of which he may be actuated dispose him to tell the truth upon the matter on which he testifies? Cross examination supplies a test to a certain extent but those who have seen most of its application will be disposed to trust it least as a proof that a man not shaken by it ought to be believed. A cool steady liar who happens not to be open to contradiction will baffie the most skilful cross examiner in the absence of accidents which are not so common in practice as [55] persons who take their notions on the subject from anecdotes or fiction would suppose.

No rules of evidence which the legislator can enact can perceptibly affect this difficulty. Judges must deal with it as well as they can by the use of their natural faculties and acquired experience and the miscarriages of justice in which they will be involved by reason of it must be set down to the imperfection of our means of arriving at truth. The natural and acquired shrewdness and

inference from assertion to matter asserted

lies

Cannot be affected by rules of evidence

experience by which an observant man forms an opinion as to whether a witness is or is not lying, is by far the most important of all a Judge's qualifications, infinitely more important than any acquaintance with law or with rules of evidence. No trial ever occurs in which the exercise of this faculty is not required, but it is only in exceptional cases that questions arise which present any legal difficulty or in which it is necessary to exercise any particular ingenuity in putting together the different facts which the evidence tends to establish. This pre-eminently important power for a Judge is not to be learnt out of books. In so far as it can be acquired at all, it is to be acquired only by experience, for the acquisition of which the position of a Judge is by no means peculiarly favourable. People come before him with their cases ready prepared, and give the evidence which they have determined to give. Unless he knows them in their unrestrained and familiar moments he will have great difficulty in finding any good reason for believing one man rather than another. The [56] rules of evidence may provide tests, the value of which has been proved by long experience, by which Judges may be satisfied that the quality of the materials upon which their judgments are to proceed is not open to certain obvious objections; but they do not profess to enable the Judges to know whether or not a particular witness tells the truth or what inference is to be drawn from a particular fact. The correctness with which this is done must depend upon the natural sagacity, the logical power and the practical experience of the Judge, not upon his acquaintance with the law of evidence.

Grounds for
believing
and dis-
believing a
witness
Power

The grounds for believing or disbelieving particular statements made by particular people under particular circumstances may be brought under three heads—those which affect the power of the witness to speak the truth, those which affect his will to do so, and those which arise from the nature of the statement itself and from surrounding circumstances. A man's power to speak the truth depends upon his knowledge and his power of expression. This knowledge depends partly on his accuracy in observation, partly on his memory, partly on his presence of mind; his power of expression depends upon an infinite number of circumstances and varies in relation to the subject of which he has to speak.

III

A man's will to speak the truth depends upon his education, his character, his courage, his sense of duty, his relation to the particular facts as to which he is to testify, his humour for the moment, and a thousand [57] other circumstances as to the presence or absence of which in any particular case it is often difficult to form a true opinion.

The third set of reasons are those which depend upon the probability of the statement.

Probability
of state-
ment

Many discussions have taken place on the effect of the improbability of a statement upon its credibility in cases which can never fall under judicial consideration. It is unnecessary to enter upon that subject here. Looking at the matter merely in relation to judicial inquiries it is sufficient to observe that whilst the improbability of a statement is always a reason and may be, in practice a conclusive reason for disbelieving it, its probability is a poor reason for believing it if it rests upon uncorroborated testimony. Probable falsehoods are those which an artful liar naturally tells, and the fact that a good opportunity for telling such a falsehood occurs is the commonest of all reasons for its being told.

Experience
is the only
guide on the
subject

Upon the whole, it must be admitted that little that is really serviceable, can be said upon the inference from an assertion to the truth of the matter asserted. The observations of which the matter admits are either generalities too vague to be of much practical use, or they are so narrow and special that they can be learnt only by personal observations and practical experience. Such observations are seldom, if ever, thrown by those who make them into the form

of express propositions. Indeed, for obvious reasons, it would be impossible to do so. The most acute observer would never be able [58] to catalogue the tones of voice, the passing shades of expression or the unconscious gestures which he had learnt to associate with falsehood, and if he did, his observations would probably be of little use to others. Every one must learn matters of this sort for himself, and though no sort of knowledge is so important to a Judge, no rules can be laid down for its acquisition (1).

If the opinion here advanced appears strange, I would invite attention to the following illustration — Is there any class of cases in which it is, in practice, [59] so difficult to come to a satisfactory decision as those which depend upon the explicit, direct testimony of a single witness uncorroborated, and, by the nature of the case, incapable of corroboration? For instance, a man and a woman are travelling alone in a railway carriage. The train stops at a station and the woman charges the man with indecent conduct which he denies. Nothing particular is known about the character or previous history of either. The woman is not betrayed on cross examination into any inconsistency. There are no cases in which the difficulty of arriving at a satisfactory decision is anything like so great. It is easy to decide them as it is easy to make a bet, but it is easier to deal satisfactorily with the most complicated and lengthy chain of inference. Illustration.

The uncertainty of inferences from an assertion to the truth of the matter asserted may be shown by stating them logically. They may be considered as being the conclusions of syllogisms in this form —

All men situated in such and such a manner speak the truth or speak falsely (as the case may be)

A B, situated in such and such a manner, says so and so

Therefore, in saying so and so, he speaks truly or falsely (as the case may be)

This is a deduction resting on a previous induction and it is obvious that the induction which furnishes the major premiss must always be exceedingly imperfect, and that the truth of the minor premiss, which is essential to the deduction, is always more or less conjectural.

[60] In many cases the defects of inferences of the first kind may be incidentally remedied by inferences of the second kind, namely, inferences from facts which are asserted, and, on the ground of such assertion, believed by the Court to exist, to facts not asserted to exist, and these I now proceed to examine. Inference from facts proved to facts not otherwise proved

I have observed that the inference from an assertion to the truth of the matter asserted often is as easy as it always appears to be. In very many Inference from assertion to truth sometimes really easy

(1) I may give a few anecdotes which have no particular value in themselves but which show what I mean. I always used to look at the witnesses' toes when I was cross-examining them. I said a friend of mine who had practised at the bar in Ceylon. As soon as they began to lie they always fidgeted about with them. I know a Judge who formed the opinion that a letter had been forged because the expression "that woman" which it contained appeared to him to be one which a woman and not a man would use and the question was whether the letter in question had been forged by a woman. In the life of Lord Keeper Guilford it is said that he always acted on the principle that a man was to be believed in what he said when he was in

a passion. The common places about the evidence of police men, children, women and the natives of particular countries belong to this subject. The only remark I feel inclined to add to what is commonly said on it is that according to my observation the power to tell the truth which implies accurate observation knowledge of the relative importance of facts and power of description properly proportioned to each other is much less common than people usually suppose it to be. It is extremely difficult for an untrained person not to mix up inference and assertion. It is also difficult for such a person to distinguish between what they themselves saw and heard and what they were told by others unless their attention is specially directed to the distinction.

instances which it is much easier to recognise when they occur than to reduce to rule a direct assertion even by a single witness of whom little is known is entitled to great weight. Suppose for instance that the matter asserted is of a

which the witness is or for aught he can single assertion of this sort may outweigh

Suppose for instance that a number of witnesses have been called to prove an *alibi* and that they allege that on a given day they were all present together with the person on behalf of whom the *alibi* is to be proved at a fair held at a certain place. If the Magistrate of the district whose duty it was to superintend the fair were to depose that the fair did not begin to be held till a day subsequent to the one in question no one would doubt that the witnesses had conspired together to give false evidence by the familiar trick of changing the day. In this case one direct assertion would outweigh many direct assertions. Why? Because the Magistrate of the district would be a man of [61] character and position, because he would (we must assume) be quite indifferent to the particular case in issue because he would be deposing to a fact of which it would be his official duty to be cognizant and on which he could hardly be mistaken, and lastly, because the fact would be known to a vast number of people and he would be open to contradiction detection and ruin if he spoke falsely. Change these circumstances and the equally explicit testimony of the very same man might be worthless. Suppose for instance that he was asked whether he had committed adultery? His denial would carry hardly any weight in any conceivable case, inasmuch as the charge is one which a guilty man would always deny and an innocent man could do no more. In other words since the course of conduct supposed is one which a man would certainly take whether he were innocent or not the fact of his taking it would afford no criterion as to his guilt or innocence.

Now in almost all judicial proceedings a certain number of facts are established by direct assertions made under such circumstances that no one would seriously doubt their truth. Others are rendered probable in various degrees and thus the judge is furnished with facts which he may use as a basis for his inferences as to the existence of other facts which are either not asserted to exist or are asserted to exist by unsatisfactory witnesses.

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guidance can be laid down. No process is gone through the correctness of which can afterwards be independently tested. The Judge has nothing to trust to but his own natural and acquired sagacity. In the other case all that is required is to go through a process with which as Mr Huxley remarks every one has a general superficial acquaintance tested by every day practice and the theory of which it is easy to understand and interesting to follow out and apply.

Facts must
fulfil test of
method of
difference

The facts supposed to be proved must ultimately fulfil the conditions of the method of difference but they may be combined by any of the recognised logical methods or by a combination of them all. The object indeed at which they are all directed is the same though they reach it by different roads. A few illustrations will make this plain. The question is whether A has embezzled a small sum of money, say a particular rupee which he received on account of his employer and did not enter in a book in which he ought to have entered it. His defence is that the omission to make the entry was accidental. No account book is examined and it is found that in a long series of instances omission of small sums have been made each of which omissions is in A's favour. This in the absence of explanation would leave no reasonable doubt of A's guilt in each and every case. It would be practically impossible to account for such facts except upon the assumption of [63] systematic fraud. Logically, this is

an instance of the Method of Agreement applied to so great a number of instances as to exclude the operation of chance. When however, this is done the Method of Agreement becomes a case of the Method of Difference.

The well known cases in which guilt is inferred from a number of separate independent and so to speak converging probabilities may be regarded as an illustration of the same principle. Their general type is as follows —

Converging probabilities

B was murdered by some one

Whoever murdered *B* had a motive for his murder

I had a motive for murdering *B*

Whoever murdered *B* had an opportunity for murdering *B*

I had an opportunity for murdering *B*

Whoever murdered *B* made preparations for the murder of *B*

I acted in a manner which might amount to a preparation for murdering *B*

In each of these instances which might of course be indefinitely multiplied one item of agreement is established between the ascertained fact that *B* was murdered and the hypothesis that *I* murdered him and it does sometimes happen that these coincidences may be multiplied to such an extent and may be of such a character as to exclude the supposition of chance and justify the inference that *I* was guilty (1). The case however is a [64] rare one and there is always a great risk of injustice unless the facts proved go beyond the mere multiplication of circumstances separately indicating guilt and amount to a substantial exclusion of every reasonable possibility of innocence.

The celebrated passage in Lord Macaulay's Essays in which he seeks to prove that Sir Philip Francis was the author of Junius's letters is an instance of an argument of this kind. The letters he says show that five facts can be predicated of Junius whoever he may have been. But these five facts may also be predicated of Sir Philip Francis and of no one else. Whether any part of this argument can in fact be sustained is a question to which it would be impertinent to refer here but that the method on which it proceeds is legitimate there can be no doubt.

Illustrations

The cases in which it is most probable that injustice will be done by the application of the method of agreement to judicial inquiries are those in which the existence of the principal fact has to be inferred from circumstances pointing to it. This is the foundation of the well known rule that the *corpus delicti* should not in general in criminal cases be inferred from other facts but should be proved independently. It has been sometimes narrowed to the proposition that no one should be convicted of murder unless the body of the murdered person has been discovered. Neither of these rules is more than a rough and partial application of the general principle stated above. If the circumstances are [65] such as to make it morally certain (within the definition given above) that a crime has been committed the inference that it was so committed is as safe as any other such inference.

Rules as to *corpus delicti*

The captain of a ship, a thousand miles from any land and with no other illustration
by several mutinous sailors.
The sailors soon afterwards
vessel. The cabin windows
are opened. The cabin is in confusion and the captain is never seen or heard of again.

A person looks at his watch and returns it to his pocket. Immediately afterwards a man comes past and makes a snatch at the watch which disappears. The man being pursued runs away and swims across a river, he

(1) See Richardson's case p. 89 (i.e. 45 of this introduction).

is arrested on the other side. He has now watch in his possession and the watch is never found.

In these cases it is morally certain that murder and theft respectively were committed, though in the first case the body, and in the second the watch is not producible.

Existence
of corpus
delicti
sometimes
wrongly in-
ferred

Cases, however, do undoubtedly occur in which the inference that a crime has been committed at all is a mistake. They may often be resolved into a case of begging the question. The process is this: suspicion that a crime has been committed is excited, upon inquiry a number of circumstances are discovered which, if it is assumed that a crime has been committed, are suspicious, but which are not suspicious unless the assumption is made.

[66] A ship is cast away under such circumstances that her loss may be accounted for either by fraud or by accident.

The captain is tried for making away with her. A variety of circumstances exist which would indicate preparation and expectation on his part if the ship really was made away with, but which would justify no suspicion at all if she was not. It is manifestly illogical first to regard the antecedent circumstances as suspicious, because the loss of the ship is assumed to be fraudulent and next to infer that the ship was fraudulently destroyed from the suspicious character of the antecedent circumstances. This, however, is a fallacy of very common occurrence, both in judicial proceedings and in common life (1).

The modes in which facts may be so combined as to exclude every hypothesis other than the one which it is intended to establish are very numerous, and are, I think, better learnt from specific illustrations and from actual practice than from abstract theories. One of the objects of the illustrations given in the next chapter is to enable students to understand this matter.

Summary of
conclusions

The result of the foregoing inquiries may be summed up as follows —

I In judicial inquiries the facts which form the materials for the decision of the court are the facts that certain persons assert certain things under certain circumstances [67] These facts the Judge hears with his own ears. He also sees with his own eyes documents and other things respecting which he hears certain assertions.

II His task is to infer—

- (1) From what he himself hears and sees the existence of the facts asserted to exist,
- (2) From the facts which on the strength of such assertions he believes to exist other facts which are not so asserted to exist.

the limitations contained in the following paragraphs) with the existence of any other cause for it than the cause of which the existence is proposed to be proved.

IV The highest results of judicial investigation must generally be, for the reasons already given, to show that certain conclusions are more or less probable.

V The question—what degree of probability is it necessary to show, in order to warrant a judicial decision in a given case? is a question not of logic, but of prudence, and is identical with the question “What risk of error is it wise to run, regard being had to the consequence of error in either direction?”

VI This degree of probability varies in different cases to an extent which cannot be strictly defined, but wherever it exists it may be called moral certainty.

(1) An illustration of this form of error occurred in the case of *R v Steward* and two others who were convicted at Singapore in 1867 for casting away the

Schooner *Erin* and subsequently received a free pardon on the ground of their innocence.

(68) CHAPTER III.

THE THEORY OF RELEVANCY, WITH ILLUSTRATIONS

An intelligence of sufficient capacity might perhaps be able to conceive of all events as standing to each other in the relation of cause and effect, and though the most powerful of human minds are unequal to efforts which fall infinitely short of this, it is possible not only to trace the connection between cause and effect, both in regard to human conduct and in regard to inanimate matter, to very considerable lengths but to see that numerous events are connected together, although the precise nature of the links which connect them may not be open to observation. The connection may be traced in either direction, from effect to cause or from cause to effect, and if these two words were taken in their widest acceptation it would be correct to say that when any theory has been formed which alleges the existence of any fact all facts are relevant which if that theory was true, would stand to the fact alleged to exist either in the relation of cause or in the relation of effect.

Relevancy means connection of events as cause and effect

It may be said that this theory would extend the limits of relevancy beyond all reasonable bounds, inasmuch as all events whatever are or may be more or [69] less remotely connected by the universal chain of cause and effect so that the theory of gravitation would upon this principle be relevant, wherever one of the facts in issue involved the falling of an object to the ground.

Objections

The answer to this objection is, that wide, general causes which apply to all occurrences, are, in most cases, admitted, and do not require proof, but no doubt if their application to the matter in question were doubtful or were misunderstood, it might be necessary to investigate them. For instance suppose that in an action for infringing a patent the defence set up was that the patent was invalid, because the invention had been anticipated by some one who preceded the patentee. The issue might be whether an earlier machine was substantially the same as the patentee's machine. All the facts, therefore, which went to make up each machine would be facts in issue. But each machine would be constructed with reference to the general formulæ called laws of nature and thus the existence of an alleged law of nature might well become, not merely relevant, but a fact in issue. If the first inventor of barometers had taken out a patent, and had had to defend its validity, the variation of atmospheric pressure, according to the height of a column of air and the fact that air has weight, might have been facts in issue.

Answer.

With regard to the remark that all events are connected together more or less, it should be said that though this is or may be true, it is not true that the influence of causes on effects is narrow. A knife is used to

Traceable influence of causes on effects narrow

commit a murder, and it is notched and stained with blood in the process. The knife is carefully washed, the water is thrown away and the notch in the blade is ground out. It is obvious that, unless each link in this chain of cause and effect could be separately proved, it would be impossible to trace the connection between the knife cleaned and ground and the purpose for which it had been used. On the other hand if the first step—the fact that the knife was bloody at a given time and place—was proved there would be no use in inquiring into the further effects produced by that fact such as the staining of the water in which it was washed, the infinitesimal effects produced on the river into which the water was thrown, and so forth.

Rule as to cause and effects true subject to caution that every step in the connection must be made out Illustration

The rule, therefore, that facts may be regarded as relevant which can be shown to stand either in the relation of cause or in the relation of effect to the fact to which they are said to be relevant may be accepted as true, subject to the caution that, when an inference is to be founded upon the existence of such a connection every step by which the connection is made out must either be proved, or be so probable under the circumstances of the case that it may be presumed without proof. Footmarks are found near the scene of a crime. The circumstances are such that they may be presumed to be the footmarks made by the criminal. These marks [71] correspond precisely with a pair of shoes found on the feet of the accused. The presumption founded upon common experience though its force may vary indefinitely, is that no two pairs of shoes would make precisely the same marks. It may further be presumed, though this presumption is by no means conclusive that shoes were worn by the owner on a given occasion. Here the steps are as follows —

- (1) The person who committed the crime probably made those marks by pressing the shoes which he wore on the ground
- (2) The person who committed the crime probably wore his own shoes
- (3) The shoes so pressed were probably the *c* shoes
- (4) These shoes are *A B* shoes

Therefore *A B* probably made those marks with those shoes

Therefore *A B* probably committed the crime

These facts may be exhibited in the relation of cause and effect thus —

- (1) *A* s owning the shoes was the cause of his wearing them
- (2) His wearing them at a given place and time caused the marks
- (3) The marks were caused by the flight of the criminal
- (4) The flight of the criminal was caused by the commission of the crime

[72] (5) Therefore the marks were caused by the flight of *f* the criminal after committing the crime

Though this mode of describing relevancy might be correct it would not be readily understood. For instance it might be asked how is an *alibi* relevant under this definition? The answer is that a man's absence from a given place at a given time is a cause of his not having done a given act at that place and time. This mode of using language would however be obscure and it was for this reason that relevancy was very fully defined in the Evidence Act (ss 6-11 both inclusive). These sections enumerate specifically the different instances of the connection between cause and effect which occur most frequently in judicial proceedings. They are designedly worded very widely and in such a way as to overlap each other. Thus a motive for a fact in issue (s 8) is part of its cause (s 7). Subsequent conduct influenced by it (s 8) is part of its effect (s 7). Facts relevant under s 11 would in most cases be relevant under other sections. The object of drawing the Act in this manner was that the general ground on which facts are relevant might be stated in as many and as popular forms as possible, so that if a fact is relevant its relevancy may be easily ascertained.

if this definition

Importance of these sections

These sections are by far the most important as they are the most original part of the Evidence Act as they affirm positively what facts may be proved, whereas the English law assumes this to [73] be known and merely declares negatively that certain facts shall not be proved.

Important as these sections are for purposes of study, and in order to make the whole body of law to which they belong easily intelligible to students and practitioners not trained in English Courts they are not likely to give rise to

litigation or to nice distinction. The reason is that s 167 of the Evidence Act which was formerly s 57 of Act II of 1855 renders it practically a matter of little importance whether evidence of a particular fact is admitted or not. The extreme intricacy and minuteness of the law of England on this subject is principally due to the fact that the improper admission or rejection of a single question and answer would give a right to a new trial in a civil case and would upon a criminal trial be sufficient ground for the quashing of a conviction before the Court for Crown Cases reserved.

The improper admission or rejection of evidence in India has no effect at all unless the Court thinks that the evidence improperly dealt with either turned or ought to have turned the scale. A Judge moreover if he doubts as to the relevancy of a fact suggested can if he thinks it will lead to any thing relevant, ask about it himself under s 165.

In order to exhibit fully the meaning of these sections to show how the Act Illustration was intended to be worked and to furnish students with models by which they may be guided in the discharge of the most important of their duties abstracts are appended of the evidence given at the following remarkable trials ---

- [74] 1 R v Donellan
 2 R v Belaney
 3 R v Richardson
 4 R v Patch
 5 R v Palmer

To every fact proved in each of these cases the most intricate that I could discover a note is attached showing under what section of the Evidence Act it would be relevant.

I may observe upon these cases that the general principles of evidence are perhaps more clearly displayed in trials for murder than in any others. Murders are usually concealed with as much care as possible and on the other hand they must from the nature of the case leave traces behind them which render it possible to apply the argument from effects to causes with greater force in these than in most other cases. Moreover as they involve capital punishment and excite peculiar attention the evidence is generally investigated with special care. There are accordingly few cases which show so distinctly the sort of connection between fact and fact which makes the existence of one fact a good ground for inferring the existence of another.

I

[75] CASE OF R v DONELLAN (1)

John Donellan Esq was tried at Warwick Spring Assizes 1781 before Mr Justice Buller for the murder of Sir Theodosius Broughton his brother in law (1) who up to the moment

was the sister of the deceased and lived with him at Lawford Hall

(1) Wills on Circumstantial Evidence
 pp 197 6

(2) Introductory fact (section 9)

(3) State of things under which facts
 in issue happened (section 7)

In the event of Sir T Broughton's death, unmarried and without issue, the greater part of his fortune would descend to Mrs Donellan(1), but it was stated, though not proved, by the prisoner in his defence that he on his marriage entered into articles for the immediate settling of her whole fortune on herself and children, and deprived himself of the possibility of enjoying even a life-estate in [76] case of her death, and that this settlement extended not only to the fortune but to expectancies (2)

For some time before the death of Sir Theodosius the prisoner had on several occasions falsely represented his health to be very bad and his life to be precarious (3) On the 29th of August the apothecary in attendance sent him a mild and harmless draught to be taken the next morning (4) In the evening the deceased was out fishing(5), and the prisoner told his mother that he had been out with him, and that he had imprudently got his feet wet, both of which assertions were false (6) When Sir Theodosius was called on the following morning he was in good health(7), and about seven o'clock his mother went to his chamber to give him his draught(8), of which he immediately complained(9), and she remarked that it smelt like bitter almonds (10) [77] In about two minutes he struggled very much as if to keep the medicine down, and Lady Broughton observed a gurgling in his stomach(11), in ten minutes he seemed inclined to doze(11), but in five minutes afterwards she found him with his eyes fixed, his teeth clenched, and froth running out of his mouth, and within half an hour after taking the dose he died (11)

Lady Broughton ran downstairs to give orders to a servant to go for the apothecary, who lived about three miles distant(12), and in less than five minutes after Sir Theodosius had been taken Donellan asked where the physic bottle was, and Lady Broughton showed him the two bottles The prisoner then took up one of them and said "Is this it?" and being answered "Yes," he poured some water out of the water bottle which was near into the phial, shook it, and then emptied it into some dirty water which was in a wash hand basin Lady Broughton said, "You should not meddle with the bottle," upon which the prisoner snatched up the other bottle and poured water into that also, and shook it, and then put his finger into it and tasted it Lady Broughton again asked what he was about, and said he ought not to meddle with the bottles, on which he replied that he did it to taste it(13) though (14) he had not tasted the first bottle (13) The prisoner ordered a [78] servant to take away the basin, the dirty things and the bottles, and put the bottles into her hands, for that purpose, she put them down again on being directed by Lady Broughton to do so, but subsequently removed them on the peremptory order of the

(1) Motive (section 8)

(2) Fact rebutting an inference suggested by a relevant fact (section 9) These facts are omitted by Mr Wills but are mentioned in my account of the case. Gen View Crim Law p 338

(3) Facts showing preparation for fact in issue (section 8) The statements are also admissions as against the prisoner (section 17)

(4) A fact affording an opportunity for facts in issue (section 7)

(5) Introductory to what follows (section 9)

(6) Preparation (section 8) Admission (section 17)

(7) State of things under which facts in issue happened (section 7)

(8) It was suggested that Donellan changed the apothecary's draught for a

poisoned one administered by Lady Broughton an innocent agent Therefore the administration of the draught suggested to be poisoned was a fact in issue (section 5)

(9) As to this see section 14

(10) i.e. of prussic acid Lady Broughton perceived by smell the presence of the poison Therefore she smelt a fact in issue (section 5)

(11) Effects of facts in issue (section 7) All these facts go to make up the fact of his death which was a fact in issue

(12) Introductory to next fact as fixing the time (section 9)

(13) Subsequent conduct influenced by a fact in issue and statements explanatory of conduct (section 8)

(14) This word is Mr Wills comment

prisoner (1) On the arrival of the apothecary, the prisoner said the deceased had been out the preceding evening fishing, and had taken cold, but he said nothing of the draught which he had taken (1) The prisoner had a still in his own room which he used for distilling roses(2), and a few days after the death of Sir Theodosius he brought it full of wet lime to one of the servants to be cleaned (3) The prisoner made several false and inconsistent statements to the servants as the cause of the young man's death(4), and on the day of his death he wrote to Sir W Wheeler, his guardian to inform him of the event, but made no reference to its suddenness (4) The coffin was soldered up on the fourth day after the death (5) Two days afterwards Sir W Wheeler in consequence of the rumours which had reached him of the manner of Sir Theodosius's death, and that suspicions were entertained that he had died from the effects of poison(6), wrote a letter to the prisoner requesting [79] that an examination might take place whom he wished it to be conducted (7) The letter but did not exhibit Sir W Wheeler's deceased had been poisoned, nor did he mention to them that they were sent for at his request Having been induced by the prisoner to suppose the case to be one of ordinary death(8), and finding the body in an advanced state of putrefaction, the medical gentlemen declined to make the examination on the ground that it might be attended with personal danger On the following day a medical man who had heard of their refusal to examine the body offered to do so but the prisoner declined his offer on the ground that he had not been directed to send for him (9) On the same day the prisoner wrote to Sir W Wheeler a letter in which he stated that the medical men had fully satisfied the family and endeavoured to account [80] for the event by the ailment under which the deceased had been suffering, but he did not state that they had not made the examination (10) Three or four days after, Sir W Wheeler having been informed that the body had not been examined(11) wrote to the prisoner insisting that it should be done(12), which, however, he prevented by various disingenuous contrivances(13), and the body was interred without examination (14) In the meantime, the circumstances having become known to the coroner he caused the body to be disinterred and examined on the eleventh day after death Putrefaction was found to be far advanced, and the head was not opened, nor the bowels examined, and in other respects the examination was incomplete (15) When Lady Broughton

(1) Subsequent conduct and explanatory statements (section 8)

(2) Opportunity to distil laurel water the poison said to have been used (section 7)

(3) Subsequent conduct (section 8)

(4) Admission 17 18

(5) Introductory to what follows (section 9)

(6) Introductory to and explanatory of what follows (section 9) It should be observed that proof of the rumours and suspicions for the purpose of showing the truth of the matters rumoured and suspected would not be admissible The fact that there were rumours and suspicions explains Sir W Wheeler's letter

(7) Statement to the prisoner and affecting his conduct (section 8 ex 2)

(8) Subsequent conduct of prisoner (section 8) and Mr Wills comment on the conduct

(9) Subsequent conduct (section 8) The fact that the first set of doctors re-

fused explains the prisoner's conduct by showing that it had the effect of preventing examinations (section 7) The ground on which they refused tends to rebut this inference (section 9) but the second doctors offer and the prisoner's conduct thereon tend to confirm it (section 9)

(10) Subsequent conduct (section 11) and admission (section 17)

(11) Introductory (section 9)

(12) Statement to the prisoner affecting his conduct (section 8 ex 2)

(13) Each contrivance and each circumstance which showed that it was disingenuous would come under the head of subsequent conduct (section 8)

(14) The burial was part of the transaction (section 6) The absence of examination is explanatory of parts of the medical evidence The whole is introductory to medical evidence (section 9)

(15) Introductory to opinions of experts (sections 9 45 46)

in giving evidence before the coroner's inquest, related the circumstance of the prisoner having rinsed the bottles, he was observed to take hold of her sleeve and endeavour to check her, and he afterwards told her that she had no occasion to have mentioned that circumstance, but only to answer such questions as were put to her, and in a letter to the coroner and jury he [81] endeavoured to impress them with the belief that the deceased had inadvertently poisoned himself with arsenic, which he had purchased to kill fish (1) Upon the trial four medical men—three physicians and an apothecary—were examined on the part of the prosecution, and expressed a very decided opinion mainly grounded upon the symptoms, the suddenness of the death, the *post mortem* appearances, the smell of the draught as observed by Lady Broughton, and the similar effects produced by experiments upon animals, that the deceased had been poisoned with laurel water (2), one of them stating that on opening the body he had been affected with a biting acrimonious taste like that which affected him in all the subsequent experiments with laurel water (3) An eminent (4) surgeon and anatomist stated a positive opinion that the symptoms did not necessarily lead to the conclusion that the deceased had been poisoned, and that the appearances presented upon dissection explained nothing but putrefaction (2) The prisoner was convicted and executed

II

[82] CASE OF R v BELANEY (5)

at the Central Criminal Court, August 1844, the murder of his wife They left their place on a journey of pleasure to London on the 1st of June (having a few days previously made mutual wills in each other's favour) (6) where on the 11th of that month they went into lodgings (7) The deceased, who was advanced in pregnancy, was slightly indisposed after the journey, but not sufficiently so to prevent her going about with her husband (8) On the 8th, being the Saturday morning after the arrival in town the prisoner rang the bell for some hot water a tumbler, and a spoon (9) and he and his wife were heard conversing in their chamber about seven o'clock About a quarter before eight the prisoner called the landlady upstairs saying that his wife was very ill, and she found her lying motionless on the bed with her eyes shut and her teeth closed and foaming at the [83] mouth On being asked if she was subject to fits, the prisoner said she had fits before but none like this,

(1) Subsequent conduct (section 8) and admissions (section 17)

(2) Opinion of experts (section 45)

(3) This is a case of testing a fact in issue viz the laurel water present in the body See definition of fact section 3

(4) This was the famous John Hunter

(5) Wills on Circumstantial Evidence pp 175—178

(6) Motive (section 8)

(7) Introductory (section 9)

(8) State of things under which fact in issue happened (section 7)

(9) Preparation (section 8)

and that she would not come out of it. On being pressed to send for a doctor, the prisoner said he was a doctor himself, and should have let blood before, but there was no pulse. On being further pressed to send for a doctor and his friends he assented, adding that she would not come to, that this was an affection of the heart, and that her mother died in the same way nine months ago. The servant was accordingly sent to fetch two of the prisoner's friends, and on her return she and the prisoner put the patient's feet and hands in warm water and applied a mustard plaster to her chest. A medical man was sent for, but before his arrival the patient had died (1). There was a tumbler close to the head of the bed, about one third full of something clear, but whiter than water, and there was also an empty tumbler on the other side of the table, and a paper of Epsom salts (2). In reply to a question from a medical man whether the deceased had taken any medicine that morning, the prisoner stated that she had taken nothing but a little salts (3). On the same morning the prisoner ordered a grave for interment on the following Monday (4). In the [84] meantime the contents of the stomach were examined and found to contain prussic acid and Epsom salts. It was deposed that the symptoms were similar to those of death by prussic acid, but might be the result of any powerful sedative poison and that the means resorted to by the prisoner were not likely to promote recovery, but that cold of brandy or ammonia (which in house) and other stimulants probably have been effectual. No smell of prussic acid had been discovered in the room, though it has a very strong odour, but the window was open, and it was stated that the odour is soon dissipated by a current of air (5). The prisoner had purchased prussic acid, as also acetate of morphine, on the preceding day, from a vendor of medicines with whom he was intimate, but he had been in the habit of using these poisons under advice for a complaint in the stomach (6). Two days after the fatal event the prisoner stated to the medical man, who had been called in and who had assisted in the examination of the body, that on the to take some prussic acid, that on endeavour [85] some difficulty, and used some force with at in consequence of breaking the neck of the bottle by the force, some of the acid was spilt, that he placed the remainder in the tumbler on the drawers at the end of the bed room, that he went into the front room to fetch a bottle wherein to place the acid but instead of so doing began to write to his friends in the country, when in a few minutes he heard a scream from his wife's bed room calling for cold water, and that the prussic acid was undoubtedly the cause of her death. Upon being asked what he had done with the bottle, the prisoner said he had destroyed it, and on being asked why he had not mentioned the circumstances before he said he had not done so because he was so distressed and ashamed at the consequence of his negligence. To various persons in the north of England the prisoner wrote false and suspicious accounts of his wife's illness. In one of them dated from the Euston Hotel on the 6th of June, he stated that his wife was unwell, and that two medical men attended her, and that in consequence

(1) The death and attendant circumstances are facts in issue and part of the transaction (sections 5-26). The other facts are conduct (section 8) and admissions (sections 17-18).

(2) State of things at death or cause or effect of administration of poison (section 7).

(3) Admissions (sections 17-18).

(4) Conduct (section 8).

(5) Effect of poisoning (section 7) opinions of experts (sections 45-46). The absence of the smell of prussic acid and the presence of the draughts are respectively a fact suggesting the absence of prussic acid, and a fact rebutting that inference (section 9).

(6) Preparation (section 8) and fact rebutting inference from purchase of poison (section 9).

he should give up an intended visit to Holland, and intimated his apprehension of a miscarriage. For these statements there was no foundation. At that time moreover he had removed from the Euston Hotel into lodgings, and on the same day he had made arrangements for leaving his wife in London, and proceeding himself on his visit to Holland. In another letter, dated 8th of June, and posted after his wife's death, though it could not be determined whether it was written before or after, the prisoner stated that [86] he had had his wife removed from the hotel to private lodgings, where she was dangerously ill and attended by two medical men, one of whom had pronounced her heart to be diseased, these representations were equally false. In another letter, dated the 9th of June, but not posted until the 10th, he stated the fact of his wife's death, but without any allusion to the cause, and in a subsequent letter he stated the reason for the suppression to be to conceal the shame and reproach of his negligence. The prisoner's statements to his landlady that his wife's mother had died from disease of the heart was also a falsehood the prisoner having himself stated in writing to the registrar of burials that brain fever was the cause of death (1). It was, however, proved that the prisoner was of a kind disposition, that he and his wife had lived upon affectionate terms and that he was extremely careless in his habits (2), and no motive for so horrible a deed was clearly made out, though it was urged that it was the desire of obtaining her property by means of her testamentary disposition (3). Upon the was certainly possible
gested, and the jury

Remarks in
cases of
Donellan
and Belaney

The two cases of Donellan and Belaney are not merely curious in themselves, but throw light upon one of the most important of the [87] points connected with judicial evidence, the point namely as to the amount of uncertainty which constitutes what can be called reasonable doubt. This I have already said is a question not of calculation, but of prudence. The cases in question show that different tribunals at different times do not measure it in precisely the same way. In Donellan's case the jury did not think the possibility that Sir Theodosius Broughton might have died of a fit sufficiently great to constitute reasonable doubt as to his having been poisoned. In Belaney's case the jury thought that the possibility that the prisoner gave his wife the poison by accident did constitute a reasonable doubt as to his guilt. If the chances of the guilt and innocence of the two men could be numerically expressed, they would, I think be as nearly as possible equal, and it might be said that both or that neither ought to have been convicted if it were not for the all important principle that every case is independent of every other, and that no decision upon facts forms a precedent for any other decision. If two juries were to try the very same case, upon the same evidence and with the same summing up and the same arguments by counsel they might very probably arrive at opposite conclusions and yet it might be impossible to say that either of them was wrong. Of the moral qualifications for the office of a Judge few are more important than the strength of mind which is capable of admitting the unpleasant truth that it is often necessary to act upon probabilities, and to run some risk of error. The cruelty of the old criminal law of Europe, and of [88] England as well as of other countries produced many bad effects, one of which was that it intimidated those who had to put it in force. The saying that it is better that ten criminals should escape than that one innocent man should be convicted expresses this sentiment, which has I think been carried too far, and has done much to enervate the administration of justice.

(1) All these are admissions (sections 17, 18) and conduct (section 3)

(2) Character (section 53)
(3) Motive (section 8)

III

[89] CASE OF R. v. RICHARDSON.(1)

In the autumn of 1786 a young woman, who lived with her parents in a remote district in the Stewartry of Kirkcudbright(2), was one day left alone in the cottage(3), her parents having gone out to the harvest-field (1) On their return home a little after mid day(2), they found their daughter murdered(5), with her throat cut(6) in a most shocking manner

The circumstances in which she was found, the character of the deceased, and the appearance of the wound, all concurred in excluding all supposition of suicide(7); while the surgeons who examined the wound were satisfied that [90] it had been inflicted by a sharp instrument, and by a person who must have held the weapon in his left hand (8) Upon opening the body the deceased appeared to have been some months gone with child(9), and on examining the ground about the cottage there were discovered the footsteps of a person who had seemingly b

a quagmire or
however, that t

stepped into the mire, by which he must have been wet nearly to the middle of the leg(11) The prints of the footsteps were accurately measured and an exact impression taken of them(12), and it appeared that they were those of a person, who must have worn shoes, the soles of which had been newly mended, and which, as is usual in that part of the country, had iron knobs or nails in them (12) There were discovered also along the track of the footsteps, and at certain intervals, drops of blood, and on a stile or small gateway near the cottage, and in the line of the footsteps some marks resembling those of a hand which had been bloody(12) Not the slightest suspicion at this time [91] attached to any particular person as the murderer, nor was it even suspected who might be the father of the child of which the girl was pregnant (13) At the funeral a number of persons of both sexes attended(14), and the steward-der
possible, to dis
whoever he was
e called together,
he

after the interment, the whole of the men who were present, being about sixty in number (14) He caused the shoes of each of them to be taken off and measured, and one of the shoes was found to resemble pretty nearly the impression of the footsteps near to the cottage The wearer of the shoe was the school-master of the parish, which led to a suspicion that he must have been the father of the child, and had been guilty of the murder to save his character On a closer examination of the shoe, it was discovered that it was pointed at the toe,

(1) Wills pp 225—229 Mr Wills observes, "This case is also concisely stated in the 'Memoirs of the Life of Sir Walter Scott' IV, p 52 and it supplied one of the most striking incidents in 'Guy Manner ing'"

(2) Introductory (section 9)

(3) Opportunity (section 7)

(4) Explanatory (section 9)

(5) Mr Wills comment They found her with the throat cut and Mr Wills says she was murdered but her murder was to them an inference, not a fact (section 3)

(6) Fact in issue (section 5)

(7) Suicide would be a relevant fact as being inconsistent with murder The facts which exclude suicide are relevant as inconsistent with a relevant fact (section

11)

(8) Opinion of experts (section 45)

(9) State of things under which death happened (section 7)

(10) Effects of facts in issue (section 7)

(11) This is so stated as to mix up inference and fact Stripped of inference the fact might have been stated thus — There were such marks in the bog as would have been produced if a person crossing the stepping stones had slipped with one foot. The mud was of such a depth that a person so slipping would get wet to the middle of the leg

(12) Effects of fact in issue (section 7)

(13) Observation

(14) Introductory (section 9)

whereas the impression of the footstep was round at that place (1) The measurement of the rest went on and after going through nearly the whole number one at length was discovered which corresponded exactly with the impression in dimensions, shape of the foot, form of the sole and the number and position of the nails (2) William Richardson, the young man to [92] whom the shoe belonged on being asked where he was the day deceased was murdered, replied, seemingly without embarrassment, that he had been all that day employed at his master's work (3),—a statement which his master and fellow servants who were present confirmed (4) This going so far to remove suspicions a warrant of commitment was not then granted, but some circumstances occurring a few days afterwards having a tendency to excite it anew, the young man was apprehended and lodged in jail (5) Upon his examination (6) he acknowledged that he was left handed (7), and some scratches being observed on his cheek, he said he had got them when pulling nuts in a wood a few days before (8) He still adhered to what [93] he had said of his having been on the day of the murder employed constantly in his master's work (9), but in the course of the inquiry it turned out that he had been absent from his work about half an hour the time being distinctly ascertained, in the course of the forenoon of that day, that he called at a smith's shop under the pretence of wanting something which it did not appear that he had any occasion for, and that this smith's shop was in the way to the cottage of the deceased (9) A young girl, who was some hundred yards from the cottage, said that, about the time when the murder was committed (and which corresponded to the time when Richardson was absent with his dress and appearance not see him return, though he would intercept him from her view and which was the very track where the footsteps had been traced (10)

His fellow servants now recollected that on the forenoon of that day they were employed with Richardson in driving their master's cart, and that when passing by a wood which they named, he said that he must run to the [94] smith's shop and would be back in a short time He then left his cart under their charge, which one of the servants remarked on his saying he would be, to

1) Irrelevant

(2) The making of the footmark was an effect of or conduct subsequent to and effected by a fact in issue (section 7) The measurement of the sixty shoes of which one only corresponded exactly with the mark was a fact or rather a set of facts making highly probable the relevant fact that that shoe made that mark (section 11) The experiment itself is an application of the method of difference This shoe would make the mark and no other of a very large number would

(3) This would be relevant against him but not in his favour as an admission (sections 17 18)

(4) The fact that his master and fellow servants confirmed his statement is irrelevant If they had testified afterwards to the fact itself it would have been relevant

(5) Irrelevant

(6) By Scotch law as well as by the Code of Criminal Procedure a prisoner may be examined

(7) The fact that he was left handed

would be a cause of a fact in issue viz the peculiar way in which the fatal wound was given The admission that he was left handed would be relevant as proof of the fact by sections 17 18

(8) If it was suggested that the scratches were made in a struggle with the girl they would be an effect of a fact in issue (section 7) and the statement would be relevant as against the prisoner as an admission (sections 17 18)

(9) Opportunity (section 7) Admissions (sections 17 18) The call at the shop was preparation by making evidence (section 8) illustration (e)

(10) There is here a mixture of fact and inferences the girl could not know that a murder was committed at the time when it was committed Probably she mentioned the time and it corresponded with the time when Richardson was away This would be preparation and opportunity (section 7) The existence of the small eminence explains her not seeing him return (section 9)

which he realised that he had stumbled in the wood to gather some

mad or drunk if he stepped into that marsh, as there was a footpath which went along the side of it." It then appeared by comparing the time he was absent with the distance of the cottage from the place where he had left his fellow-servants that he might have gone there, committed the murder, and returned to them (1). A search was then made for the stockings he had worn that day (2). They were found concealed in the thatch of the apartment where he slept, and

he had assisted in bleeding a horse but it was proved that he had not assisted [95] and had stood at such a distance that the blood could not have reached him (4). On examining the mud or sand upon the stockings, it appeared to correspond precisely with that of the mire or puddle adjoining the cottage, and which was of a very particular kind, none other of the same kind being found in that neighbourhood (5). The shoe maker was then discovered who had mended his shoes a short time before, and he spoke distinctly to the shoes of the prisoner which were exhibited to him as having been those he had mended (6). It then came out that Richardson had been acquainted with the deceased, who was considered in the country as of weak intellect, and had on one occasion been seen with her in a wood in circumstances that led to a suspicion that he had criminal intercourse with her, and, on being taunted with having such connection with one in her situation, he seemed much ashamed and greatly [96] hurt (7). It was proved further by the person who sat next him when his shoes were measuring, that he trembled much and seemed a good deal agitated, and that, in the interval between that time and his being apprehended, he had been advised to fly, but his answer was, "Where can I fly to?" (8).

On the other hand, evidence was brought to show that about the time of the murder a boat's crew from Ireland had landed on that part of the coast near to the dwelling of the deceased (9), and it was said that some of the crew might have committed the murder, though their motive for doing so it was difficult to explain, it not being alleged that robbery was their purpose, or that any thing was missing from the cottages in the neighbourhood. The prisoner was convicted, confessed, and was hanged.

(1) All these facts are either opportunity or preparation or subsequent or previous conduct or admissions (sections 7, 8 17).

(2) Introductory to next fact (section 91).

(3) The concealment is subsequent conduct (section 8). The state of the stockings is the effect of a fact in issue (section 7).

(4) The falsehoods are subsequent conduct (section 8) or admissions (sections 17 & 18). The prisoner's allegation about the horse is an allegation of a fact explaining the relevant fact that there was blood on the stockings (section 9) and the fact proved about his distance from the horse is a fact rebutting the inference suggested thereby that the blood was the horse's (section 7).

(5) Effect of a fact in issue (section 7). The identity of the mud on the stockings

to the sand in the marsh was one of the effects of the slip which was the effect of the murder.

(6) That the marks were made by the prisoner's shoe was relevant as an effect of facts in issue. That the shoes which made the marks were the prisoner's had been already proved by their being found on his feet. This further proof seems superfluous unless it was suggested that they belonged to some one else.

(7) The opinion about her would be irrelevant. The fact that her intellect was weak would be part of the state of things under which the murder happened, and with what follows would show motive (sections 7 & 8).

(8) Subsequent conduct (section 10). The weight of this is very slight.

(9) Opportunity for the murder (section 7).

Remarks on
Richardson's case

This case illustrates the application of what Mr Mill calls the method of agreement upon a scale which excludes the supposition of chance, thus —

- (1) The murderer had a motive,—Richardson had a motive
- (2) The murderer had an opportunity at a certain hour of a certain day in a certain place,—Richardson had an opportunity on that hour of that day at that place
- [97] (3) The murderer was left handed,—Richardson was left handed
- (4) The murderer wore shoes which made certain marks,—Richardson wore shoes which made exactly similar marks
- (5) If Richardson was the murderer and wore stockings they must have been soiled with a peculiar kind of sand,—he did wear stockings which were soiled with that kind of sand
- (6) If Richardson was the murderer, he would naturally conceal his stockings,—he did conceal his stockings
- (7) The murderer would probably get blood on his clothes —Richardson got blood on his clothes
- (8) If Richardson was the murderer, he would probably tell lies about the blood—he did tell lies about the blood
- (9) If Richardson was the murderer, he must have been at the place at the time in question—a man very like him was seen running towards the place at the time
- (10) If Richardson was the murderer, he would probably tell lies about his proceedings during the time when the murder was committed,—he told such lies

Here are ten separate marks, five of which must have been found in the murderer one of which must have been found on the murderer if he wore stockings whilst others probably would be found in him

All ten were found in Richardson Four of them were so distinctive that they could hardly have met in more than one man It is hardly imaginable that two left handed men wearing precisely similar shoes and closely [98] resembling each other should have put the same leg into the same hole of the same marsh at the same time that one of them should have committed a murder, and that the other should have causelessly hidden the stockings which had got soiled in the marsh Yet this would be the only possible supposition consistent with Richardson's innocence

IV

[99] CASE OF R v PATCH (1)

A man named Patch had been received by Mr Isaac Blight, a ship breaker, near Greenland Dock into his service in the year 1803 Mr Blight having become embarrassed in his circumstances in July 1805, entered into a deed of composition with his creditors and in consequence of the failure of this arrangement, he made a colourable transfer of his property to the prisoner (2) It was afterwards agreed between them that Mr Blight was to retire nominally from the business, which the prisoner was to manage, and the former was to have two thirds of the profits and the prisoner the remaining third, for which

he was to pay £1,250. Of this amount, £250 was paid in cash, and a draft was given for the remainder upon a person named Goom, which would become payable on the 16th of September, the prisoner representing that he had received the purchase money of an estate and lent it to Goom (1). On the 16th of September the prisoner represented to Mr Blight's bankers that Goom could not take [100] up the bill, and withdrew it, substituting his own draft upon Goom, to fall due on the 20th September (2). On the 19th of September the deceased went to visit his wife at Margate, and the prisoner accompanied him as far as Deptford (3), and then went to London and represented to his bankers that Goom would not be able to face his draft, but that he had obtained from him a note which satisfied him, and therefore they were not to present it (4). The prisoner boarded in Mr Blight's house, and the only other inmate was a female servant, whom the prisoner about eight o'clock the same evening (the 19th) sent out to procure some oysters for his supper (5). During her absence a gun or pistol ball was fired through the shutter of a parlour fronting the Thames, where the family, when at home, usually spent their evenings. It was low water, and the mud was so deep that any person attempting to escape in that direction must have been suffocated and a man who was standing near the gate of the wharf which was the only other mode of escape, heard the report, but saw no person (6). From the manner in which [101] the ball entered the shutter it was clear that it had been discharged by some person who was close to the shutter, and the river was so much below the level of the house, that the ball, if it had been fired from thence must have reached a much higher part than that which it struck. The prisoner declined the offer of the neighbours to remain in the house with him that night (7). On the following day he wrote to inform the deceased of the transaction, stating his hope that the shot had been accidental, that he knew of no person who had any animosity against him, that he wished to know for whom it was intended, and that he should be happy to hear from him, but much more so to see him (8). Mr Blight returned home on the 23rd September, having previously been to London to see his bankers on the subject of the £1,000 draft (9). Upon getting home, the draft became the subject of conversation, and the deceased desired the prisoner to go to London, and not to return without the money (10). Upon his return the prisoner and the deceased spent the evening in the back parlour, a different one from that in which the family usually sat (11). About eight o'clock the prisoner went from the parlour into the kitchen, and asked [102] the servant for a candle (12), complaining that he was disordered (13). The prisoner's way from the kitchen was through an outer door which fastened by a spring lock, and across a paved court in front of the house which was enclosed by palisades, and through a gate over a wharf in front of that court, on which there was the kind of soil peculiar to premises for breaking up ships, and then through a

- (1) Motive (section 8)
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The last fact illustrates the remarks made at pages 40-41. The inference from the facts stated assuming them to be true is necessary but suppose that the man standing near the gate saw some one running and for reasons of his own denied it how could he be contradicted?

- (7) Conduct (section 8)
- (8) Preparation (section 8)
- (9) Hardly relevant except as introductory to what follows (section 9)
- (10) Motive (section 8)
- (11) State of things under which facts in issue happened (section 7)
- (12) Preparation (section 8).
- (13) Preparation (section 8).

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(8) Preparation (section 8)

(9) Hardly relevant except as introductory to what follows (section 9).

(10) Motive (section 8)

(11) State of things under which the crime happened (section 2)

(12) Preparation (section 8)

(13) Preparation (section 8)

counting house. All of these doors, as well as the door of the parlour, the prisoner left open, notwithstanding the state of alarm excited by the former shot. The servant heard the privy door slam, and almost at the same moment saw the flash of a pistol at the door of the parlour where the deceased was sitting upon which she ran and shut the outer door and gate. The prisoner immediately afterwards rapped loudly at the door for admittance with his clothes in disorder. He evinced great apparent concern for Mr Blight, who was mortally wounded and died on the following day. From the state of the tide and from the testimony of various persons who were on the outside of the premises, no person could have escaped from them (1)

In consequence of this event Mrs Blight returned home(2), and the prisoner had made her husband a hole of the property and in his sleeping room was found a pair of stockings rolled up like clean stockings, but with the feet plastered over with the sort of soil found on the wharf, and a ramrod was found in the privy (5). The prisoner usually wore boots, but on the evening of the murder he wore shoes and stockings (6). It was supposed that to prevent alarm to the deceased or the female servant, the murderer must have approached without his shoes, and afterwards gone on the wharf to throw away the pistol into the river (7). All the prisoner's statements as to his pecuniary transactions with Goom and his right to draw upon him, and the payment of the bill, turned out to be false (8). He attempted to tamper with the servant girl as to her evidence before the coroner, and urged her to keep to one account(9), and before that officer he made several inconsistent statements as to his pecuniary transactions with the deceased and equivocated much as to whether he wore [104] boots or shoes on the evening of the murder, as well as to the ownership of the soiled stockings(10), which, however, were clearly proved to be his, and for the soiled state of which he made no attempt to account(10). The prisoner suggested the existence of malicious feelings in two persons with whom the deceased had been on ill terms(11), but they had no motive(12) for doing him any injury, and it was clearly proved that upon both occasions of attack they were at a distance (13)

on

Patch's case

Patch's case illustrates the method of difference(14) and the whole of it may be regarded as a very complete illustration of section 11. The general effect of the evidence is, that Patch had motive and opportunity for the murder, and that no one else, except himself, could have fired either the shot which caused the murdered man's death, or the shot which was intended to show that the murdered man had enemies who wished to murder him. The relevancy of the

(1) These facts collectively are inconsistent with the firing of the shot by anyone except Patch (section 11). They would also be relevant as being either facts in issue, or the state of things under which facts in issue happened (section 7) or as preparation or opportunity (sections 7 & 8 illustration h)

(2) Introductory (section 9)

(3) Subsequent conduct influenced by a fact in issue (section 8)

(4) Irrelevant

(5) Effect of fact in issue (section 7)

(6) State of things under which facts in issue happened (section 7)

(7) Fact and inference are mixed up in this statement the facts are (1) that

the state of things was such that the deceased and his servant would have heard the steps of a man with shoes on under the window and (2) that a person who wished to throw anything into the Thames would have to go on to the wharf

(8) Preparation (section 8)

(9) Subsequent conduct (section 8) and admission (sections 17 & 18)

(10) Effect of fact in issue (section 7)

(11) Motive (section 8)

(12) *ie.*, no special motive beyond general ill will

(13) Facts inconsistent with relevant fact (section 11)

(14) P 34

first shot arose from the suggestion that it was an act of preparation. The proof that it was fired by Patch consisted of independent facts showing that it was fired, and that he, and no one else, could have fired it. The firing of the second shot by which the murder was committed was a fact in issue. The proof of it by a strange [105] combination of circumstances was precisely similar in principle to the proof as to the first shot.

the way in which the chain of
 st dissimilar kind, and this
 relevant and irrelevant facts,
 otherwise than by enumerating as completely as possible the more common
 forms in which the relation of cause and effects displays itself. In Patch's case
 the firing of the first shot was an act of preparation by way of what is called
 'making evidence' but the fact that Patch fired it appeared from a combina-
 tion of circumstances which showed that he might, and that no one else could,
 have done so. It is easy to conceive that some one of the facts necessary to com-
 plete this proof might have had to be proved in the same way. For instance,
 part of the proof that Patch fired the shot consisted in the fact that no one left
 certain premises by a certain gate which was one of the suppositions necessary to

should have been spun after the shot was fired and [106] before the gate was
 examined. In that case the proof would have stood thus —

Patch's preparations for the murder were relevant to the question whether
 he committed it. Patch's firing the first shot was one of his preparations for
 the murder. The facts inconsistent with his not having fired the shot were
 relevant to the question whether he fired it. The fact that a certain door was
 not opened between certain hours was one of the facts which, taken together,
 were inconsistent with his not having fired the shot. The fact that a spider's
 web was whole overnight and also in the morning was inconsistent with the door
 having been opened.

Inversely the integrity of the spider's web was relevant to the opening of
 the door, the opening of the door was relevant to the firing of the first shot,
 the firing of the first shot was relevant to the firing of the second shot, and
 the firing of the second shot was a fact in issue, therefore the integrity of the
 spider's web was relevant to a fact in issue.

V

[107] CASE OF R v PALMER (1)

On the 14th of May, 1856, William Palmer was tried at the Old Bailey
 under powers conferred on the Court of Queen's Bench by 19 Vic, c 16, for
 the murder of John Parsons Cook at Rugeley, in Staffordshire. The trial

lasted twelve days, and ended on the 27th May, when the prisoner was convicted, and received sentence of death, on which he was afterwards executed at Stafford

Palmer was a general medical practitioner at Rugeley, much engaged in sporting transactions. Cook, his intimate friend, was also a sporting man, and died at the Talbot Arms Hotel, at that 21st November, 1855, under circumstances which raised a suspicion that he had been poisoned by Palmer. The case against Palmer was that he had a strong motive to murder his friend, and that his conduct before, at the time of, and after his death, coupled with the circumstances of the death itself, left no reasonable doubt [108] that he did murder him by poisoning him with antimony and strychnine administered on various occasions—the antimony probably being used as a preparation for the strychnine

The evidence stood as follows.—At the time of Cook's death, Palmer was involved in bill transactions which appeared to have begun in the year 1853. His wife died in September, 1851, and on her death he received £13,000 on policies on her life, nearly the whole of which was applied to the discharge of his liabilities (1). In the course of the year 1855 he raised other large sums, amounting in all to £13,500, on what purported to be acceptances of his mother's. The bills were renewed from time to time at enormous interest (usually sixty per cent per annum) by a money lender named Pratt, who, at the time of Cook's death, held eight bills—four on his own account and four on account of his client, two already overdue and six others falling due—some in November and others in January. About £1,000 had been paid off in the course of the year, so that the total amount then due or shortly to fall due to Pratt, was £12,500. The only means which Palmer had by which these bills could be provided for was a policy on the life of his brother, Walter Palmer, for £13,000. Walter Palmer died in August, 1855 (2) and William Palmer had instructed Pratt to recover the amount from the insurance office, but the office refused to pay. In consequence of this difficulty, Pratt earnestly [109] pressed Palmer to pay something in order to keep down the interest or diminish the principal

understood that more money was to be raised as early as possible

Besides the money £10,400 Part of these, Palmer, were collateral property. These bills Mr Padwick also held remained unpaid, and which was twelve months overdue on the 16th of October, 1855. Palmer, on the 12th November, had given Esplan a cheque ante-dated on the 28th November, for the other £1,000. Mrs Sarah Palmer's acceptance was on nearly all these bills, and in every instance was forged.

The result was, that about the time of the Shrewsbury races, Palmer was being pressed for payment on forged acceptances to the amount of nearly £20,000 and that his only resources were a certain amount of personal property, over which Wright held a bill of sale, and a policy for £13,000, the payment of

(1) A bill was found against him for her murder

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ed in obtaining payment there still remained the necessary to provide for ds of his own was proved by the fact that his balance at the bank on the 19th November was £9, 6s, and that he had to borrow £25 of a farmer named Walbank, to go to Shrewsbury races. It follows that he was under the most pressing necessity to obtain a considerable sum of money, as even a short delay in obtaining it might involve him not only in insolvency, but in a prosecution for uttering forged acceptances.

Besides the embarrassment arising from the bills in the hands of Pratt, Wright and Padwick, Palmer was involved in a transaction with Cook, which had a bearing on the rest of the case. Cook and he were parties to a bill for £500 which Pratt had discounted, giving £365 in cash, and a wine warrant for £65, and charging £60 for discount and expenses. He also required an assignment of two race horses of Cook's—Pole star and Sirius—as a collateral security. By Palmer's request the £365, in the shape of a cheque payable to Cook's order and the wine warrant, were sent by post to Palmer at Doncaster. Palmer wrote Cook's endorsement on the cheque and paid the amount to his own credit at the Bank at Rugeley. On the part of the prosecution it was said that this transaction afforded a reason why Palmer should desire to be rid of Cook, inasmuch as it amounted to a forgery by which [111] Cook was defrauded of £375. It appeared, however, on the other side, that there were £300 worth of notes relating to some other transaction in the letter which enclosed the cheque, and as it did not appear that Cook had complained of getting no consideration for his acceptance it was suggested that he had authorized Palmer to write his name on the back of the cheque, and had taken the notes himself. This arrangement seems not improbable, as it would otherwise be hard to explain why Cook acquiesced in receiving nothing for his acceptance, and there was evidence that he meant to provide for the bill when it became due. It also appeared later in the case that there was another bill for £500, in which Cook and Palmer were jointly interested (1).

Such was Palmer's position when he went to Shrewsbury races on Monday, the 12th November, 1855. Cook was there also, and on Tuesday, the 13th, his mare Pole-star won the Shrewsbury Handicap, by which he became entitled to the stakes, worth about £380, and bets to the amount of nearly £2,000. Of these bets he received £700 or £800 on the course at Shrewsbury. The rest was to be paid at Tattersall's on the following Monday, the 19th November (1). After the race Cook invited some of his friends to dinner at the Raven Hotel, and on that occasion and on the following day he was both sober and well (2). On the Wednesday night a man named Ishmael Fisher came into the sitting room, which Palmer shared with Cook, and [112] found them in company with some other men drinking brandy and water. Cook complained that the brandy "burned his throat dreadfully," and put down his glass with a small quantity. Read
What s
rwards
left the room called out FISHER and told him that he had been sick and
'He thought that damned Palmer had dosed him.' He also handed over to Fisher £700 or £800 in notes to keep for him (3). He then became sick again, and was ill all night, and had to be attended by a doctor. He told the doctor,

(1) All these facts go to show motive (section 8)

(2) State of things under which the following facts occurred (section 7)

(3) Conduct of person against whom offence was committed and statement explanatory of such conduct (section 2 exp 1)

lasted twelve days, and ended on the 27th May, when the prisoner was convicted, and received sentence of death, on which he was afterwards executed at Stafford

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(2) A bill was found against Palmer
for his murder

ed in obtaining payment there still remained the necessary to provide for at once by some means or other. That he had no funds of his own was proved by the fact that his balance at the bank on the 19th November was £9, 6s., and that he had to borrow £25 of a farmer named Walbank, to go to Shrewsbury races. It follows that he was under the most pressing necessity to obtain a considerable sum of money, as even a short delay in obtaining it might involve him not only in insolvency, but in a prosecution for uttering forged acceptances.

Besides the embarrassment arising from the bills in the hands of Pratt, Wright and Padwick, Palmer was involved in a transaction with Cook, which had a bearing on the rest of the case. Cook and he were parties to a bill for £500 which Pratt had discounted, giving £365 in cash, and a wine warrant for £65, and charging £60 for discount and expenses. He also required an assignment of two race horses of Cook's—Pole star and Sirius—as a collateral security. By Palmer's request the £365, in the shape of a cheque payable to Cook's order and the wine warrant, were sent by post to Palmer at Doncaster. Palmer wrote Cook's endorsement on the cheque and paid the amount to his own credit at the Bank at Rugeley. On the part of the prosecution it was said that this transaction afforded a reason why Palmer should desire to be rid of Cook inasmuch as it amounted to a forgery by which [111] Cook was defrauded of £375. It appeared however on the other side that there were £300 worth of notes relating to some other transaction in the letter which enclosed the cheque, and as it did not appear that Cook had complained of getting no consideration for his acceptance, it was suggested that he had authorized Palmer to write his name on the back of the cheque, and had taken the notes himself. This arrangement seems not improbable as it would otherwise be hard to explain why Cook acquiesced in receiving nothing for his acceptance and there was evidence that he meant to provide for the bill when it became due. It also appeared later in the case that there was another bill for £500, in which Cook and Palmer were jointly interested (1).

Such was Palmer's position when he went to Shrewsbury races on Monday the 12th November, 1855. Cook was there also and on Tuesday the 13th, his mare Pole-star won the Shrewsbury Handicap by which he became entitled to the stakes worth about £380 and bets to the amount of nearly £2,000. Of these bets he received £700 or £800 on the course at Shrewsbury. The rest was to be paid at Tattersalls on the following Monday the 19th November (1). After the race Cook invited some of his friends to dinner at the Raven Hotel, and on that occasion and on the following day he was both sober and well (2). On the Wednesday night a man named Ishmael Fisher came into the sitting room, which Palmer shared with Cook and [112] found them in company with some other men drinking brandy and water. Cook complained that the brandy "burned his throat dreadfully" and put down his glass with a small quantity

Read
What a
rewards
and,

* He thought that damned Palmer had dosed him. He also handed over to Fisher £700 or £800 in notes to keep for him (3). He then became sick again, and was ill all night, and had to be attended by a doctor. He told the doctor,

(1) All these facts go to show motive (section 8)

(2) State of things under which the following facts occurred (section 7)

(3) Conduct of person against whom offence was committed and statement explanatory of such conduct (section 8 exp 1)

Mr Gibson, that he thought he had been poisoned, and he was treated on that supposition (1) Next day Palmer told Fisher that Cook had said that he (Palmer) had been putting something into his brandy. He added that he did not play such tricks with people, and that Cook had been drunk the night before—which appeared not to be the case (2) Fisher did not expressly say that he returned the money [113] to Cook, but from the course of the evidence it seems that he did (3), for Cook asked him to pay Pratt £200 at once, and to repay himself on the following Monday out of the bets which he would receive on Cook's account at the settling at Tattersall's.

About half past ten on the Wednesday, and apparently shortly before Cook drank the brandy and water which he complained of, Palmer was seen by a Mrs Brooks in the passage looking at a glass lamp, through a tumbler which contained some clear fluid like water, and which he was shaking and turning in his hand. There appears, however, to have been no secrecy in this, as he spoke to Mrs Brooks, and continued to hold and shake the tumbler as he did so (4) George Myatt was called to contradict this for the prisoner. He said that he was in the room when Palmer and Cook came in, that Cook made a remark about the brandy, though he gave a different version of it from Fisher and Read, that he did not see anything put in it, and that if anything had been put in it he should have seen. He also swore that Palmer never left the room from the time he came in till Cook went to bed. He also put the time later than Fisher and Read (5) All this, however, came to very little. It was the sort of thing which a fri honest Myatt was enou as honestly

Brooks, and also from that of Cook were taken ill at Shrewsbury symptoms Mrs Brooks said, might have been poisoned in any back to Rugeley according

to Myatt (6)

The evidence as to what passed at Shrewsbury clearly proves that Palmer being then in great want of money, Cook was to his knowledge in possession of £700 or £800 in bank notes and was also entitled to receive on the following Monday about £1 400 more. It also shows that Palmer may have given him a dose of antimony, though the weight of the evidence to this effect is weakened by the proof that diarrhoea and vomiting were prevalent in Shrewsbury at the time. It is, however, important in connection with subsequent events.

On Thursday November 15th, Palmer and Cook returned together to Rugeley, which they reached about ten at night. Cook went to the Talbot Arms, and Palmer to his own house immediately opposite. Cook still came a company with about ten in the 1) Palmer came given to Cook

11.

(1) The administration of antimony by Palmer would be a fact in issue as being one of a set of acts of poisoning which finally caused Cook's death. Cook's feelings were relevant as the effect of his being poisoned (section 7), and his statement as to them was relevant under section 14 as a statement showing the existence of a relevant bodily feeling.

(2) Admission (sections 17-18)

(3) Motive (section 8)

(4) Preparation (section 8)

(5) Evidence against last fact (section 5)

(6) Facts rebutting inference suggested by preceding fact (section 9)

(7) Introductory to what follows (section 9) and shows state of things under which following facts occurred (section 7)

by Mills, the chambermaid, in Palmer's presence. When she next went to his room, an hour or two afterwards, it had been vomited (1). In the course of the day, and apparently about the middle of the day, Palmer sent a charwoman, named Rowley, to get some broth for Cook at an inn called the Albion. She put it by the fire to warm, and left the room. She poured it into a cup and sent it to the Talbot Arms from Mr Jeremiah Smith. The broth was given to Cook, who at first refused to take it. Palmer, however, came in, and said he must have it. The chambermaid brought back the broth which she had taken downstairs and left it in the room. It also was thrown up (1). In the course of the afternoon Palmer called in Mr Bamford, a surgeon, eighty years of age, to see Cook, and told him that when Cook dined at his (Palmer's) house he had taken too much champagne (2). Mr Bamford, however, found no bilious symptoms about him, and he said he had only drunk two glasses (3). On the Saturday night Mr Jeremiah Smith slept in Cook's room, as he was still ill. On the Sunday, between twelve and one, Palmer sent over his gardener, [116] Hawley, with some more broth for Cook (4). Elizabeth Mills, the servant at the Talbot Arms, tasted it, taking two or three spoonfuls. She became exceedingly sick about half an hour afterwards and vomited till 5 o'clock in the afternoon. She was so ill that she had to go to bed. This broth was also taken to Cook, and the cup afterwards returned to Palmer. It appears to have been taken and vomited, though the evidence is not quite explicit on that point (5). By the Sunday's post Palmer wrote to Mr Jones, an apothecary and Cook's most intimate friend, to come and see him. He said that Cook was "confined to his bed with a severe bilious attack, combined with diarrhoea." The servant Mills said there was no diarrhoea (6). It was observed on the part of the defence that this letter was strong proof of innocence. The prosecution suggested that it was "part of a deep design, and was meant to make evidence in the prisoner's favour." The fair conclusion seems to be that it was an ambiguous act which ought to weigh neither way, though the falsehood about Cook's symptoms is suspicious as far as it goes.

On the night between Sunday and Monday Cook had some sort of attack. When the servant Mills went into his room on the Monday he said, "I was just mad for two minutes." She said, "Why did you not ring the bell?" He said, "I thought that you would be all fast asleep, [117] and not hear it." He also said he was disturbed by a quarrel in the street. It might have waked and disturbed him, but he was not sure. This incident was not mentioned at first by Barnes and Mills, but was brought out on their being recalled at the request of the prisoner's counsel. It was considered important for the defence, as proving that Cook had had an attack of some kind before it was suggested that any strychnine was administered, and the principal medical witness for the defence, Mr Nunneley, referred to it, with this view (7).

On the Monday, about a quarter past or half past seven, Palmer again visited Cook, but as he was in London about half past two, he must have gone to town by an early train. During the whole of the Monday Cook was much

(1) Fact in issue and its effect as this was an act of poisoning (section 5)

(2) Conduct and statements explaining conduct (section 8)

(3) Rebutts inference in Palmer's favour suggested by preceding fact and explains the object of his conduct by showing that his statement was false (section 9). Cook's statement relates to his state of body

(section 14)

(4) Fact in issue—administration of poisons (section 5)

(5) Effect of facts in issue (section 7)

(6) Conduct (section 8) and explanation of it (section 9)

(7) Fact tending to rebut inference from previous fact (section 9)

better He dressed himself, saw a jockey and his trainer, and the sickness ceased (1)

In the meantime Palmer was in London He met by appointment a man named Herring, who was connected with the turf Palmer told him he wished to settle Cook's account and read to him from a list, which Herring copied as Palmer read it, the particulars of the bets which he was to receive They amounted to £984 clear Of this sum Palmer instructed Herring to pay £450 to Pratt and £350 to Padwick The nature of the debt to Padwick was not proved in evidence, as Padwick himself was not called Palmer told Herring [118] the £450 was to settle the bill for which Cook had assigned his horses He wrote Pratt on the same day a letter in these words,—“Dear Sir,—You will place the £50 I have just paid you, and the £450 you will receive from Mr Herring, together £500, and the £200 you received on Saturday” (from Fisher) “towards payment of my mother's acceptance for £2 000, due 25th October”(2)

Herring received upwards of £800, and paid part of it away according to Palmer's directions. Pratt gave Palmer credit for the £450, but the £350 was not paid to Padwick, according to Palmer's directions, as part was retained by Mr Herring for some debts due from Cook to him, and Herring received less than he expected In his reply the Attorney General said that the £350 intended to be paid to Padwick was on account of a bet, and suggested that the motive was to keep Padwick quiet as to the ante dated cheque for £1,000 given to Espin on Padwick's account There was no evidence of this, and it is not of much importance It was clearly intended to be paid to Padwick on account, not of Cook (except possibly as to a small part), but of Palmer Palmer thus disposed, or attempted to dispose, in the course of Monday, November 19th, of the whole of Cook's winnings for his own advantage (3)

This is a convenient place to mention the final result of the transaction relating to the bill for £500, in which Cook and Palmer were jointly interested On the Friday [119] when Cook and Palmer dined together (November 16th), Cook wrote to Fisher (his agent) in these words —“It is of very great importance to both Palmer and myself that a sum of £500 should be paid to a Mr Pratt of 5, Queen Street, Mayfair, 300*l* has been sent up to night, and if you would be kind enough to pay the other £200 to morrow, on the receipt of this, you will greatly oblige me I will settle it on Monday at Tattersall's” Fisher did pay the £200, expecting, as he said, to settle Cook's account on the Monday, and repay himself On the Saturday, November 17th (the day after the date of the letter), “a person,” said Pratt, “whose name I did not know, called on me with a cheque, and paid me 300*l* on account of the prisoner that” (apparently the cheque, not the 300*l*) “was a cheque of Mr Fisher's” When Pratt heard of Cook's death he wrote to Palmer, saying, “The death of Mr Cook will now compel you to look about as to the payment of the bill for £500 due the 2nd of December”(4)

Great use was made of these letters by the defence It was argued that they proved that Cook was helping Palmer, and was eager to relieve him from
 “consequence of this he not only took
 apply the £800 to similar purposes,
 instead of Fisher, so that Fisher
 he had advanced to Pratt, it was
 asked how it could be [120] Palmer's interest, on this supposition, that Cook

(1) Supports the inference suggested by the previous fact that Palmer's doses caused Cook's illness (section 9)

(2) Conduct and statement explanatory thereof (section 8 ex 2)

(3) All this is Palmer's conduct and is explanatory of it (sections 7, 9)

(4) Motive for not poisoning Cook (section 8)

should die, especially as the first consequence of his death was Pratt's application for the money due on the £500 bill.

These arguments were, no doubt, plausible; and the fact that Cook's death compelled Pratt to look to Palmer for the payment of the £500 lends them weight; but it may be asked, on the other hand, why should Cook give away the whole of his winnings to Palmer? Why should Cook allow Palmer to appropriate to the diminution of his own liabilities the £200 which Fisher had advanced to the credit of the bill on which both were liable? Why should he join with Palmer in a plan for defrauding Fisher of his security for this advance? No answer to any of these questions was suggested. As to the £300, Cook's letter to Fisher says, "*£300 has been sent up this evening*." There was evidence that Pratt never received it, for he applied to Palmer for the money on Cook's death. Moreover, Pratt said that on the Saturday he did receive £300 *on account of Palmer*, which he placed to the account of the forged acceptance for £2,000. Where did Palmer get the money? The suggestion of the prosecution was that Cook gave it him to pay to Pratt on account of their joint bill, and that he paid it on his own account. This was probably the true view of the case. The observation that Pratt, on hearing of Cook's death, applied to Palmer to pay the £500 bill, is met by the reflection that that bill was genuine, and collaterally secured by the assignment of the race-horses, and that the other bill bore a forged acceptance, and must be satisfied at all hazards. [121] The result is that on the Monday evening Palmer had the most imperious interest in Cook's death, for he had robbed him of all he had in the world, except the equity of redemption in his two horses.

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... was
improper, but nothing appeared on cross examination to suggest that the witness was wilfully perjured

Cook had ... y, and on Monday evening Mr Bamford, ... pills for him, which he left at the hotel ... or strychnine. They were taken up in the box in which they came to Cook's room by the chambermaid, and were left there on the dressing table about eight o'clock. Palmer came (according to Barnes the waitress) between eight and nine, and Mills said she saw him sitting by the fire between nine and ten (2)

[122] If this evidence were believed, he would have had an opportunity of substituting poisoned pills for those sent by Mr Bamford just after he had, according to Newton, procured strychnine. The evidence, however, was contradicted by a witness called for the prisoner, Jeremiah Smith the attorney. He said that on the Monday evening, about ten minutes past ten, he saw Palmer coming in a car from the direction of Stafford, that they went up to Cook's room together, stayed two or three minutes, and went with Smith to the house of old Mrs Palmer, his mother. Cook said Bamford sent him some pills, and he had taken them, and Palmer was late, intimating that he should not have taken them if he had thought Palmer would have called in before. If this

evidence were believed it would of course have proved that Cook took the pills which Bamford sent as he sent them (1) Smith, however, was cross examined by the Attorney General at great length. He admitted with the greatest reluctance that he had witnessed the assignment of a policy for £13,000 by Walter to William Palmer, that he wrote to an office to effect an insurance for £10,000 on the life of Bates, who was Palmer's groom, at £1 a week, that he tried, after Walter Palmer's death to get his widow to give up her claim on the policy, that he was applied to to attest other proposals for insurances on Walter Palmer's life for similar amounts, and that he had got a cheque for £5 for attesting the assignment (2)

[123] Lord Campbell said of this witness in summing up, "Can you believe a man who so disgraces himself in the witness box? It is for you to say what faith you can place in a witness, who, by his own admission, engaged in such fraudulent proceedings."

It is curious that though the credit of this witness was so much shaken in cross examination, and though he was contradicted both by Mills and Newton, ~~he was not~~ wrong as to the time when Palmer came down at the Euston at the time when Palmer came down at the Euston in by which Palmer could have left London

"between nine and ten" Nothing, however, is more difficult than to speak accurately to time, on the other hand, if Smith spoke the truth, Newton could not have seen him at all that night and Mills, if at all, must have seen him for a moment only in Smith's company. Mills never mentioned Smith, and Smith would not venture to swear that she or any one else saw him at the Talbot Arms. It was a suspicious circumstance that Serjeant Shee did not open Smith's evidence to the jury. An opportunity for perjury was afforded by [124] the mistake made by the witnesses as to the time which the defence were able to prove by the evidence of the police inspector. If Smith were disposed to tell an untruth, the knowledge of this fact would enable him to do so with an appearance of plausibility.

Whatever view is taken as to the effect of this evidence it was clearly proved that about the middle of the night between Monday and Tuesday Cook had a violent attack of some sort. About twelve or a little before, his bell rang, he screamed violently. When Mills, the servant, came in he was sitting up in bed, and asked that Palmer might be fetched at once. He was beating the bed clothes, he said he should suffocate if he lay down. His head and neck and his whole body jumped and jerked. He had great difficulty in breathing, and his eyes protruded. His hand was stiff, and he asked to have it rubbed. Palmer came in, and gave him a draught and some pills. He snapped at the glass, and got both it and the spoon between his teeth. He had also great difficulty in swallowing the pills. After this he got more easy, and Palmer stayed by him some time, sleeping in an easy chair (4).

Great efforts were made in cross examination to shake the evidence of Mills by showing that she had altered the evidence which she gave before the coroner, so as to make her description of the symptoms tally with those of poisoning by

(1) Evidence against the existence of the fact last mentioned (section 5)

(2) This cross examination tended to test the veracity of the witness and to test his credit (section 146)

(3) Facts inconsistent with a relevant fact (section 11) and fixing the time of the occurrence of a relevant fact (section 9)

(4) Effect of fact in issue viz., the administration of poison (section 7)

strychnine, and also by showing that she had been drilled as to the evidence which she was to give by [125] persons connected with the prosecution. She denied most of the suggestions conveyed by the questions asked her, and explained others (1). As to the differences between her evidence before the coroner and at the trial, a witness (Mr Gardner an attorney) was called to show that the depositions were not properly taken at the inquest (2).

On the following day, Tuesday, the 20th, Cook was a good deal better. In the middle of the day he sent the boots to ask Palmer if he might have a cup of coffee. Palmer said he might, and came over, tasted a cup made by the servant, and took it from her hands to give it to Cook. This coffee was afterwards thrown up (3).

A little before or after this, the exact hour is not important, Palmer went to the shop of Hawkins, a druggist at Rugeley, and was there served by his apprentice Roberts with two drachms of prussic acid, six grains of strychnine and two drachms of Batley's Sedative (4). Whilst he was making the purchase, Newton from whom he had obtained the other strychnine the night before came in, Palmer took him to the door saying he wished to speak to him, [126] and when he was there asked him a question about the firm of a Mr Edwin Salt—a matter with which he had nothing at all to do. Whilst they were there a third person came up and spoke to Newton, on which Palmer went back into Hawkins shop and took away the things, Newton not seeing what he took. The obvious suggestion upon this is that Palmer wanted to prevent Newton from seeing what he was about. No attempt even was made to shake, or in any way discredit, Roberts, the apprentice (5).

At about four P.M. Mr Jones, the friend to whom Palmer had written, arrived from Lutterworth (6). He examined Cook in Palmer's presence, and remarked that he had not the tongue of a bilious patient, to which Palmer replied, 'You should have seen it before.' Cook appeared to be better during the Tuesday, and was in good spirits (7). At about seven P.M. Mr Bamford came in and Cook told him in Palmer's presence that he objected to the pills, as they had made him ill the night before. The three medical men then had a private consultation. Palmer proposed that Bamford should make up the pills as on the night before, and that Jones should not tell Cook what they were made of, as he objected to the morphine which they contained. Bamford agreed, and Palmer went up to his house with him and got the pills and was present whilst they were made up, put into a pill box [127] and directed. He took them away with him between seven and eight (8). Cook was well and comfortable all the evening, he had no bilious symptoms, no vomiting, and no diarrhoea (7).

Towards eleven Palmer came with a box of pills directed in Bamford's hand. He called Jones, 'a man of eighty' (9). It was to impress Jones with Bamford. With reference to Smith's evidence it is remarkable that Bamford on the second

(1) Former statements inconsistent with evidence (section 155)

(2) The depositions before the coroner would be a proper mode of proof as being a record of a relevant fact made by a public servant in the discharge of his official duty (section 35) and any document purporting to be such a deposition would on production be presumed to be genuine and the evidence would be presumed to be duly taken (sections 79 and 80) but this might be rebutted (section 4) definition of shall

presume)

(3) Part of the transaction of poisoning (section 8)

(4) Preparation (section 8)

(5) Conduct (section 8)

(6) Introductory (section 9)

(7) State of things under which Cook was poisoned (section 7)

(8) Preparation (section 8)

(9) Conduct and statement (section 8, ex 2)

night sent the pills, not "between nine and ten," but at eleven Palmer pressed Cook to take the pills, which at first he refused to do, as they had made him so ill the night before. At last he did so, and immediately afterwards vomited. Jones and Palmer both examined to see whether the pills had been thrown up, and they found that they had not. This was about eleven. Jones then had his supper, and went to bed in Cook's room about twelve. When he had been in bed a short time, perhaps ten minutes, Cook started up and called out, "Doctor, get up, I am going to be ill; ring the bell for Mr. Palmer." He also said, "Rub my neck." The back of his neck was stiff and hard. Mills ran across the road to Palmer's and rang the bell. Palmer immediately came to the bed room window and said he would come at once. Two minutes afterwards he was in Cook's room, and [128] said he had never dressed so quick in his life. He was dressed as usual. The suggestion upon this was that he had been sitting up expecting to be called (1).

By the time of Palmer's arrival Cook was very ill. Jones, Elizabeth Mills, and Palmer were in the room, and Barnes stood at the door. The muscles of his neck were stiff, he screamed loudly. Palmer gave him what he said were two ammonia pills. Immediately afterwards—too soon for the pills to have any effect—he was dreadfully convulsed. He said, when he began to be convulsed, "Raise me up, or I shall be suffocated." Palmer and Jones tried to do so, but could not, as the limbs were rigid. He then asked to be turned over, which was done. His heart began to beat weakly. Jones asked Palmer to get some ammonia to try to stimulate it. He fetched a bottle, and was absent about a minute for that purpose. When he came back, Cook was almost dead, and he died in a few minutes, quite quietly. The whole attack lasted about ten minutes. The body was twisted back into the shape of a bow, and would have rested on the head and heels had it been laid on its back. When the body was laid out it was very stiff. The arms could not be kept down by the sides till they were tied behind the back with tape. The feet also had to be tied, and the fingers of one hand were very stiff, the hand being clenched. This was about one A.M., half or three quarters of an hour after the death (2).

[129] As soon as Cook was dead, Jones went out to speak to the house-keeper, leaving Palmer alone with the body. When Jones left the room he sent the servant Mills in, and she saw Palmer searching the pockets of Cook's coat and searching also under the pillow and bolster. Jones shortly afterwards returned, and Palmer told him that as Cook's nearest friend, he (Jones) ought to take possession of his property, containing five pounds and no other money. Palmer said, Mr. Cook was responsible for £3,000 or £4,000, and I hope Mr. Cook's friends will not let me lose it. If they do not assist me all my horses will be seized. The betting book was mentioned. Palmer said "It will be no use to any one," and added that it would probably be found (3).

Wetherby was to receive for him. This cheque had been drawn on the Tuesday, about seven o'clock in the evening under peculiar circumstances. Palmer wrote out, from a copy which he produced, telling him to bring a receipt. He said it was for money which

(1) Fact in issue (section 15) Conduct (section 8)

(2) Cook's death, in all its detail, was

a fact in issue (section 5)

(3) Conduct (section 8)

Cook owed him, and that he was going to take it [130] over for Cook to sign Cheshire wrote out the body of the cheque, and Palmer took it away. When Mr Wetherby received the cheque, the stakes had not been paid to Cook's credit. He accordingly returned the cheque to Palmer, to whom the prosecution gave notice to produce it at the trial (1). It was called for, but not produced (2). This was one of the strongest facts against Palmer in the whole of the case. If he had produced the cheque, and if it had appeared to have been really signed by Cook, it would have shown that Cook, for some reason or other, had made over his stakes to Palmer, and this would have destroyed the strong purpose of the bets to his own almost upset the case as to the production of the cheque. It amounted to an admission that it was a forgery, and if that were so, Palmer was forging his friend's name for the purpose of stealing his stakes at the time when to all outward appearance there was every prospect of his speedy recovery, which must result in the detection of the fraud. If he knew that Cook would die that night this was natural. On any other supposition it was inconceivable rashness (3).

Either on Thursday, 22nd or Friday, 23rd, Palmer sent for Cheshire again, and produced a paper which he [131] said Cook had given to him some days before. The paper purported to be an acknowledgment that certain bills—the particulars of which were stated—were all for Cook's benefit and not for Palmer's. The amount was considerable as at least one item was for £1,000, and another for £500. This document purported to be signed by Cook, and Palmer wished Cheshire to attest Cook's execution of it, which he refused to do. This document was called for at the trial, and not produced. The same observations apply to it as to the cheque (4).

Evidence was further given to show that Palmer, who, shortly before, had but £9, 6s at the bank, and had borrowed £25 to go to Shrewsbury, paid away large sums of money soon after Cook's death. He paid Pratt £100 on the 21st, he paid a farmer named Spilsbury £46, 2s with a bank of England note for £50 on the 22nd, and Bown, a draper, a sum of £60 or thereabouts in two £50 notes, on the 20th (5). The general result of these money transactions is, that Palmer appropriated to his own use all Cook's bets, that he tried to appropriate his stakes, and that shortly before, or just after his death, he was in possession of between £400 and £600, of which he paid Pratt £100, though very shortly before he was being pressed for money.

On Wednesday, November 21st, Mr Jones went up to London, and informed Mr Stephens, Cook's step-father, of his step-son's death. Mr Stephens went to Lutterworth, found a will by which Cook appointed him his executor, [132] and then went on to Rugeley, where he arrived about the middle of the day on Thursday (6). He asked Palmer for information about Cook's affairs and he replied, "There are £4,000 worth of bills out of us, and I am sorry to say my name is to them, but I have got a paper drawn up by a lawyer and signed by Mr Cook to show that I never had any benefit from them." Mr Stephens said that at all events he must be buried. Palmer offered to do so himself and said that the body ought to be fastened up as soon as possible. The conversation then ended for the time. Palmer went

(1) Conduct (section 8)

(2) See section 66 as to notice to produce

(3) As to these inferences see section 114 illust. (g)

(4) Conduct (section 8) See section 66

as to notice to produce. As to these inferences see section 114 illust. (g)

(5) Conduct (section 8)

(6) Introductory and explanatory (section 9)

out and without authority from Mr Stephens ordered a shell and a strong oak coffin (1)

In the afternoon Mr Stephens, Palmer, Jones, and a Mr Gradford, Cook's brother in law, dined together, and after dinner Mr. Stephens desired Mr Jones to fetch Cook's betting book. Jones went to look for it, but was unable to find it. When he took a stamp from a pocket book, a stamp which could not be found, Palmer said it was of no manner of use. Mr Stephens said he understood Cook had won a great deal of money at Shrewsbury, to which Palmer replied: "It's no use, I assure you, when a man dies his bets are done with." He did not mention the fact that Cook's bets had been paid to Herring on the Monday. Mr Stephens then said that the book must be found, and [133] Palmer answered that no doubt it would be (2). Before leaving the inn Mr Stephens went to look at the body, before the coffin was fastened, and observed that both hands were clenched. He returned at once to town and went to his attorney. He returned to Rugeley on Saturday, the 24th, and informed Palmer of his intention to have a *post mortem* examination, which took place on Monday, 26th (3).

The *post mortem* examination was conducted in the presence of Palmer by Dr Harland, Mr Devonshire, a medical student, assisting Mr Monkton and Mr Newton. The heart was contracted and empty. There were numerous small yellowish white spots, about the size of mustard seed, at the larger end of the stomach. The upper part of the spinal cord was in its natural state, the lower part was not examined till the 25th January, when certain granules were found. There were many follicles on the tongue, apparently of long standing. The lungs appeared healthy to Dr Harland, but Mr Devonshire thought that there was some congestion (4). Some points in Palmer's behaviour, both before and after the *post mortem* examination attracted notice. Newton said that on the Sunday night he sent for him and asked what dose of strychnine would kill a dog. Newton said a grain. He asked whether it would be found in the [134] stomach and what would be the appearance of the stomach after death. Newton said there would be no inflammation, and he did not think it would be found. Newton thought he replied "It's all right," as if speaking to himself and added that he snapped his fingers. Whilst Devonshire was opening the stomach Palmer pushed against him, and part of the contents of the stomach was spilt. Nothing particular being found in the stomach, Palmer observed to Bamford, "They will not hang us yet." As they were all crowding together to see what passed the push might have been an accident, and as Mr Stephens' suspicions were well known the remark was natural, though coarse. After the examination was completed the intestines, etc., were put into a jar over the top of which were tied two bladders. Palmer removed the jar from the table to a place near the door, and when it was missed said he thought it would be more convenient. When replaced it was found that a slit had been cut through both the bladders (5).

After the examination Mr Stephens and an attorney's clerk took the jars containing the viscera, etc., in a fly to Stafford (6). Palmer asked the postboy if he was going to drive them to Stafford? The postboy said, "I believe I am," Palmer said, "Is it Mr Stephens you are going to take?" He said, "I

(1) Admission and conduct (sections 17 18 section 8)

(2) These facts and statements together make it highly probable that Palmer stole the betting book which would be relevant as conduct (sections 8 11)

(3) Introductory to what follows (section 9)

(4) Facts supporting opinions of experts (section 46)

(5) Conduct (section 8)

(6) Introductory (section 9)

believe it is" Palmer said, "I suppose you are going to take the jars?" He said, "I am" Palmer asked if he would upset them? He said, "I shall [135] not" Palmer said if he would, there was a £10 note for him. He also said something about its being "a humbugging concern" (1). Some confusion was introduced into this evidence by the cross-examination, which tended to show that Palmer's object was to upset Mr Stephens and not the jars, but at last the postboy (J Myatt) repeated it as given above. Indeed, it makes little difference whether Palmer wished to upset Stephens or the jars, as they were all in one fly, and must be upset together if at all.

Shortly after the *post mortem* examination an inquest was held before Mr Ward, the coroner. It began on the 29th November and ended on the 5th December. Cheshire, the postmaster, "if he could not open a letter" Afterw. Alfred Taylor, who had analyzed the contents of the stomach, etc., to Mr Gardiner, the attorney for the prosecution, and informed Palmer that Dr Taylor said in that letter that no traces of strychnine were found. Palmer said he knew they would not and he was quite innocent. Soon afterwards Palmer wrote to Mr Ward, suggesting various questions to be put to witnesses at the inquest and saying that he knew Dr Taylor had told Mr Gardiner there were no traces of strychnia, prussic acid, or opium. A few days before this, on the 1st December, Palmer had sent Mr Ward, as a present, a codfish, a barrel of oysters, a brace of [136] pheasants, and a turkey (2). These circumstances certainly prove improper and even criminal conduct. Cheshire was imprisoned for his offence, and Lord Campbell spoke in severe terms of the conduct of the coroner, but a bad and unscrupulous man, as Palmer evidently was, might act in the manner described, even though he was innocent of the particular offence charged.

A medical book found in Palmer's possession had in it some MS notes on the subject of strychnine, one of which was, "It kills by causing tetanic contraction of the respiratory muscles." It was not suggested that this memorandum was made for any particular purpose. It was used merely to show that Palmer was acquainted with the properties and effects of strychnine (3).

This completes the evidence as to Palmer's behaviour before, at and after the death of Cook. It proves beyond all question that, having the strongest possible motive to obtain at once a considerable sum of money, he robbed his friend of the whole of the bets paid to Herring on the Monday by a series of ingenious devices, and that he tried to rob him of the stakes, it raises the strongest presumption that he robbed Cook of the £300 which, as Cook supposed, was sent up to Pratt on the 16th, and that he stole the money which he had on his person, and had received at Shrewsbury, it proves that he forged his name the night before he died, and that he tried to procure a fraudulent attestation to [137] another forged document relating to his affairs the day after he died. It also proves that he had every opportunity of administering poison to Cook, that he told repeated lies about his state of health, and that he purchased deadly poison, for which he had no lawful use, on two separate occasions shortly before two paroxysms of a similar character to each other, the second of which deprived him of life.

The rest of the evidence was directed to prove that the symptoms of which Cook died were those of poisoning by strychnine, and that antimony, which was never prescribed for him, was found in his body. Evidence was also given in the course of the trial as to the stage of Cook's health.

(1) Conduct (section 8)

(3) Fact showing knowledge (section

(2) Conduct and facts introductory 14)

thereto (sections 8, 9)

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Shortly after the *post mortem* examination an inquest was held before Mr Ward, the coroner. It began on the 29th November and ended on the 5th December. On Sunday, 3rd December, Palmer asked Cheshire, the postmaster, "if he had anything fresh" Cheshire replied that he could not open a letter. Afterwards, however, he did open a letter from Dr Alfred Taylor, who had analyzed the contents of the stomach, etc., to Mr Gardiner the attorney for the prosecution, and informed Palmer that Dr Taylor said in that letter that no traces of strychnine were found. Palmer said he knew they would not, and he was quite innocent. Soon afterwards Palmer wrote to Mr Ward suggesting various questions to be put to witnesses at the inquest and saying that he knew Dr Taylor had told Mr Gardiner there were no traces of strychnia, prussic acid, or opium. A few days before this, on the 1st December, Palmer had sent Mr Ward, as a present, a codfish, a barrel of oysters, a brace of [136] pheasants, and a turkey (2). These circumstances certainly prove improper and even criminal conduct. Cheshire was imprisoned for his offence, and Lord Campbell spoke in severe terms of the conduct of the coroner, but a bad and unscrupulous man, as Palmer evidently was, might act in the manner described, even though he was innocent of the particular offence charged.

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(1) Conduct (section 8)

(3) Fact showing knowledge (section

(2) Conduct and facts introductory 14)
thereto (sections 8, 9)

At the time of his death Cook was about twenty eight years of age Both his father and mother died young and his sister and half brother were not robust He inherited from his father about £12,000 and was articled to a solicitor Instead of following up that profession he betook himself to sporting pursuits, and appears to have led a rather dissipated life He suffered from syphilis, and was in the habit of occasionally consulting Dr Savage on the state of his health Dr Savage saw him in November 1854, in May, in June, towards the end of before his death, &c the subject especially Savage said that he had large teeth, that he had a red and tender, and it these symptoms were syphilitic, but Dr Savage thought decidedly that they were not He also noticed an indication of pulmonary affection under the left lung Wishing to get him away from his turf associates, Dr Savage recommended him to go abroad for the winter His general health Dr Savage considered good for a man who was not robust Mr Stephens said that when he last saw him alive he was looking better than he had looked for some time, and on his remarking "You do not look anything of an invalid now," Cook struck himself on the breast and said he was quite well His friend, Mr Jones, also said that his health was generally good, though he was not very robust, and that he both hunted and played at cricket (1)

On the other hand witnesses were called for the prisoner who gave a different account of his health A Mr Sargent said he was with him at Liverpool a week before the Shrewsbury races, that he called his attention to the state of his mouth and throat and the back part of his tongue was in a complete state of ulcer I said," added the witness "I was surprised he could eat and drink in the state his mouth was in He said he had been in that state for weeks and months and now he did not take notice of it" This was certainly not consistent with Dr Savage's evidence (2)

Such being the state of health of Cook at the time of his [139] death, the next question was as to its cause The prosecution contended that the symptoms which attended it proved that he was poisoned by strychnia Several eminent physicians and surgeons—Mr Curling, Dr Todd, Sir Benjamin Brodie, Mr Daniel and Mr Solly—gave an account of the general character and causes of the disease of tetanus Mr Curling said that tetanus consists of spasmodic affection of the voluntary muscles of the body which at last ends in death, produced either by suffocation caused by the closing of the windpipe or by the wearing effect of the severe and painful struggles which the muscular spasm produce Of this disease there are three forms,—idiopathic tetanus, which is produced without any assignable external cause, traumatic tetanus, which results from wounds, and the tetanus which is produced by the administration of strychnia, bruchia, and nux vomica, all of which are different forms of the same poison Idiopathic tetanus is a very rare disease in England Sir Benjamin Brodie had seen only one doubtful case of it Mr Daniel, who for twenty eight years was surgeon to the Bristol Hospital, saw only two, Mr. Lunneley, professor of surgery at Leeds, had seen four In India, however, it is comparatively common Mr Jackson, in twenty five years' practice there saw about forty cases It was agreed on all hands, that though the exciting cause of the two diseases is different, their symptoms are the same They were described in similar terms by several of the witnesses Dr Todd said the disease begins with stiffness about the jaw, the symptoms [140] then extend

(1) Conduct and facts introductory thereto (sections 8 9)

(2) State of things under which crime was committed (section 7)

themselves to the other muscles of the trunk and body. They gradually develop themselves. When once the disease has begun there are remissions of severity, but not complete intermission of the symptoms. In acute cases the disease terminates in three or four days. In chronic cases it will go on for as much as three weeks. There was some question as to what was the shortest case upon record. In a case mentioned by one of the prisoner's witnesses Mr. Ross the patient was said to have been attacked in the morning either at eleven or some hours earlier, it did not clearly appear which, and to have died at half past seven in the evening. This was the shortest case specified on either side, though its duration was not accurately determined. As a rule, however, tetanus, whether traumatic or idiopathic, was said to be a matter not of minutes or even of hours, but of days (1).

Such being the nature of tetanus, traumatic and idiopathic, four questions arose. Did Cook die of tetanus? Did he die of traumatic tetanus? Did he die of idiopathic tetanus? Did he die of the tetanus produced by strychnia? The case for prosecution upon these questions was, first, that he did die of tetanus. Mr. Curling said no doubt there was spasmodic action of the muscles (which was his definition of tetanus) in Cook's case, and even Mr. Nunneley, the principal witness for the prisoner, who contended that the death of Cook was [141] caused neither by tetanus in its ordinary forms nor by the tetanus of strychnia, admitted that the paroxysm described by Mr. Jones was "very like" the paroxysm of tetanus. The close general resemblance of the symptoms to those of tetanus was indeed assumed by all the witnesses on both sides, as was proved by the various distinctions which were stated on the side of the Crown between Cook's symptoms and those of traumatic and idiopathic tetanus, and on the side of the prisoner between Cook's symptoms and the symptoms of the tetanus of strychnia. It might, therefore, be considered to be established that he died of tetanus in some form or other.

The next point asserted by the prosecution was, that he did not die of traumatic or idiopathic tetanus, because there was no wound on his body, and also because the course of the symptoms was different. They further asserted that the symptoms were those of poison by strychnia.

Upon these points the evidence was as follows.—Mr. Curling was asked, Q "Were the symptoms consistent with any form of traumatic tetanus which has evi-

Q "He answered, "No" imatic tetanus which you have d t of the fatal symptoms

In all cases that have fallen under my notice the disease has been preceded by the milder symptoms of tetanus." Q "Gradually progressing to their complete development, and completion and death?" A "Yes." He also [142] mentioned "the sudden onset and rapid subsidence of the spasms" as inconsistent with the theory of either traumatic or idiopathic tetanus, and he said he had never known a case of tetanus which ran its course in less than eight or ten hours. In the one case which occupied so short a time the true period could not be ascertained. In general, the time required was from one to several days. Sir Benjamin Brodie was asked, "In your opinion, are the symptoms those of traumatic tetanus or not?" He replied, "As far as the spasmodic contraction of the muscles goes, the symptoms resemble those of traumatic tetanus, as to the course which the symptoms took, that was entirely different." He added, "The symptoms of traumatic tetanus always begin as far as I have seen, very gradually, the stiffness of the lower jaw being I believe, the symptom first complained of—at least, so it has been in my experience, then the contraction of the muscles of the back is always a later symptom, generally much

(1) Opinions of experts and facts on which they were founded (sections 45, 46). The rest of the evidence falls under this head.

later ; the muscles of the extremities are affected in a much less degree than those of the neck and trunk, except in some cases, where the injury has been in a limb, and an early symptom has been a contraction of the muscles of that limb I do not myself recollect a case in which in ordinary tetanus there was that contraction of the muscles of the hand which I understand was stated to have existed in this instance The ordinary tetanus rarely runs its course in less than two or three days, and often is protracted to a much longer period, I know one case only in which the disease was [143] said to have terminated in twelve hours " He said, in conclusion, " I never saw a case in which the symptoms described arose from any disease, when I say that, of course, I refer not to the particular symptoms, but to the general course which the symptoms took " Mr Daniel being asked whether the symptoms of Cook could be referred to idiopathic or traumatic tetanus, said, " In my judgment they could not " He also said that he should repeat Sir Benjamin Brodie's words if he were to enumerate the distinctions Mr Solly said that the symptoms were not referable to any disease he ever witnessed, and Dr Todd said, " I think the symptoms were those of strychnia " The same opinion was expressed with equal confidence by Dr Alfred Taylor, Dr Rees, and Mr Christison

In order to support this general evidence witnesses were called who gave account of three fatal cases of poisoning by strychnia, and of one case in which the patient recovered The first of the fatal cases was that of Agnes French, or Senet, who was accidentally poisoned at Glasgow Infirmary, in 1845, by some pills which she took, and which were intended for a paralytic patient According to the nurse, the girl was taken ill three quarters of an hour, according to one of the physicians (who, however was not present) twenty minutes, after she swallowed the pills She fell suddenly back on the floor, when her clothes were cut off she was stiff, " just like a poker," her arms were stretched out, her hands clenched, she vomited slightly, she had no lockjaw, [144] there was a retraction of the mouth and face, the head was bent back, the spine curved She went into severe paroxysms every few seconds, and died about an hour after the symptoms began She was perfectly conscious The heart was found empty on examination

The second case described was that of Mrs Serjeantson Smyth who was accidentally poisoned at Romsey in 1848, by strychnine put into a dose of ordinary medicine instead of salicine She took the dose about five or ten minutes after seven, in five or ten minutes more the servant was alarmed by a violent ringing of the bell She found her mistress leaning on a chair, went out to send for a doctor, and on her return found her on the floor She screamed loudly, or her hands were clenched, the feet contracted and on a *post mortem* examination the heart was found empty

The third case was that of Mrs Dove, who was poisoned at Leeds by her husband She had five children, and was on Saturday of the week, and twittings

semi bent, feet strongly arched The lungs were congested, the spinal cord was also much congested The head being opened first, a good deal of blood flowed out, part of which might flow from the heart

The case in which the patient recovered was that of a paralytic patient of Mr Moore's He took an overdose of strychnia, and in about three quarters

of an hour Mr Moore found him stiffened in every limb His head was drawn back ; he was screaming and " frequently requesting that we should turn him, move him, rub him " His spine was drawn back He snapped at a spoon with which an attempt was made to administer medicine, and was perfectly conscious during the whole time

Dr Taylor and Dr Owen Rees examined Cook's body They found no strychnia but they found antimony in the liver, the left kidney, the spleen and also in the blood.

The case for the prosecution upon this evidence was, that the symptoms were those of tetanus, and of tetanus produced by strychnia The case for the prisoner was, first, that several of the symptoms observed were inconsistent with strychnia, and secondly, that all of them might be explained on other hypotheses Their evidence was given in part by their own witnesses, and in part by the witnesses for the Crown in cross examination The replies suggested by the Crown were founded partly on the evidence of their own witnesses given by way of anticipation and partly by the evidence obtained from the witnesses for the prisoner on cross examination

[146] The first and most conspicuous argument on behalf of the prisoner was, that the fact that no strychnia was discovered by Dr Taylor and Dr Rees was inconsistent with the theory that any had been administered The material part of Dr Taylor's evidence upon this point was, that he had examined the stomach and intestines of Cook for a variety of poisons, strychnia among others, without success The contents of the stomach were gone, though the contents of the intestines remained, and the stomach itself had been cut open from end to end, and turned inside out, and the mucous surface on which poison, if present, would have been found was rubbing against the surface of the intestines This Dr Taylor considered a most unfavourable condition for the discovery of poison and Mr Christison agreed with him Several of the prisoner's witnesses on the contrary—Mr Nunneley, Dr Letheby, and Mr Rogers—thought that it would only increase the difficulty of the operation and not destroy its chance of success

Apart from this, Dr Taylor expressed his opinion that from the way in which strychnia acts, it might be impossible to discover it even if the circumstances were favourable The mode of testing its presence in the stomach is to treat the stomach in various ways, until at last a residue is obtained which, upon the application of certain chemical ingredients, changes its colour if strychnia is present All the witnesses agreed that strychnia acts by absorption—that is, it is taken up from the stomach by the absorbents thence it passes into the blood thence into the solid [147] part of the body, and at some stage of its progress causes death by its action on the nerves and muscles Its noxious effects do not begin till it has left the stomach From this Dr Taylor argued that if a minimum dose were administered, none would be left in the stomach at the time of death, and therefore none could be discovered there He also said that if the strychnia got into the blood before examination, it would be diffused over the whole mass, and so no more than an extremely minute portion would be present in any given quantity If the dose were half a grain, and there were twenty five pounds of blood in the body, each pound of blood would contain only one fiftieth of a grain He was also of opinion that the strychnia undergoes some chemical change by reason of which its presence in small quantities in the tissues cannot be detected In short, the result of his evidence was that if a minimum dose were administered, it was uncertain whether strychnia would be present in the stomach after death, and that if it was not in the stomach, there was no certainty that it could be found at all He added that he considered the colour tests fallacious, because the colours might be produced by other substances

Dr. Taylor further detailed some experiments which he had tried upon

administered at intervals, he obtained proof of the presence of strychnia both by a bitter [148] taste and by the colour. In a case where one grain was administered he obtained the taste but not the colour. In the other two cases, where he administered one grain and half a grain respectively, he obtained no indication at all of the presence of strychnia. These experiments proved to demonstration that the fact that he did not discover strychnia did not prove that no strychnia was present in Cook's body.

Mr Nunneley, Mr Herapath, Mr Rogers, Dr Letheby and Mr Wrightson contradicted Dr Taylor and Dr Rees upon this part of their evidence. They denied the theory that strychnine undergoes any change in the blood and they professed their own ability to discover its presence even in most minute quantities in any body into which it had been introduced, and their belief that the colour tests were satisfactory. Mr Herapath said that he had found strychnine in the blood and in a small part of the liver of a dog poisoned by it, and he also said that he could detect with organic matter. Mr Campbell for the way in expect to find strychnia if it were present, and that he had found it in the tissues of an animal poisoned by it.

Here, no doubt, there was a considerable conflict of evidence upon a point on which it was difficult for unscientific persons to pretend to have any opinion. The evidence given for the prisoner, however, tended to prove not so much that there was no strychnia in Cook's body, [149] as that Dr Taylor ought to have found it if there was. In other words, it has less to do with the guilt or innocence of the prisoner, than with the question whether Mr Nunneley and Mr Herapath were or were not better analytical chemists than Dr Taylor. The evidence could not even be considered to shake Dr Taylor's credit, for no part of the case rested on his evidence except the discovery of the antimony, as to which he was corroborated by Mr Brande, and was not contradicted by the prisoner's witnesses. His opinion as to the nature of Cook's symptoms was shared by many other medical witnesses of the highest eminence, whose credit was altogether unimpeached. The prisoner's counsel were placed in a curious difficulty by this state of the question. They had to attack, and did attack, Dr Taylor's credit vigorously for the purpose of rebutting his conclusion that Cook might have been poisoned by strychnine, yet they had also to maintain his credit as a skilful analytical chemist, for if they destroyed it, the fact that he did not find strychnine went for nothing. This dilemma was fatal. To admit his skill was to admit their client's guilt. To deny it was to destroy the value of nearly all their own evidence. The only possible course was to admit his skill and deny his good faith, but this too was useless, for the reason just mentioned.

Another argument used on behalf of the prisoner was that some of the symptoms of Cook's death were inconsistent with poisoning by strychnine. Mr. Nunneley and Dr. Letheby thought that the facts that Cook sat up in [150] bed when the attack came on, that he moved his hands, and swallowed, and asked to be rubbed and moved, showed more power of voluntary motion than was consistent with poisoning by strychnia. But Mrs Serjeantson Smyth got out of bed and rang the bell, and both she, Mrs Dove and Mrs Moore's patient begged to be rubbed and moved before the spasms came on. Cook's movements were before the paroxysm set in, and the first paroxysm ended his life.

Mr Nunneley referred to the fact that the heart was empty, and said that, in his experiments, he always found that the right side of the heart of the poisoned animals was full

Both in Mrs Smyth's case, however, and in that of the girl Senet the heart was found empty, and in Mrs Smyth's case the chest and abdomen were opened first, so that the heart was not emptied by the opening of the head. Mr Christison said that if a man died of spasms of the heart, the heart would be emptied by them, and would be found empty after death, so that the presence or absence of the blood proved nothing

Mr Nunneley and Dr Letheby also referred to the length of time before the symptoms appeared, as inconsistent with poisoning by strychnine. The time between the administration of the pills and the paroxysm was not accurately measured. It might have been an hour, or a little less, or more, but the poison, if present at all, was administered in pills, which would not begin to operate till they were broken up, and the rapidity with which they [151] would be broken up, would depend upon the materials of which they were made. Mr Christison said that if the pills were made up with resinous materials, such as are within the knowledge of every medical man, their operation would be delayed. He added "I do not think we can fix, with our present knowledge, the precise time for the poison beginning to operate." According to the account of one witness in Agnes French's case, the poison did not operate for three quarters of an hour, though probably her recollection of the time was not very accurate after ten years. Dr Taylor also referred (in cross examination) to cases in which an hour and a half, or even two hours elapsed, before the symptoms showed themselves.

These were the principal points in Cook's symptoms said to be inconsistent with the administration of strychnia. All of them appear to have been satisfactorily answered. Indeed, the inconsistency of the symptoms with strychnia was faintly maintained. The defence turned rather on the possibility of showing that they were consistent with some other disease.

In order to make out this point various suggestions were made. In the cross examination of the different witnesses for the Crown, it was frequently suggested that the case was one of traumatic tetanus, caused by syphilitic sores, but to this there were three fatal objections. In the first place, there were no syphilitic sores. In the second place, no witness for the prisoner said that he had heard of syphilitic sores producing tetanus. Two witnesses for the prisoner were called to show that a man died of tetanus who had sores on his elbow and elsewhere which were possibly syphilitic, but it did not appear whether he had rubbed or hurt them, and Cook had no symptoms of the sort.

Another theory was that the death was caused by general convulsions. This was advanced by Mr Nunneley, but he was unable to mention any case in which a man died of general convulsions without becoming unconscious. Dr Letheby met with one case in which a man died of general convulsions without becoming unconscious. He referred the case to Dr Letheby. But he also failed to mention an instance in which epilepsy did not destroy consciousness. This witness assigned the most extraordinary reasons for supposing that it was a case of this form of epilepsy. He said that the fit might have been caused by sexual excitement though the man was ill at Rugeley for nearly a week before his death, and that it was within the range of possibility that sexual intercourse might produce a convulsion fit after an interval of a fortnight.

Both Mr Nunneley and Dr McDonald were cross examined with great closeness. Each of them was taken separately through all the various symptoms of the case, and asked to point out how they differed from those of poisoning by strychnia, and what were the reasons why they should be supposed to arise from anything else. After [153] a great deal of trouble Mr Nunneley was
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 instance, that excitement and depression of spirits might predispose to convulsions, but the only excitement under which Cook had laboured was on winning the race a week before, and as for depression of spirits, he was laughing and joking with Mr Jones a few hours before his death. Dr McDonald was equally unable to give satisfactory explanation of these difficulties. It is impossible by any abridgment to convey the full effect which these cross examinations produced. They deserve to be carefully studied by any one who cares to understand the full effect of this great instrument for the manifestation not merely of truth, but of accuracy and fairness.

Of the other witnesses for the prisoner, Mr Herapath admitted that he had said that he thought that there was strychnine in the body, but that Dr Taylor did not know how to
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 concilable with everything that he was acquainted with—strychnia poison included. He admitted, however, that they were not inconsistent with what he had heard of the symptoms of Mrs Serjeantson Smyth who was undoubtedly poisoned by strychnine. Mr Partridge was called to [154] show that the case might be one of arachnitis, or inflammation of one of the membranes of the spinal cord caused by two granules discovered there. In cross examination he instantly admitted with perfect frankness, that he did not think the case was one of arachnitis, as the symptoms were not the same. Moreover, on being asked whether the symptoms described by Mr Jones were consistent with poisoning by strychnia, he said, "Quite," and he concluded by saying that in the whole course of his experience and knowledge he had never seen such a death proceed from natural causes. Dr Robinson, from Newcastle, was called to show that tetanic convulsions preceded by epilepsy were the cause of death. He, however, expressly admitted in cross-examination that the symptoms were consistent with strychnia, and that some of them were inconsistent with epilepsy. He said that in the absence of any other cause, if he put aside the hypothesis of strychnia, he would ascribe it to epilepsy, and that he thought the granules in the spinal cord might have produced epilepsy. The degree of importance attached to these granules by different witnesses varied. Several of the witnesses for the Crown considered them unimportant. The last of the prisoner's witnesses was Dr Richardson, who said the disease might have been angina pectoris. He said, however, that the symptoms of angina pectoris were so like those of strychnine that he should have great difficulty in distinguishing them from each other.

The fact that antimony was found was never seriously disputed, nor could it be denied that its administration [155] would account for all the symptoms of sickness, etc., which occurred during the week before Cook's death. No one but the prisoner could have administered it.

The general result of the whole evidence on both sides appears to be to prove beyond all reasonable doubt that the symptoms of Cook's death were perfectly consistent with those of poisoning by strychnine and that there was strong reason to believe that they were inconsistent with any other cause. Coupling this with the proof that Palmer bought strychnia just before each of

the two attacks, and that he robbed Cook of all his property, it is impossible to doubt the propriety of the verdict

Palmer's case is remarkable on account of the extraordinary minuteness and labour with which it was tried, and on account of the extreme ability with which the trial was conducted on both sides

Remarks on
Palmer's
case

The intricate set of facts which show that Palmer had a strong motive to commit the crime, his behaviour before it, at the time when it was being committed, and after it had been committed, the various considerations which showed that Cook must have died by tetanus produced by strychnine, that Palmer had the means of administering strychnine to him, that he did actually administer what in all probability was strychnine, that he also administered antimony on many occasions, and that all the different theories by which Cook's death otherwise than by strychnine could be accounted for were open to fatal objections, form a collection of eight or ten different sets of facts, all connected [156] together immediately or remotely either as being, or as being shown not to be, the causes or the effects of Cook's murder, or as forming part of the actual murder itself

The scientific evidence is remarkable on various grounds but particularly because it supplies a singularly perfect illustration of the identity between the ordinary processes of scientific research, and the principles explained above, as being those on which Judicial Evidence proceeds. Take, for instance the question, did Cook die of tetanus, either traumatic or idiopathic? The symptoms of those diseases are in the first place ascertained inductively and their nature was proved by the testimony of Sir Benjamin Brodie and others. The course of the symptoms being compared with those of Cook, they did not correspond. The inference by deduction was that Cook's death was not caused by those diseases. Logically the matter might be stated thus —

All persons who die either of traumatic or of idiopathic tetanus exhibit a certain course of symptoms

Cook did not exhibit that course of symptoms, therefore Cook did not die of traumatic or of idiopathic tetanus

Everyone of the arguments and theories stated in the case may easily be shown by a little attention to be so many illustrations of the rules of evidence on the one hand, and of the rules of induction and deduction on the other

On the other hand, a flood of irrelevant matter apparently connected with the trial pressed, so to speak for admittance, and if it had been admitted, would have swollen the trial to unmanageable proportions, and thrown no real [157] light upon the main question. Palmer was actually indicted for the murder of his wife, Ann Palmer, and for the murder of his brother, Walter Palmer. Every sort of story was in circulation as to what he had done. It was said that twelve or fourteen persons had at different times been buried from his house under suspicious circumstances. It was said that he had poisoned Lord George Bentinck who died very suddenly some years before. He had certainly forged his mother's acceptance to bills of exchange and had carried on a series of gross frauds on insurance offices. There was the strongest reason to suspect that the evidence of Jeremiah Smith referred to in the case, was plotted and artful perjury. If Palmer had been tried in France, every one of these and innumerable other topics would have been introduced, and the real matter in dispute would not have been nearly so fully discussed.

No case sets in a clearer light either the theory or the practical working of the principles on which the Evidence Act is based

One special matter on which Palmer's trial throws great light is the nature of the evidence of experts. The provisions relating to this subject are contained in sections 45 and 46 of the Evidence Act. The only point of much

importance in connection with them is that it should be borne in mind that their evidence is given on the assumption that certain facts occurred but that it does not in common cases show whether or not the facts on which the expert gives his opinion did really occur. For instance [158] Sir Benjamin Brodie and other witnesses in Palmer's case said that the symptoms they had heard described were the symptoms of poisoning by strychnine but whether the maid servants and others who witnessed and described Cook's death were or were not speaking the truth was not a question for them but for the jury. Strictly speaking, an expert ought not to be asked, 'Do you think that the deceased may attribute the

his death to
would account

matter of form. The substance of the rules as to experts is that they are only witnesses, not judges, that their evidence however important is intended to be used only as materials upon which others are to form their decision and that the fact which they have to prove is the fact that they entertain certain opinions on certain grounds and not the fact that grounds for their opinions do really exist.

[159] IRRELEVANT FACTS

Having thus described and illustrated the theory of relevancy it will be desirable to say something of irrelevant facts which might at first sight be supposed to be relevant.

From the explanations given in the earlier part of the chapter it follows that facts are irrelevant unless they can be shown to stand in the relation of cause or in the relation of effect to facts in issue every step in the connection being either proved or of such a nature that it may be presumed without proof.

What facts
are irrelevant

The vast majority of ordinary facts simply co-exist without being in any assignable manner connected together. For instance at the moment of the commission of a crime in a great city, numberless other transactions are going on in the immediate neighbourhood, but no one would think of giving evidence of them unless they were in some way connected with the crime. Facts obviously irrelevant therefore present little difficulty. The only difficulty arises in dealing with facts which are apparently relevant but are not really so. The most important of these are three —

Facts apparently relevant

- 1 Statements as to facts made by persons not called as witnesses
- [160] 2 Transactions similar to but unconnected with the facts in issue
- 3 Opinions formed by persons as to the facts in issue or relevant facts

None of these are relevant within the definition of relevancy given in sections 6—11, both inclusive. It may possibly be argued that the effect of the second paragraph of section 11* would be to admit proof of such facts as these.

* Sect. on 11 is as follows —

Facts not otherwise relevant are relevant —

(1) If they are inconsistent with any fact in issue or relevant fact

(2) If by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable

It may, for instance be said *A* (not called as a witness) was heard to declare that he had seen *B* commit a crime. This makes it highly probable that *B* did commit that crime. Therefore *A*'s declaration is a relevant fact under section 11. This was not the intention of the section as is shown by the elaborate provisions contained in the following part of the Chapter II (sections 32—39) as to particular classes of statements which are regarded as relevant facts either because the circumstances under which they are made invest them with importance or because no better evidence can be got. The sort of facts which the section was intended to include are facts which either exclude or imply more or less distinctly the existence of the facts sought to be proved. Some degree of latitude was designedly left in the working of the section (in compliance with a suggestion from the Madras Government) [161] on account of the variety of matters to which it might apply. The meaning of the section would have been more fully expressed if words to the following effect had been added to it —

No statement shall be regarded as rendering the matter stated highly probable within the meaning of this section unless it is declared to be a relevant fact under some other section of this Act.

The reasons why statements as to facts made by persons not called as witnesses are excluded except in certain specified cases (see sections 17—39), are various. In the first place it is matter of common experience that statements in common conversation are made so lightly and are so liable to be misunderstood or misrepresented that they cannot be depended upon for any important purpose unless they are made under special circumstances. Reason for exclusion of hearsay

It may be said that this is an objection to the weight of such statements and not to their relevancy and there is some degree of truth in this remark. No doubt when a man has to inquire into facts of which he receives in the first instance very confused accounts it may and often will be extremely important for him to trace the most cursory and apparently futile report. And facts relevant in the highest degree to facts in issue may often be discovered in this manner. A policeman or a lawyer engaged in getting up a case Criminal or Civil would neglect his duty altogether if he shut his ears to everything which was not relevant within the meaning of [162] the Evidence Act. A Judge or Magistrate in India frequently has to perform duties which in England would be performed by police officers or attorneys. He has to sift out the truth for himself as well as he can and with little assistance of a professional kind. Section 165 is intended to arm the Judge with the most extensive power possible for the purpose of getting at the truth. The effect of this section * is that in order to get to the bottom of the matter before it the Court will be able to look at and inquire into every fact whatever. It will not however be able to found its judgment upon the class of statements in question for the following reason — Objection

If this were permitted it would present a great temptation to indolent Judges to be satisfied with second hand reports.

It would open a wide door to fraud. People would make statements for which they were made stated. E tell a lie a

Effect of section 165

* Section 165 is as follows —

The Judge may in order to discover or obtain proper proof of relevant facts ask any question he pleases in any form

at any time of any witness or of the party about any fact relevant or irrelevant and may order the production of any document or thing

Suppose that *A, B, C, and D* give to *E, F, and G* a minute detailed account of a crime which they say was [163] committed by *Z, E, F, and G* repeat what they have heard correctly *A, B, C, and D* disappear or are not forthcoming It is evident that *Z* would be altogether unable to defend himself in this case, and that the Court would be unable to test the statement of *A, B, C, and D*. The only way to avoid this is to exclude such evidence altogether, and so to put upon both Judges and Magistrates as strong a pressure as possible to get to the bottom of the matter before them

It would waste an incalculable amount of time To try to trace unauthorized and irresponsible gossip, and to discover the grains of truth which may lurk in it is like trying to trace a fish in the water

Unconnected transactions

The exclusion of evidence as to transactions similar to, but not specially connected with, the facts in issue, rests upon the ground that if it were not enforced, every trial, whether civil or criminal, might run into an inquiry into the whole life and character of the parties concerned Litigants have frequently many matters in difference besides the precise point legally at issue between them, and it often requires a good deal of rigour to prevent them from turning Courts of Justice into theatres in which all their affairs may be discussed A very slight acquaintance with French procedure is enough to show the evils of not keeping people close to the point in judicial proceedings

Exclusion of evidence of opinion Exception to rules as to irrelevancy

As to evidence of opinion it is excluded because its admission would in nearly all cases be mere waste of time

[164] The concluding part of the chapter on the relevancy of facts enumerates the exceptions which are to be made to the general rules as to irrelevancy The rules as to admissions, statements made by persons who cannot be called as witnesses, and statements made under circumstances which in themselves afford a guarantee for their truth are an exception to the exclusion of statements as proof of the matter stated.

Judgments in Courts of Justice on other occasions form an exception to the exclusion of evidence of transactions not specifically connected with facts in issue, and the provisions as to the admission of evidence of opinions in certain cases are contained in sections 45—55 I will notice very shortly the principle on which these provisions proceed

Admissions

1 The general rule with regard to admissions, which are defined to mean all that the parties or their representatives in certain degrees say about the matter in dispute, or facts relevant thereto, is that they may be proved as against those who made them, but not in their favour The reason of the rule is obvious If *A* says, "*B* owes me money," the mere fact that he says so does not even tend to prove the debt If the statement has any value at all, it must be *A's* recollection but his can testify of which If, on the other hand, *A* is a fact

Confessions

Admissions in reference to crimes are usually called confessions I may observe upon the provisions relating to them that sections 25, 26, and 27 were transferred to the Evidence Act *verbatim* from the Code of Criminal Procedure, Act XXV of 1861 They differ widely from the law of England, and were inserted in the Act of 1861 in order to prevent the practice of torture by the police for the purpose of extracting confessions from persons in their custody

Statements by witness who cannot be called

¶ Statements made by persons who are dead or otherwise incapacitated from being called as witnesses are admitted in the cases mentioned in sections 32 and 33 The reason is that in the cases in question no better evidence is to be had

In certain cases statements are made under circumstances which in themselves are to be true, and in these cases there is no special circumstance by whom the statement was made
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It may be well to point out here the manner in which the Evidence Act affects the proof of evidence given by a witness in a Court of Justice. The relevancy of the fact that such evidence was given, depends partly on the general principles of relevancy. For instance, if a witness were accused of giving false testimony, the fact that he gave the testimony alleged to be false would be a fact [166] in issue. But the Act also provides for cases in which the fact that evidence was given on a different occasion is to be admissible, either to prove the matter stated (section 33), or in order to contradict (section 155 3) or in order to corroborate (section 157) the witness. By reference to these sections it must be ascertained whether the fact that the evidence was given is relevant. If it is relevant, section 35 enacts that an entry of it in a record made by any public servant in the discharge of his duty shall be relevant as a mode of proving it. The Codes of Civil and Criminal Procedure direct all judicial officers to make records of the evidence given before them, and section 80 of the Evidence Act provides that a document purporting to be a record of evidence shall be presumed to be genuine that statements made as to the circumstances under which it was taken shall be presumed to be true, and the evidence to have been duly taken. The result of these sections taken together is that when proof of evidence given on previous occasions is admissible, it may be proved by the production of the record or a certified copy (see section 76).

The sections as to judgments (40, 41) designedly omit to deal with the question of the effect of judgments in preventing further proceedings in regard of the same matter. The law upon this subject is to be found in section 2 of the Code of Civil Procedure and in section 460 of the Code of Criminal Procedure. The cases which the Evidence Act provides [167] for are cases in which the judgment of a Court is in the nature of a law, and creates the right which it affirms to exist. Judgments in other cases

The opinions of any person, other than the Judge by whom the fact is to be decided, as to the existence of facts in issue or relevant facts are, as a rule, irrelevant to the decision of the cases to which they relate for the most obvious reasons. To show that such and such a fact had been committed or a person would invest the person some few cases. In They are specified in sections 45—51. Opinions

The sections as to character require little remark. Evidence of character is, generally speaking, only a makeweight, though there are two classes of cases in which it is highly important — Character, when important

(1) Where conduct is equivocal, or even presumably criminal. In this case evidence of character may explain conduct and rebut the presumptions which it might raise in the absence of such evidence. A man is found in possession of stolen goods. He says he found them and took charge of them to give them to the owner. If he is a man of very high character this may be believed.

(2) When a charge rests on the direct testimony of a single witness and on the bare denial of it by the person charged. A man is accused of an indecent assault by a [168] woman with whom he was accidentally left alone. He denies it. Here a high character for morality on the part of the accused person would be of great importance.

formed a part, affect English law, but substantially the result is somewhat as follows —

Presumptions are of four kinds according to English law.

1 Conclusive presumptions These are rare, but when they occur they provide that certain modes of proof shall not be liable to contradiction

2 Presumptions which affect the ordinary rule as to the burden of proof that he who affirms must prove He [174] who affirms that a man is dead must usually prove it, but if he shows that the man has not been heard of for seven years, he shifts the burden of proof on his adversary

3 There are certain presumptions which, though liable to be rebutted, are regarded by English law as being something more than mere maxims though it is by no means easy to say how much more An instance of such a presumption is to be found in the rule that recent possession of stolen goods unexplained raises a presumption that the possessor is either the thief or a receiver

4 Bare presumptions of facts, which are nothing but arguments to which the Court attaches whatever value it pleases

Presump-
tions

Chapter VII of the Evidence Act deals with this subject as follows — First it lays down the general principles which regulate the burden of proof (sections 101—106) It then enumerates the cases in which the burden of proof is determined in particular cases, not by the relation of the parties to the cause but by presumptions (sections 107—111) It notices two cases of con-
from birth during marriage
ession of territory from the
 Gazette of India (section 113)

This is one of several conclusive Statutory presumptions which will be found in different parts of the Statutes and Acts Finally, it declares in section 114, that the Court may in all cases whatever draw from the facts before it whatever inferences it thinks just The terms of this section are such [175] as to reduce to their proper position of mere maxims which are to be applied to facts by the Courts in their discretion, a large number of presumptions to which English law gives to a greater or less extent, an artificial value Nine of the most important of them are given by way of illustration

All notice of certain general legal principles which are sometimes called presumptions, but which in reality belong rather to the substantive law than the law of Evidence, was designedly omitted, not because the truth of those principles was denied, but because it was not considered that the Evidence Act was the proper place for them The most important of these is the presumption, as it is sometimes called that every one knows the law The principle is far more correctly stated in the maxim that ignorance of the law does not excuse a breach of it, which is one of the fundamental principles of Criminal Law

The subject of estoppels (Chapter VIII) differs from that of presumptions in the circumstance that an estoppel is a personal disqualification laid upon a person peculiarly circumstanced from proving peculiar facts A presumption is a rule that particular inferences shall be drawn from particular facts whoever proves them Much of the English learning connected with estoppels is extremely intricate and technical, but this arises principally from two causes, the effect of prior judgment of the law

[176] The remainder of the Act consists of a reduction to express propositions of rules as to the examination of witnesses, which are well established and understood They call for no commentary or introduction, as they sufficiently explain their own meaning, and do not materially vary the existing law and practice

SOME CRITICISMS ON THE ACT

discriminating, of others may be divided into two classes. Some there are who approve of the general principle upon which the Act proceeds (*viz.*, that it is both possible and advisable positively to determine what is Evidence), but criticise the actual terms in which such determination is made. Others disapprove, preferring the more practical and historical method of English law which confines itself mainly to the negative task of declaring not what is but what is not Evidence.

Of the first class Mr Whitworth in his able pamphlet on the theory of relevancy⁽²⁾ while of opinion that probably no enactment in such few words as sections 6—16 brought so much assistance to the administration of Justice says that the question yet suggests itself whether even these rules give the theory of relevancy in its simplest form and states that they certainly do not show in themselves upon what principle it is that they have been founded. Differing from the author of the Act in regard to the adequacy of his definition of relevancy as the connection of events as cause and effect, he works out from the rules propounded under the Act what he conceives to be a fuller and more satisfactory statement. He arrives by this process of exposition at exactly the same result as Sir James Fitzjames Stephen, but claims for the new rules which he suggests that although different in form they are identical with those of the Act in their effect⁽³⁾.

Mr Whitworth uses the word "relevant" as Sir James Fitzjames Stephen uses it in the third chapter of his Introduction, and not as it is sometimes used as co extensive with "admissible." What is thus meant by a relevant fact is a *fact that has a certain degree of probative force*. All such facts are not admissible. They may be excluded under rules of Evidence other than those which treat of relevancy. For example, as he points out, a fact may be relevant, but it may be one of a kind so easy to fabricate, or so difficult to test, or of so suspicious an origin, that it is more convenient to declare that it shall not be taken into consideration at all. With such questions he is not concerned, but only with the simpler and narrower question as to what facts are relevant in the strict sense of the term.

He points out that the word is

its wide sense, Chapter II of Part I with relevancy in its strict sense. The ambiguity is unfortunate. Sir Fitzjames Stephen has said that relevancy is fully defined in sections 6—11 of the Act, and until the double meaning of the

(1) Reynolds's Theory of the Law of Evidence 3rd Ed 1897 Preface vi. See also observations in Preface to Rice's General Principles of the Law of Evidence.

(2) The theory of relevancy for the purpose of Judicial Evidence by George Clifford Whitworth 2nd Ed 1881. Mr George Clifford Whitworth of the Bombay Civil Service has lately criticised this theory in an ingenious and able

pamphlet and the frank accuracy of it

word is observed, it seems, as Mr Whitworth points out, inconsistent with this that many subsequent sections should declare certain things to be relevant as do sections 22, 23, 24, 28, 32, etc. What such sections as these have to declare is really not that the things they mention are relevant or irrelevant (using the words strictly) but (that question being decided by sections 6—16), that those things are not to be excluded or admitted under rules relating to subjects other than relevancy, which would, without the provision made, exclude or admit them.

The theory of relevancy is concerned with the question — Why is one thing relevant and another thing irrelevant? There must, Mr Whitworth says, be some principle applicable to all cases by which it may be determined whether a particular fact is or is not relevant to another fact, without reference to a number of rules framed to meet different classes of cases. The purpose of judicial enquiries is not a purpose peculiar to them. All men upon occasion endeavour to ascertain, as quickly and as satisfactorily as they can, whether facts unknown to them personally have or have not happened. And what is calculated to aid the human mind in such inquiries must be something capable of being defined by the enunciation of its essential difference, as well as by an enumeration of its details. Sir James Fitzjames Stephen, in the third Chapter of his Introduction to this Act, has briefly considered this question, and has said that relevancy means the connection of events as cause and effect. "If these two words were taken in their widest acceptation, it would be correct to say that when any theory has been formed which alleges the existence of any fact, all facts are relevant which, if that theory was true, would stand to the fact alleged to exist either in the relation of cause or in the relation of effect." Mr Whitworth criticises this definition as follows — "But the proviso that the words 'cause' and 'effect' must be taken in their widest acceptation does not seem to be sufficient. It seems necessary —

acceptation of the words is his expression a cause or effect of the act of stabbing? Or consider the case of the Whitechapel murder in London. Upon the issue, Did Wainwright murder Harriet Lane? it is offered in evidence that the body before the Court is that of a woman who never bore children. How is this a cause or effect of the fact in issue? The widest acceptation of the words 'cause' and 'effect' will not include such facts as these. And if we give them the meaning necessary to make true the statement that relevancy means the connection of events as cause and effect, then the statement itself becomes of no use, because every fact will be relevant. No doubt to a being of such capacity of intelligence as to see the whole cause of every effect and the whole effect of every cause, everything that ever happened becomes one rigid fact and nothing is irrelevant. But for human purposes there is no question that relevancy and irrelevancy are realities, the difference between the two is recognizable by an ordinarily human capacity, and must be something expressible in ordinary language.

The definition that relevancy means the connection of events as cause and effect, leaves us, then, in this difficulty, that if we take the words in any, even the widest comprehensible sense, the definition does not include all facts which we know from our experience to be really relevant.

existence of every other fact that did exist at the same time, then the definition includes everything, and so ceases to be a definition.

Thus the statement that relevancy means the connection of events as cause and effect, requires some addition, if the words are used in any ordinary sense, and some limitation, if they are given a transcendent sense

Mr Stephen, using the words in the latter sense, imposes one limitation and declares the practical existence of another. He says, (a) the rule is to be subject to the caution that every step in the connection must be made out and (b) that wide, general causes, which apply to all occurrences, are in most cases, admitted, and do not require proof. The first of these limitations goes far to get rid of the objection that everything is relevant. The connection must be discernible, and every step in the connection proved or pre-umable. But if it is meant that each step must be recognizable as a proceeding from cause to effect, then, as shown above, things really relevant will be excluded. And if any other kind of connection will suffice, then it may be said of both the limitations, that they are of little service, that the help they give in deducing practical rules from the general principle is small. For those rules are least likely to be appealed to in the case of wide general causes, or occurrences, the connection of which with the fact in issue is not traceable. The object of the rules is to keep out irrelevant matter that is brought forward. As a fact, such matter is submitted as evidence every day. Such matter does not usually consist of wide general causes that are admitted, nor of occurrences that have no connection with the facts in issue, and therefore these limitations do not exclude it. Therefore these limitations are not sufficient.

Now as the theory propounded falls short of defining what relevancy is, so we may expect to find in the rules themselves things that cannot be explained by the theory. Again, as the rules are not deduced from first principles but are generalization from actual experience, it is possible that in some unusual cases the language of the rules may not prescribe with accuracy the true limit of the relevancy. And, thirdly, and for the same reason, it is possible that the rules laid down may not be in every part strictly confined to the subject of relevancy.

Thus it is not immediately apparent, from the theory set forth, why one part of a transaction throws light upon another part which is so distinct from the first as to form in itself a fact in issue. When Mr Hall shot three or four Gaekwar sowars, and it was a fact in issue whether he shot a particular one, no doubt the fact that he shot the others increased the probability of his having shot the one in question. But the theory does not afford a ready explanation of this.

By section 7 those facts are relevant to facts in issue 'which constitute the state of things under which they happened' 'some persons of not no, and the object of the
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before whom the case came on appeal, remarked upon the irrelevancy of this, and of course it was utterly useless, but the rule quoted does not seem to exclude evidence of it. By the same section, facts which afford an 'opportunity' for the occurrence of a fact in issue, or relevant facts, are relevant. The theory does not explain why. When Mr Hall shot the sowars, the fact that he had a rifle, gave him an opportunity of shooting the men he shot, but it gave him equal opportunity of shooting other persons whom he did not shoot. Its particular bearing upon the fact in issue to make it relevant is not explained.

Section 8 is partly concerned with the admissibility of evidence of statements. It includes the substance of the English rule that declarations which are part of the *res gestæ* may be proved. But this has nothing to do with relevancy strictly so called. (i post, remarks upon III (j) of this section.)

word is observed, it seems, as Mr Whitworth points out, inconsistent with this that many subsequent sections should declare certain things to be relevant as do sections 22, 23, 24, 28, 32, etc. What such sections as these have to declare is really not that the things they mention are relevant or irrelevant (using the words strictly), but (that question being decided by sections 6—16), that those things are not to be excluded or admitted under rules relating to subjects other than relevancy, which would without the provision made, exclude or admit them.

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exist at the same time, then the definition includes everything, and so ceases to be a definition.

Thus the statement that relevancy means the connection of events as cause and effect, requires some addition, if the words are used in any ordinary sense, and some limitation, if they are given a transcendent sense

Mr Stephen, using the words in the latter sense, imposes one limitation and declares the practical existence of another. He says, (a) the rule is to be subject to the caution that every step in the connection must be made out and (b) that wide, general causes, which apply to all occurrences, are in most cases, admitted, and do not require proof. The first of these limitations goes far to get rid of the objection that everything is relevant. The connection must be discernible, and every step in the connection proved or presumable. But if it is meant that each step must be recognizable as a proceeding from cause to effect, then, as shown above, things really relevant will be excluded. And if any other kind of connection will suffice, then it may be said of both the limitations, that they are of little service, that the help they give in deducing practical rules from the general principle is small. For those rules are least likely to be appealed to in the case of wide general causes, or occurrences, the connection of which with the fact in issue is not traceable. The object of the rules is to keep out irrelevant matter that is brought forward. As a fact, such matter is submitted as evidence every day. Such matter does not usually consist of wide general causes that are admitted, nor of occurrences that have no connection with the facts in issue, and therefore these limitations do not exclude it. Therefore these limitations are not sufficient.

Now as the theory propounded falls short of defining what relevancy is, so we may expect to find in the rules themselves things that cannot be explained by the theory. Again, as the rules are not deduced from first principles but are generalization from actual experience, it is possible that in some unusual cases the language of the rules may not prescribe with accuracy the true limit of the relevancy. And, thirdly, and for the same reason, it is possible that the rules laid down may not be in every part strictly confined to the subject of relevancy.

Thus it is not immediately apparent, from the theory set forth, why one part of a transaction throws light upon another part which is so distinct from the first as to form in itself a fact in issue. When Mr Hall shot three or four Gaekwar sowsars, and it was a fact in issue whether he shot a particular one, no doubt the fact that he shot the others increased the probability of his having shot the one in question. But the theory does not afford a ready explanation of this.

By section 7 those facts are relevant to facts in issue 'which constitute the state of things under which they happened' 'some persons of noting, and, the object of the Hindu religious Reformers, he commenced his of Religion and religious Reformation down to before whom the case came on appeal, remarked upon the irrelevancy of this, and of course it was utterly useless, but the rule quoted does not seem to exclude evidence of it. By the same section, facts which afford an 'opportunity' for the occurrence of a fact in issue, or relevant facts, are relevant. The theory does not explain why. When Mr Hall shot the sowsars, the fact that he had a rifle, gave him an opportunity of shooting the men he shot, but it gave him equal opportunity of shooting other persons whom he did not shoot. Its particular bearing upon the fact in issue to make it relevant is not explained.

Section 8 is partly concerned with the admissibility of evidence of statements. It includes the substance of the English rule that declarations which are part of the *res gestæ* may be proved. But this has nothing to do with relevancy strictly so called. (c *post*, remarks upon III. (j) of this section.)

Section 9 declares facts necessary to explain or introduce a fact in issue to be relevant, but prescribes no test of the necessity. Is there no danger of useless matter being brought upon the record under this rule on the ground that it explains or introduces something to follow? It is true there is a provision, under the law for the examination of witnesses, that when either party proposes to give evidence of any fact, the Judge may ask in what manner the fact would be relevant, and need not admit it unless he thinks it would be relevant (section 136, Evidence Act), but still whether or not the fact is necessary to explain or introduce may be a disputable matter. The first illustration says that when the question is whether a given document is the Will of A, the state of A's property and of his family at the date of the alleged Will *may* be relevant facts. Now, it is obvious that some particulars about the property would be useful to be known, and some would be useless. So the rule seems partly to fail of its object, in that it does not define what class of particulars is relevant.

Section 10 is a rule relating to one particular kind of transaction, conspiracy, and section 12 refers only to the question of damages. But the mind sets to work to ascertain such facts as these in just the same way as any other facts, and it does not appear why special rules are requisite. When any person is charged with conspiracy, one of the facts in issue is the existence of the conspiracy, its absolute existence without reference to the accused person, and from the nature of the thing itself, requiring as it does the action of more than one mind it is to be expected that causes of it and effects of it will be found existing outside the mind, and without the knowledge, of a particular person. Therefore no rule is required to make such causes or effects or other connected facts relevant to the fact in issue.

But the rule goes on to declare that such facts are relevant also for the purpose of showing that the accused person was a party to the conspiracy. Well, if such facts will show that, clearly they are in very truth relevant. But it is obvious that very many such facts will have no bearing whatever upon the question of the accused person's complicity. And it seems an error in the rule to declare all such facts relevant for that purpose, instead of showing which are and which are not. Consider some such conspiracy as that which went by the name of Fenianism. Suppose a man is being tried in Ireland for so conspiring. Suppose he had been in prison for a month before trial. Suppose the Court had received abundant evidence of the existence, nature and objects of the conspiracy. Still, under this rule the Court could not refuse to listen to witnesses just arrived from America stating that a party of Fenians had burnt a farm there a fortnight before the day of trial—thus to prove the accused person's complicity in the conspiracy.

Section 14 declares that facts which show the existence of any state of mind are relevant when the existence of such 'state of mind' is in issue or relevant. Looking at the illustration, it seems doubtful whether the expression 'state of mind' is wide enough. One of the states of mind mentioned is 'knowledge'. Illustration (c) is an example of this. There the question is whether a man knew that his dog was ferocious, and the facts that the dog had bitten several persons and that they had complained to the owner are relevant. These facts are really connected with the fact in issue through the owner's knowledge. But Illustration (a) also purports to be an example of fact being relevant as tending to show knowledge. The question there is whether a person found in possession of a stolen article knew that it was stolen, and it is said that the fact that, at the same time, he was in possession of many other stolen articles is relevant as tending to show that he knew each and all of the articles to be stolen. No doubt the fact is relevant, but it is not through the receiver's knowledge that it is connected with the fact in issue. What it proves is not a state of mind, but a habit, a habit which makes the receiving with a guilty knowledge a more likely fact than it would be without proof of the habit.

Mr Whitworth then proceeds to propound his theory of relevancy with the new rules which he deduces from it.—

“Every fact in issue may be affirmed or denied, and that not merely in the bare form in which it may be stated as a fact in issue, but in every detail of the meaning of that statement. The whole includes the part; if any fact is affirmed as a whole, any part of it may be affirmed or denied; anything implied by an affirmation is really part of that affirmation and may be expressly affirmed or denied. It may be in issue merely, Did *A* murder *B*? But if, as the affirmation is inquired into, it is found to mean that *A* murdered *B* at a particular hour and a particular place, then, that *A* was in that place at that hour may be affirmed or denied. The issue may be merely, Did Wainwright murder Harriet Lane? But if those affirming it produce a body saying it is Harriet Lane's, then anything showing that it is or is not may be put forward. Or the issue may be, did the accused person attempt to poison Colonel Phayre? But if it is found that the charge means that the accused person put arsenic into a glass of sherbet which, from his knowledge of Colonel Phayre's habits, he knew Colonel Phayre would drink, then Colonel Phayre's habit of drinking sherbet at a particular time and the prisoner's knowledge of this are parts of the fact in issue.

But besides the matters expressly or virtually in issue, some surrounding matters may aid in determining an unknown fact. Knowing that the progress of events is from cause to effect, any fact that seems likely to have caused the fact to be determined, or any fact that suggests the fact to be determined as a cause of it, may be of use.

Again one cause may have many effects and the cause may be ascertainable from one effect as well as from another. If then in endeavouring to ascertain whether a particular event has happened we see some other event that suggests as its cause something that would probably have caused the thing we want to ascertain then that event will be of use. For example, we want to ascertain whether *A* stabbed *B*, and we hear on the occasion on which he is said to have done so, *A* said to *B*, “then die.” Now this seems to imply just such volition employing the tongue as would employing an armed hand stab *B*. The words and the fact in issue are effects of the same volition. Similarly were *A* charged with poisoning *B*, the fact that before the death of *B* he procured poison of the kind that was administered to *B* would be relevant. The procuring the poison is an effect of a cause which might be the cause of the fact in issue.

Thus there are four classes of fact which aid in determining a fact in issue

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But it is not the whole of these facts that are of use. Some facts connected with the fact in issue in one of the four ways mentioned may be of a general nature, existing whether or not the fact in issue happened and therefore indicating nothing as to whether it happened or not. For example *A* is charged with the murder of *B* by pushing him over a precipice. Here the fall of *B* to the ground after he was pushed over is as much a cause of his death as the pushing over, and as much an effect of the push as his death is. But gravitation is a general fact and exists all the same whether *B* went over the precipice or not and proof of it is therefore needless.

Besides such general facts there may be facts connected with the fact in issue in one of the four ways, but with such a very slight bearing upon it that their probative force is quite insignificant, as, for instance, if a boyish quarrel

Section 9 declares facts necessary to explain or introduce a fact in issue to be relevant, but prescribes no test of the necessity. Is there no danger of useless matter being brought upon the record under this rule on the ground that it explains or introduces something to follow? It is true there is a provision, under the law for the examination of witnesses, that when either party proposes to give evidence of any fact, the Judge may ask in what manner the fact would be relevant, and need not admit it unless he thinks it would be relevant (section 136, Evidence Act), but still whether or not the fact is necessary to explain or introduce may be a disputable matter. The first illustration says that when the question is whether a given document is the Will of A, the state of A's property and of his family at the date of the alleged Will *may* be relevant facts. Now, it is obvious that some particulars about the property would be useful to be known, and some would be useless. So the rule seems partly to fail of its object, in that it does not define what class of particulars is relevant.

Section 10 is a rule relating to one particular kind of transaction—conspiracy, and section 12 refers only to the question of damages. But the mind sets to work to ascertain such facts as these in just the same way as any other facts, and it does not appear why special rules are requisite. When any person is charged with conspiracy, one of the facts in issue is the existence of the conspiracy, its absolute existence without reference to the accused person, and from the nature of the thing itself, requiring as it does the action of more than one mind, it is to be expected that causes of it and effects of it will be found existing outside the mind, and without the knowledge, of a particular person. Therefore no rule is required to make such causes or effects or other connected facts relevant to the fact in issue.

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Besides such general facts there may be facts connected with the fact in issue in one of the four ways but with such a very slight bearing upon it that their probative force is quite insignificant, as, for instance, if a boyish quarrel

of fifty years ago were brought forward to prove ill feeling between two men who had joined in partnership twenty years before

To meet both these classes of cases, one proviso only is requisite, namely, that no fact is relevant to another unless it makes the existence of that other more likely. It is not necessary that the fact must raise a probability of the fact in issue. The test is whether the fact in issue is eventually to decide whether the fact offered in evidence will, if proved, aid him in that decision.

The theory, then, so far as we have gone, is this. Those facts are relevant to a fact in issue, the existence of which makes the existence of the fact in issue more probable, and they are found to be connected with the fact in issue in one of these ways, as being, (a) part of the fact in issue, (b) cause of it, (c) effect of it, or (d) an effect of a cause of it.

But as, relying upon the principle that effects follow causes, we take from the surrounding circumstances facts that appear to be probable causes or probable effects of a fact unknown, as a means of proving it, so, upon the same principle we may first consider what would be probable causes or effects of the fact unknown and look upon their absence as a means of disproving it.

Therefore in addition to the four classes of facts above mentioned, which may be said to be positively relevant, — *facts which may be called negatively relevant* — that might be expected as part of a fact in issue, (b) facts showing the absence of cause of the fact in issue, (c) facts showing the absence of effect of the fact in issue, (d) facts showing the absence of effects (other than the fact in issue) of the probable cause of the fact in issue. And as it is essential to facts positively relevant that they make the fact in issue more likely, so those facts only are negatively relevant which make the existence of the fact in issue less likely.

Again, as facts are relevant only by reason of their being connected with the fact in issue, it follows, that to disprove the connection of an alleged relevant fact with the fact in issue, the fact is not really relevant. If the fact in issue is proved, the alleged facts never existed. And as the connection of an alleged relevant fact may be disputed, so it may be affirmed in anticipation of dispute. That is to say, all facts which tend to prove or disprove the connection in the way of relevancy between facts in issue and alleged relevant facts are themselves relevant.

As relevant facts may be proved and as the mode of proof of any fact is (beyond the affirmation of witnesses of the fact) by means of facts relevant to it, it follows that "facts relevant to relevant facts are themselves relevant."

These considerations suggested to Mr Whitworth the following rules, which he considered sufficient to decide, and the simplest test by which to decide, whether any fact offered in evidence is relevant —

RULE I — No fact is relevant which does not make the existence of a fact in issue more likely or unlikely, and that to such a degree as the Judge considers will aid him in deciding the issue.

RULE II — Subject to Rule I, the following facts are relevant —

- (1) Facts which are part of, or which are implied by, a fact in issue, or which show the absence of what might be expected as a part of, or would seem to be implied by, a fact in issue,
- (2) Facts which are a cause, or which show the absence of what might be expected as a cause, of a fact in issue,

(3) Facts which are an effect, or which show the absence of what might be expected as an effect, of a fact in issue,

(4) Facts which are an effect of a cause, or which show the absence of what might be expected as an effect of a cause, of a fact in issue

RULE III—Facts which affirm or deny the relevancy of facts alleged to be relevant under Rule II are relevant

RULE IV—Facts relevant to relevant facts are relevant

Mr Whitworth gives a single example of each kind of relevancy according to his classification, taking all examples from a simple case, that of Muller, who was tried for the murder of an old gentleman, a banker, named Briggs, by beating him with a life-preserver, as they were travelling together by rail, and then throwing him out of the train. Muller tried to make his escape to America, but was pursued and arrested on his arrival there. One point urged in the prisoner's defence was that he was not physically strong enough to commit the murder as alleged. His object appeared to be robbery.

The kinds of relevancy according to Rule II are four, but, as the first clause contains two classes with an apparent difference, they may, Mr Whitworth says, be taken for the purpose of illustration as five, and as each kind may be either positive or negative, the number becomes ten. And as by Rule III the connection of a fact with the fact in issue may be disputed as well as its existence, the number of illustrations required is twenty.

These he gives in order as cited in the footnote(1) —

(1) (a) *Part of fact in issue*—It would be relevant to prove that at the time the offence was said to be committed a witness by the roadside got a glimpse as the train passed of the prisoner standing up in the carriage with his hand raised above his head.

(b) *Disputing the connection*—It would be relevant to show that at the time in question the prisoner had occasion to close a ventilator in the top of the carriage.

(c) *Absence of what might be expected as part of the fact in issue*—It would be relevant to show that no noise was heard by the occupants of the next compartment.

(d) *Disputing the connection*—It would be relevant to show that the occupants of the next compartment were fast asleep.

(e) *Fact implied by a fact in issue*—It would be relevant to show that Muller was armed with a weapon.

(f) *Disputing the connection*—It would be relevant to show that such a weapon could not have caused the marks found on the body.

(g) *Absence of fact implied by fact in issue*—It would be relevant to show that Muller was physically a very weak man.

(h) *Disputing the connection*—It would be relevant to show that under the circumstances but little strength was required.

(i) *Cause*—It would be relevant to show that Mr Briggs had done Muller some great injury.

(j) *Disputing the connection*—It would

be relevant to show that Muller was not aware that it was Mr Briggs who had done him an injury.

(k) *Absence of cause*—It would be relevant to show that Mr Briggs had nothing valuable about him to tempt a robber.

(l) *Disputing the connection*—It would be relevant to show that Muller had reason to believe that Mr Briggs had valuables in his possession.

(m) *Effect*—It would be relevant to show that immediately after the occurrence Muller took passage for America.

(n) *Disputing the connection*—It would be relevant to show that Muller had sudden and urgent business that called him to America.

(o) *Absence of effect*—It would be relevant to show that the railway carriage bore no marks of a struggle.

(p) *Disputing the connection*—It would be relevant to show that Mr Briggs was too old and feeble to offer any considerable resistance.

(q) *Effect of a cause of a fact in issue*—It would be relevant to show that Muller had just before provided himself with a life preserver.

(r) *Disputing the connection*—It would be relevant to show that Muller anticipated violence to himself on the day in question.

(s) *Absence of effect of cause of fact in issue*—It would be relevant to show that Muller and Mr Briggs had travelled together for a long distance before the

After giving this single example of each kind of relevancy according to his classification Mr Whitworth proceeds to decide by reference to the above rules all the cases quoted in illustration of the rules set forth in this Act, and shows that his rules are identical in effect with the Law by reference to them of the illustrations in the Act as follows —

SECTION 6 *Illustration (a) (1)*—For upon examination every part of a transaction will be found to be connected with every other part as cause or effect or as effects of one cause

Illustration (b) (2)—That war was waged is one of the facts in issue These occurrences are part of that fact

Illustration (c) (3)—Besides the fact of the publication, there may be in issue the question of *B*'s good faith or malice of the sense in which the words were used whether the occasion was privileged or not Other parts of the correspondence may be causes or effects of the publication or effects of *B*'s good faith or malice or effects of the words having been used in a particular sense or effects of a relationship between the parties showing that the occasion was or was not privileged

Illustration (d) (4)—Each delivery is a relevant fact as being part of the fact in issue Did the goods pass from *B* to *A*?

SECTION 7 *Illustration (a), (5)*—The first fact is relevant as a fact implied by the fact in issue and the second is relevant as a cause of the fact in issue

Illustration (b) (6)—The marks are relevant facts as effects of part of the act in issue

Illustration (c), (7)—That *B* was ill before the symptoms ascribed to poison is relevant as denying the connection of cause and effect between the fact in issue and the symptoms
 was well is relevant
 alleged that the
 (If the opportunity was not availed of the habits are not relevant)

fatal occurrence and that through all that time Muller had equal opportunity to attack Mr Briggs and had not done so

(1) *Disputing the connection*—It would be relevant to show that Muller had ascertained how far Mr Briggs was going to travel and that he (Muller) could best effect his escape by getting out at some place the train came to after the occurrence

(2) *A* is accused of the murder of *B* by beating him Whatever was said or done by *A* to *B* or the bystanders at the beating or so shortly before or after it as to form part of the transaction is a relevant fact

(3) *A* is accused of waging war against the Queen by taking part in an armed insurrection in which property is destroyed troops are attacked and gaols are broken open The occurrence of these facts is relevant as forming part of the general transaction though *A* may not have been present at all of them

(4) *A* sues *B* for a libel contained in a letter forming part of a correspondence

Letters between the parties relating to the object out of which the libel arose and forming part of the correspondence in which it is contained are relevant facts though they do not contain the libel itself

(5) The question is whether certain goods ordered from *B* were delivered to *A* The goods were delivered to several intermediate parties successively Each delivery is a relevant fact

(6) The question is whether *A* robbed *B* The facts that shortly before the robbery *B* went to a fair with money in his possession and that he showed it or mentioned the fact that he had it to a third person are relevant

(7) The question is whether *A* murdered *B* Marks on the ground produced by a struggle at or near the place where the murder was committed are relevant facts

(8) The question is whether *A* poisoned *B* The state of *B*'s health before the symptoms ascribed to poison and habits of *B* known to *A* which afforded an opportunity for the administration of poison are relevant facts

SECTION 8: Illustration (a), (1)—The facts are relevant as causes of the fact in issue

Illustration (b), (2)—The fact is relevant as a cause of the fact in issue

Illustration (c), (3)—The fact is relevant as an effect of a cause of the fact in issue

Illustration (d), (4)—The facts are relevant as effects of the cause of the fact in issue

Illustration (e), (5)—The facts are relevant; for they are all effects of the immediate cause (namely, *A*'s resolution to commit the offence) of the fact in issue

Illustration (f), (6)—The latter fact is relevant as an effect of the fact in issue, and the former as a cause of the latter. As to the sense in which *C*'s statement is relevant, see remarks below, illustration (j), *post*

Illustration (g), (7)—For *A*'s going away without making any answer is an effect of the fact in issue, and the other two facts are causes of that effect

Illustration (h), (8)—The first fact is relevant as an effect of the fact in issue and the second as a cause of that effect

Illustration (i), (9)—The facts are relevant as effects of a fact in issue

Illustration (j), (10)—The facts are relevant as effects of the fact in issue. The illustration goes on to say that the fact that without making a complaint she said that she had been ravished, is not relevant as conduct under section 8 though it may be relevant as a dying declaration or as corroborative evidence. Nowhere, as Mr Whitworth points out, the strict use of the term 'relevant'

(1) *A* is tried for the murder of *B*. That *A* murdered *C* that *B* knew that *A* had murdered *C* and that *B* had tried to extort money from *A* by threatening to make his knowledge public are relevant.

(2) *A* sues *B* upon a bond for the payment of money. *B* denies the making of the bond. The fact that at the time when the bond was alleged to be made *B* required money for a particular purpose is relevant.

(3) *A* is tried for the murder of *B* by poison. The fact that before the death of *B* *A* procured poison similar to that which was administered to *B* is relevant.

(4) The question is whether a certain document is the Will of *A*. The facts that not long before the date of the alleged Will *A* made inquiry into matters to which the provisions of the alleged Will relate that he consulted vakils in reference to making the Will and that he caused drafts of other Wills to be prepared of which he did not approve are relevant.

(5) *A* is accused of a crime. The facts that either before or at the time of or after the alleged crime *A* provided evidence which would tend to give to the facts of the case an appearance favourable to himself or that he destroyed or concealed evidence or prevented the presence or procured the absence of persons who might have been witnesses or suborned persons

to give false evidence respecting it are relevant.

(6) The question is whether *A* robbed *B*. The facts that after *B* was robbed *C* said in *A*'s presence "The police are coming to look for the man who robbed *B*" and that immediately afterwards *A* ran away are relevant.

(7) The question is whether *A* owes *B* 10 000 rupees. The facts that *A* asked *C* to lend him money, and that *D* said to *C* in *A*'s presence and hearing "I advise you not to trust *A* for he owes *B* 10 000 rupees" and that *A* went away without making any answer are relevant facts.

(8) The question is whether *A* committed a crime. The fact that *A* absconded after receiving a letter warning him that inquiry was being made for the criminal and the contents of the letter are relevant.

(9) *A* is accused of a crime. The facts that after the commission of the alleged crime he absconded or was in possession of property or the proceeds of property acquired by the crime or attempted to conceal things which were or might have been used in committing it are relevant.

(10) The question is whether *A* was ravished. The facts that shortly after the alleged rape she made a complaint relating to the crime the circumstances under which and the terms in which the complaint was made are relevant.

has been departed from. That the woman said she had been ravished is relevant though it does not follow that it is admissible. The Act declares when statements of fact in issue or relevant facts may be proved. When the statement is a dying declaration is one instance that such statements may under certain circumstances be proved as corroborative evidence is another and another is to this effect that when the conduct of any person is a relevant fact using that conduct or statements made at that conduct may be proved. This has no rule seems out of place in section 8. It is because the woman's statement without complaint is not admissible under this rule that the Act says that statement is not relevant as conduct under this section. So above in Illustrations (f) (g) (h) some of the relevant facts are statements. They are also admissible as being connected with conduct. They are simply pronounced relevant. It is plain that it is meant that they may be proved. But that the statements are relevant in the strict sense is sufficient for the present purpose.

Illustration (k) (1)—The facts in the first sentence of the illustration are relevant as effects of the fact in issue. The fact that he said he had been robbed without making any complaint is relevant though whether it is admissible or not depends upon the law relating to the question what statements may be proved.

SECTION 9 *Illustration (a) (2)*—The Act says the state of A's property and of his family at the date of the alleged Will may be relevant facts. But it may be stated absolutely that so much of the state of A's property or of his family as shows probable cause for his making such a Will as the alleged one or as shows the absence of such probable cause is relevant.

Illustration (b) (3)—Upon this issue so much of the position and relations of the parties at the time when the libel was published as shows cause for B's publishing a true libel or a false one or the absence of such causes and so much as bears upon the matter asserted in the libel as cause of its truth or otherwise is relevant.

The particulars of a dispute between A and B about a matter unconnected with the issue are irrelevant because they do not show the position and relations of the parties defined above.

Illustration (c) (4)—The absconding is relevant as an effect of the fact in issue.

The fact of the sudden call is relevant as denying the connection of cause and effect between the fact in issue and the alleged relevant fact.

The details further than as stated in the illustration do not make the fact in issue more likely or unlikely to have happened.

(1) The question is whether A was robbed. The fact that soon after the alleged robbery he made a complaint relating to the offence the circumstances under which and the terms in which the complaint as made are relevant.

(2) The question is whether a given document is the Will of A.

(3) A uses B for a libel imputing to B disgraceful conduct to A. B affirms that the matter alleged to be libellous is true.

(4) A is accused of a crime. The fact

that soon after the commission of the crime A absconded from his house is relevant under s. 8 as conduct subsequent to, and affected by facts in issue. The fact that at the time he left home he had sudden and urgent business at the place to which he went is relevant as tending to explain the fact that he left home suddenly. The details of the business on which he left are not relevant except in so far as they are necessary to show that the business was sudden or urgent.

Illustration (d), (1)—This statement is relevant as affirming the connection of cause and effect between the fact in issue (*B*'s persuasion) and the relevant fact (*C*'s leaving *A*'s service)

Illustration (e), (2)—*B*'s statement is relevant as an effect of a fact in issue

Illustration (f), (3)—That the riot occurred is a fact in issue, and the cries of the mob are relevant as parts or as effects of the fact

SECTION 10 *Illustration, (4)*—And any of these facts that are so connected with the other fact in issue, *A*'s complicity, as to make it more or less likely, are relevant for that purpose also

SECTION 11 *Illustration (a), (5)*—Presence at Lahore is relevant as denying a part of the fact in issue The other fact is relevant as making a part of the fact in issue unlikely

Illustration (b), (6)—That the crime was committed is adduced as an effect of the fact in issue that *A* committed it To show that some other person committed it is relevant as denying the connection of cause and effect between the fact in issue and relevant fact, and to show that no other person committed it is relevant as affirming that connection

SECTION 12 (7)—For the amount of damages is a fact in issue, and any fact which will enable the Court to determine it will be found to be connected with the fact in issue in one of the ways specified

SECTION 13 *Illustration (8)*—The deed is relevant as a cause of the fact in issue The mortgage is relevant as an effect of the father's right, which is relevant as a cause of *A*'s right The subsequent grant of *A*'s is relevant as denying a fact implied by that relevant fact Particular instances of exercise

(1) *A* sues *B* for inducing *C* to break a contract of service made by him with *A* *C* on leaving *A*'s service says to *A* I am leaving you because *B* has made me a better offer This statement is a relevant fact as explanatory of *C*'s conduct which is relevant as a fact in issue

(2) *A* accused of theft is seen to give the stolen property to *B* who is seen to give it to *A*'s wife *B* says as he delivers it *A* says you are to hide this *B*'s statement is relevant as explanatory of a fact which is part of the transaction

(3) *A* is tried for a riot and is proved to have marched at the head of a mob The cries of the mob are relevant as explanatory of the nature of the transaction

(4) Reasonable ground exists for believing that *A* has joined in a conspiracy to wage war against the Queen

The fact that *B* procured arms in Europe for the purpose of the conspiracy *C* collected money in Calcutta for a like object *D* persuaded persons to join the conspiracy in Bombay *E* published writing advocating the object in view in Agra and *F* transmitted from Delhi to *G* at Cabul the money which *C* had collected at Calcutta and the contents of a letter written by *H* giving an account of the conspiracy are each relevant to prove the existence of the conspiracy although he may have been ignorant of all of them and although the

persons by whom they were done were strangers to him and although they may have taken place before he joined the conspiracy or after he left it

(5) The question is whether *A* committed a crime at Calcutta on a certain day The fact that on that day *A* was at Lahore is relevant The fact that near the time when the crime was committed *A* was at a distance from the place where it was committed which would render it highly improbable though not impossible that he committed it is relevant

(6) The question is whether *A* committed a crime The circumstances are such that the crime must have been committed by *A* *B* *C* or *D* Every fact which shows that the crime could have been committed by no one else and that it was not committed by either *B* *C* or *D* is relevant

(7) In suits in which damages are claimed any fact which will enable the Court to determine the amount of damages which ought to be awarded is relevant

(8) The question is whether *A* has a right to a fishery *A* deed conferring the fishery on *A*'s ancestors a mortgage of the fishery by *A*'s father a subsequent grant of the fishery by *A*'s father irreconcilable with the mortgage particular instances in which *A*'s father exercised the right or in which the exercise of the right was stopped by *A*'s neighbours are relevant facts

of the right are relevant facts as effects of the father's right. And instances in which the exercise of the right were stopped are relevant as contradicting those relevant facts.

SECTION 14 *Illustration (a)* (1)—The fact that, at the same time, he was in possession of many other stolen articles is relevant as an effect of a habit of receiving stolen goods the habit being relevant as a cause of his receiving the particular article with a knowledge that it was stolen.

Illustration (b), (2)—The fact is relevant as effects of a habit, which habit is a cause of his delivering the particular piece with a knowledge that it was counterfeit.

Illustration (c), (3)—The facts are relevant as the causes of a fact in issue, *B*'s knowledge that the dog was ferocious.

Illustration (d), (4)—For *A*'s knowledge on the previous occasions is a cause of his knowledge on the occasion in question, and that there was not time for the previous bills to be transmitted to him by the payee if the payee had been a real person is a cause of his knowledge on previous occasions, and the fact that *A* accepted the bills is an affirmation of the connection of cause and effect between the fact concerning time and the fact of *A*'s knowledge.

Illustration (e), (5)—The fact of previous publications is relevant as an effect of the same cause as that of which the fact in issue is an effect.

The fact that there was no previous quarrel between *A* and *B*, is relevant as alleging absence of fact in issue. The fact that *A* reported the matter as he heard it is relevant as denying the connection of cause and effect between the two facts the malicious intention and the publication.

Illustration (f), (6)—For *A*'s good faith is in issue i.e. did *A*, when he represented *C* as solvent, think him solvent? is in issue. As *C*'s insolvency may be put forward on one side as a cause of *A*'s thinking him not solvent, so, that his neighbours and persons dealing with him supposed him to be solvent, may be put forward as effects of causes which are causes also of *A*'s thinking him solvent. Thus the neighbours' suppositions are effects of causes of a fact in issue.

(1) *A* is accused of receiving stolen goods knowing them to be stolen. It is proved that he was in possession of a particular stolen article. The fact that at the same time he was in possession of many other stolen articles is relevant as tending to show that he knew each and all of the articles of which he was in possession to be stolen.

(2) *A* is accused of fraudulently delivering to another person a piece of counterfeit coin which at the time when he delivered it he knew to be counterfeit. The fact that at the time of its delivery *A* was possessed of a number of other pieces of counterfeit coin is relevant. (The rest of the illustration was added after Mr. Whitworth's pamphlet by Act III of 1891.)

(3) *A* sues *B* for damage done by a dog of *B*'s which *B* knew to be ferocious. The fact that the dog had previously bitten *Y*, *Y* and *Z* and that they had made complaints to *B* are relevant.

(4) The question is whether *A* the acceptor of a bill of exchange knew that the name of the payee was fictitious.

The fact that *A* had accepted other bills

drawn in the same manner before they could have been transmitted to him by the payee if the payee had been a real person is relevant as showing that *A* knew that the payee was a fictitious person.

(5) *A* is accused of defaming *B* by publishing an imputation intended to harm the reputation of *B*. The fact of previous publications by *A* respecting *B* showing ill will on the part of *A* towards *B* is relevant as proving *A*'s intention to harm *B*'s reputation by the particular publication in question. The facts that there was no previous quarrel between *A* and *B* and that *B* repeated the matter complained of as he heard it are relevant as showing that *A* did not intend to harm the reputation of *B*.

(6) *A* is sued by *B* for fraudulently representing to *B* that *C* was solvent whereby *B* being induced to trust *C* who was insolvent suffered loss. The fact that at the time when *A* represented *C* to be solvent *C* was supposed to be solvent by his neighbours and by persons dealing with him is relevant as showing that *A* made the representation in good faith.

Illustration (g), (1)—The fact that *A* paid *C* for the work in question is relevant. For it is in issue—was *B*'s contract with *A*? Therefore that *A* contracted for the same piece of work with *C* is relevant as showing absence of cause to contract with *B*, and that he paid *C* is relevant as an effect of the relevant fact that he contracted with *C*.

Illustration (h), (2)—The fact of notice is relevant as a cause of his knowledge that the real owner could be found.

The other fact is relevant as showing that the alleged cause of the fact in issue had not the effect of causing the fact in issue.

Illustration (i), (3)—For *A*'s intention is a fact in issue. The fact is one which may continue through a space of time, and the previous shooting is an effect of it.

Illustration (j), (4)—For the intention to cause fear is a fact in issue. It is a fact capable of prolonged existence, and the previous letters may be effects of it.

Should it, however, be objected that the fact in issue is intention at a particular moment and not intention through a space of time, Mr Whitworth's reply: that previous intention is a cause of subsequent intention, or both are effects of the same cause.

Illustration (l), (5)—The expressions are relevant as effects of the cause of the fact in issue or as showing absence of cause of the fact in issue.

Illustration (l), (6)—The statements are relevant as effects of effects of the fact in issue.

Illustration (m), (7)—The statements are relevant as effects of the fact in issue.

Illustration (n), (8)—The drawing of *B*'s attention is relevant as a cause of *B*'s knowledge which is a fact in issue.

The fact that *B* was habitually negligent is irrelevant, for it is not connected with the fact in issue.

(1) *A* is sued by *B* for the price of work done by *B* upon a house of which *A* is owner by the order of *C* a contractor. *A*'s defence is that *B*'s contract was with *C*. The fact that *A* paid *C* for the work in question is relevant as proving that *A* did in good faith make over to *C* the management of the work in question so that *C* was in a position to contract with *B* on *C*'s account and not as agent for *A*.

(2) *A* is accused of the dishonest misappropriation of property which he had found and the question is whether when he appropriated it he believed in good faith that the real owner could not be found. The fact that public notice of the loss of the property had been given in the place where *A* was is relevant as showing that *A* did not in good faith believe that the real owner of the property could not be found. The fact that *A* knew or had reason to believe that the notice was given fraudulently by *C* who had heard of the loss of the property and wished to set up a false claim to it is relevant as showing that the fact that *A* knew of the notice did not disprove *A*'s good faith.

(3) *A* is charged with shooting at *B* with intent to kill him. The fact of *A*'s

having previously shot at *B* may be proved.

(4) *A* is charged with sending threatening letters to *B*. Threatening letters previously sent by *A* to *B* may be proved as showing the intention of the letters.

(5) The question is whether *A* has been guilty of cruelty towards *B* his wife. Expressions of their feeling towards each other shortly before or after the alleged cruelty are relevant facts.

(6) The question is whether *A*'s death was caused by poison. Statements made by *A* during his illness as to his symptoms are relevant facts.

(7) The question is what was the state of his health at the time when an assurance on his life was effected. Statements made by *A* as to the state of his health at or near the time in question are relevant facts.

(8) *A* sues *B* for negligence in providing him with a carriage for hire not reasonably fit for use whereby *A* was injured. The fact that *B*'s attention was drawn on other occasions to the defect of that particular carriage is relevant. The fact that *B* was habitually negligent about the carriages which he let for hire is irrelevant.

Illustration (o), (1)—The fact is relevant as an effect of a fact in issue, *B's* intention

The fact that *A* was in the habit of shooting at people is irrelevant, for it is not connected with a fact in issue

Mr Whitworth adds that this case, in which a habit is declared irrelevant, has some resemblance to that of *Illustration (a)*, where a habit is relevant, but that there is a real difference between the two. He says "The man who habitually shoots at people with intent to murder them has in each case a definite intention of killing the particular person shot at. There is not, as far as the facts are stated, any ulterior common object to connect together the fact of the previous shooting and the fact in issue. But in the case of receiving stolen property the ulterior common object of making dishonest gain by receiving supplies the connection."

Illustration (p), (2)—The first fact is relevant as an effect of the cause of his committing the crime

The second fact is irrelevant, as it is not connected with the fact in issue, namely, whether he committed the particular crime

SECTION 15 *Illustration (a), (3)*—The facts are relevant as effects of the cause of the fact in issue

Illustration (b), (4)—The facts are relevant as effects of the cause of *A's* making the particular false entry intentionally

Illustration (c), (5)—The facts are relevant as effects of the cause of the intentional delivery of the rupee in question

SECTION 16 *Illustration (a), (6)*—The facts are relevant as causes of the fact in issue

Illustration (b), (7)—The facts are relevant, the first as a cause of the fact in issue, and the second as affirming the connection of cause and effect between the first and the fact in issue

Mr Whitworth was unfortunately prevented by want of leisure from dealing generally with the criticisms which his essay provoked. One of these was that his first rule was a practical abandonment of the scientific form of

(1) *A* is tried for the murder of *B* by intentionally shooting him dead. The fact that *A* on other occasions shot at *B* is relevant as showing his intention to shoot *B*. The fact that he was in the habit of shooting at people with intent to murder them is irrelevant.

(2) *A* is tried for a crime. The fact that he said something indicating an intention to commit that particular crime is relevant. The fact that he said something indicating a general disposition to commit crimes of that class is irrelevant.

(3) *A* is accused of burning down his house in order to obtain money for which it is insured. The facts that *A* lived in several houses successively each of which he insured in each of which a fire occurred and after each of which fires *A* received payment from a different insurance office are relevant as tending to show that the fires were not accidental.

(4) *A* is employed to receive money from the debtors of *B*. It is his duty to make entries in a book showing the amount received by him. He makes an

entry showing that on a particular occasion he received less than he really did receive. The question is whether this false entry was accidental or intentional. The facts that other entries made by *A* in the same book are false and that the false entry is in each case in favour of *A* are relevant.

(5) *A* is accused of fraudulently delivering to *B* a counterfeit rupee. The question is whether the delivery of the rupee was accidental. The facts that soon before or soon after the delivery to *B* *A* delivered counterfeit rupees to *C*, *D* and *E* are relevant as showing that the delivery to *B* was not accidental.

(6) The question is whether a particular letter was despatched. The facts that it was the ordinary course of business for all letters put in a certain place to be carried to the post and that that particular letter was put into that place are relevant.

(7) The question is whether a particular letter reached *A*. The fact that it was posted in due course and was not returned through the Dead Letter Office are relevant.

the others Mr Whitworth's answer to this in his Preface to the Second Edition of his Pamphlet was that an examination of the connection of the first with the other rules would show that their scientific form was of independent value. The second, third and fourth rules supplied, he contended, a definition of relevancy and would be complete if the subject were the theory of relevancy absolutely. The qualification applied by the first rule was required, because the subject is the theory of relevancy *for the purpose of judicial evidence*. The theory is one thing; its application to a particular purpose is another. He added — "It might be well to have rules that would express at once both the principle and its limitation. Failing this, I have propounded one rule (an unscientific one) as to the limitation and three others (scientific in form) as to the principle. But the importance or unimportance of the failure is to be measured by considering whether questions of difficulty in actual practice usually relate to the limitation of the principle or to the principle itself, in other words, whether, for the solution of such questions unscientific or scientific rules are provided. Now the first rule relates chiefly to what Sir James Stephen speaks of as "wide general causes which apply to all occurrences, are, in most cases, admitted, and do not require proof, and the test in cases of *disputed relevancy* will, I think, usually be found to be one of the other, the scientific rules."

The theory contained in Mr Whitworth's essay was subsequently adopted by Sir James Stephen himself in the earlier edition of his Digest of the Law of Evidence (1). In the present edition Sir J F Stephen substituted another definition of relevancy in place of that contained in the earlier editions and Sir J F Stephen observes, because it gave rather the principle practical rule (2).

Dr Wharton (3) while defining relevancy as that which conduces to the proof of a pertinent hypothesis, a pertinent hypothesis being one which, if sustained, would logically influence the issue, and adopting several of Sir J F Stephen's positions, offers two criticisms as explaining why he cannot accept his scheme as affording a complete solution of the difficulties which beset this branch of evidence. In the first place, the words "cause," and "effect" are open, when used in this connection, to an objection which, though subtle is in some cases fatal. The "cause" of a fact in issue, it is alleged, is relevant, yet whether such a cause produced such a fact is the question the action is often instituted to try, and it is a *petitio principii* to say that the "cause" is relevant because it is the "cause" and that it is shown to be the cause because it is relevant. In the second place, the distinction between "facts in issue" and "fact relevant to fact in issue" cannot be sustained. An issue is never raised as to an evidential fact, the only issues the law knows are those which affirm or deny conclusions from one or more evidential facts. Thus, Sir J F Stephen when explaining the supposed distinction says "A is indicted for the murder of B and pleads guilty. The following facts may be in issue: the fact that A killed B, etc." But if the group of facts classified as facts in issue be scrutinized it will be found that, as they are facts which could not be put in evidence, they are not relevant facts, though they might be relevant hypotheses to be sustained by relevant fact. If Counsel should ask a witness whether "A killed B" the question would, if excepted to, be ruled out, on the ground that it called not for "facts," but for a conclusion from facts, and to such conclusions witnesses are not permitted to testify (4). The only way of proving "facts

(1) Steph Dig pp 156 157

(2) *Ib* p 158. The substituted definition is given *post* in the Introduction to Ch II

(3) A Commentary on the Law of

Evidence in Civil Issues by F Wharton LL.D 3rd Ed 1888 Philadelphia §§ 20 26

(4) See Wharton Ev § 507

when he has to consider whether a fact is relevant? In the first place I answer that this is a question which he has very rarely to consider. Parties to a litigation or their advocates very rarely attempt to offer irrelevant evidence to waste time. They hope to influence what is really irrelevant he would certainly not resort to any abstruse consideration about cause and effect. He would simply consult his own experience." The real discussions which take place before a Judge upon evidence are, as he points out, not as to its relevancy but as to its *admissibility*. And this Act would have been far more intelligible if the language of it had corresponded with a collection of rules not upon relevancy but upon admissibility. In that case whilst their own reason and common sense would have told the Judge and parties what was relevant, it would only have been necessary on an objection to look into the provisions of the Act to see whether there was any rule prohibiting the reception of the particular evidence in question. Whether or no certain kinds of evidence shall be admissible depends on a variety of considerations besides relevancy and the putting forward of relevancy in the Act as if it were the only test is not only erroneous but unfortunate, as it makes the Act difficult to explain and adds to the mystery by which this branch of the law is usually supposed to be surrounded. There is, however, no mystery about the matter if it be remembered that the ordinary processes of reasoning or argument are not left at the door of the Court House and that within it the law does not properly undertake to regulate these processes except as helping by certain rules which may be presented in a readily intelligible manner to discriminate and select the material of fact upon which these are to operate. Legal reasoning, at bottom, is like all other reasoning, though practical considerations come in to shape it. Rules, principles and methods of legal reasoning have, however, figured as rules of evidence to the perplexity and confusion of those who sought for a strong grasp of the subject. The notion may be dismissed that legal reasoning is some natural process by which the human mind is required to infer what does not logically follow. What is called the "legal mind" is still the human mind and must reason according to the laws of its constitution. But to understand properly the Law of Evidence one must detach and hold apart from it all that belongs to that other untechnical and far wider subject (1). The position may be summed up by saying that the laws of reasoning indicate what facts are *relevant*. The Law of Evidence declares which of those facts are *inadmissible*. These latter should be concisely stated and codified. But just as other organic processes are ordinarily and in most cases are the better carried on unconsciously, so little of use is attained and the risk of confusion is involved in an attempted analysis of the reasons. The common-sense and experience of both the parties and the Judge will tell them what they have to prove and what should be proved and what is relevant for that purpose. And if these do not, abstract considerations of causality will not help them, interesting though these may be in inquiries less practical than those which come before a Court of Justice (2).

to contain the whole law of evidence two at least of the general rules of exclusion (including that against hearsay) are not treated in it. The language of s 60 he contends does not as is generally supposed exclude hearsay.

(1) Thayer *op cit*, Ch VI and the same Author's Select Cases on Evidence 14

(2) As matters now stand on an objection to evidence the party tendering it has to search the Act for the section

which justifies its reception. This is not always an easy matter and it is probably owing to this and a not unnatural reluctance to enter into the mazes of the law of causality that there is such popular resort to s 11. In a Code which aimed merely at embodying the rules of exclusion all evidence would be *prima facie* admissible unless the objecting party could show some positive rule in the Code excluding it.

ACT No. I OF 1872.

PASSED BY THE GOVERNOR-GENERAL OF INDIA
IN COUNCIL

(Received the assent of the Governor-General on the 15th
March 1872)

THE INDIAN EVIDENCE ACT. 1872.

The Title of an Act may be resorted to, to explain an enacting clause when doubtful (1) As to the title of an Act giving colour to, and controlling its provisions, *vide* note (2)

The law of evidence applicable in every case is that of the *lex fori* which "governs the Courts whether a witness is competent or not, whether a certain matter requires to be proved by writing or not, whether certain evidence proves a certain fact or not, these and the like questions must be determined, not *lege loci contractus* but by the law of the country where the question arises, where the remedy is sought to be enforced and where the Court sits to enforce it" (3) As to the law applicable in this country (*vide post*)

WHEREAS it is expedient to consolidate, define and amend the Law of Evidence; it is hereby enacted as follows.—<sup>The Pre-
amble</sup>

COMMENTARY.

The Preamble shows that this Act is not merely a fragmentary enactment but a consolidatory enactment repealing all rules of evidence other than those saved by the last part of the second section (1)

The " " " " India is contained in this Act relating to the subject of evi-
and in dence " tion, or enacted subsequent to

102, 103	Law of Evidence
104	not contained
105	British India
106	evidence is admis

sible under some provision either of this Act or of the Acts abovementioned for there are no other rules of evidence in force in British India except such as are contained in these Acts. Thus it has been held that since, under

(1) *Hurro Chunder v Shooro Dhonee*,
9 W R 402 404 405 (F B) (1868)
see *Salkeld v Johnson* 2 Exch 256 282
283

(2) *Uda Begari v. Imam ud din* 2 A 90 (1878) and see *Alangamonjori v. Sonamoni* 8 C 637 639 643 (1882) *Crauford v. Spooner*, 4 M I A, 179

187 (1846)

(3) *Bain v. Whitehead & Railway Co.*,
3 H. L. Cas. 119 per Lord Brougham.

(4) *Collector of Gorakhpur v Palak diani Singh* 12 A 35 (1899) As to construction of consolidating Acts, see Introduction

section 2, the English Extradition Act, which is applicable to this country, is part of the *lex fori*, records authenticated in the manner prescribed by that Act are admissible (1) So where certain administration-papers were tendered on behalf of the plaintiff, the Privy Council observed and held: "The Indian Evidence Act has repealed all rules of evidence not contained in any Statute or Regulation, and the plaintiff must therefore show that these papers are admissible under some provision of the Indian Evidence Act" (2) "Instead of assuming the English Law of Evidence, and then inquiring what changes the

complete Code of the Law of Evidence for British India (4)

Headings

The Headings prefixed to sections or sets of sections are regarded as preambles to those sections (5) The headings are not to be treated as if they were marginal notes, or were introduced into the Act merely for the purpose of classifying the enactments They constitute an important part of the Act itself, and may be read not only as explaining the sections which immediately follow them, as a preamble to a Statute may be looked to, to explain its enactments, but as affording a better way to the construction of the sections which follow than might be afforded by a mere preamble (6)

Interpretation-clauses

Legislative definitions or interpretations, being necessarily of a very general nature, not only do not control, but are controlled by, subsequent and express provisions on the subject matter of the same definition, they are by no means to be strictly construed; they must yield to enactments of a special and precise nature, and, like words in Schedules, they are received rather as general examples than as overruling provisions (7) The effect of an interpretation-clause is to give the meaning assigned by it to the word interpreted in all places of the Act in which that word occurs, wherever that word appears it must, unless the contrary plainly appear, be understood in accordance with the meaning so assigned. But it is by no means defined shall have annexed to it by any other Act of the Legislature (8) Where a definition "includes" certain persons or things, it does not, therefore, necessarily exclude other persons and things not so included; for when a definition is intended to be exclusive, it would seem the form of words (as in the definition of "fact") is "means and includes" (9) Where a word has acquired a special technical meaning, a defining clause in the Act,

(1) *In the matter of Rudolf Stallman*, 39 C., 164 (1911)

(2) See *Lekhraj Kuar v Mahpal Singh*, 7 I A 70 (1879), 5 C., 754, 6 C L R 593, also *Collector of Gorakhpur v Palahdhari Singh*, 12 A., 11, 12 19, 20 34, 35 43 (1889) This section in effect prohibits the employment of any kind of evidence not specifically authorised by the Act itself *R v Abdullah* 7 A., 399 (1885) (but see also *ib*, p 401) *Muhammad Allahabad v Muhammad Ismail*, 10 A., 235 (1888), *R v Pitamber Jena* 2 B., 64 (1877)

(3) *R v Ashootosh Chuckerbutty*, 4 C., 491 (1878) *per* Jackson, J

(4) *R v Kartick Chunder*, 14 C., 721, 778 F B (1887)

(5) *Maxwell on Statutes*, 6th Ed 92

(6) *Eastern Counties, etc., Companies v Warrage* 9 H L C 41, *Dwarka Nath Chaudhuri v Tafezar Rahaman Sarkar*, 44 C 267 (1917), *Woodroffe, J*

(7) *Uda Begam v Imam ud din*, 2 A., 74 86 (1878), *Dwarris on Statutes* 2nd Ed (1848) 509 *R v Justice of Cambridgeshire*, 7 A & E, 480, 491

(8) *Uma Churn v Ajadantissa Bibee*, 12 C 430, 432 433 (1885), see also *R v Ashootosh Chuckerbutty*, 4 C., 492 (1878)

(9) *R v Ashootosh Chuckerbutty*, 4 C., 493 (1878)

(10) *Ruckmabaye v Lulloobhoy Motichund* 5 M I A., 234 (1852), *Futteshangji Jastantsangji v Dessai Kulhanraji*, 21 W R., 178 (1874)

The words of the section are not limited to the Illustrations given. The plain meaning of the section is that the effect would be to curtail the power of the Legislature to confer (1) Illustrations, which form part of the Acts and are merely go to show the intention or respects they may be useful, provided they are correct (2) The practice of looking more at the Illustrations than at the words of the section of the Act is a mistake. The Illustrations are only intended to assist in construing the language of the Act (3)

It has been held in England that marginal notes are no part of sections so as to throw light upon questions of construction and that they are merely abstracts of the clauses intended to catch the eye and to make the task of reference easier and more expeditious (4). As regards Indian Acts there appears to have been some difference of opinion. In the undermentioned case (5) the Court was disposed to think that such notes might be used for the purpose of interpreting Indian Acts, the State Publication of such Acts being framed with marginal notes. In a subsequent case (6) Pethuram, C J, referred to the marginal notes to s 5, Act XXI of 1870, and s 149, Act V of 1881, and said that although the marginal notes were not any part of the Act, they did indicate the object of the sections, and in a later decision (7), it was said with reference to s 147 of the Criminal Procedure Code — "The only reference to easements is in the marginal note, which is no part of the enactment, but even the marginal note does not restrict the application of the section in the manner suggested." In both of these cases the Court, while holding that marginal notes formed no part of an enactment, appear to have referred to the same on the question of construction. In, however, the latest reported decisions the Court held that marginal notes did not form part of the section and could not be referred to for the purpose of construing it (8).

General observations on this matter are contained in the *Introduction* to which the reader is referred. The modern general rule is that Statutes must be construed according to their plain meaning, neither adding to, nor subtracting from, them (9). The Court will put a reasonable construction upon an Act, and will not allow the strict language of a section to prevent their giving

(1) *Koylash Chunder v Sonatun Chun* 7 C 137 135 (1881), s. c. 8 C L R 283. *Exempla illustrant non restringunt legem* Co Litt 24 (a).

(2) *Anan Ram v Mehni Lal* 1 A 487 495 496 (1877) see also *Dubey Sahai v Ganesh Lal* 1 A 34 36 (1875).

(3) *Slakh Omed v Nidhee Ram* 22 W R 367 (1874) see also *R v Rahimat* 1 B 147 155 (1876) *Soorjo Narain v Bissambhur Singh* 23 W R 311 (1875) *Gujju Lal v Fatteh Lal* 6 C 171 185 187 (1880) [illustration referred to to show meaning of word in s 13 *post*] *R v Chidda Khan* 3 A 573 575 (1881) (id).

(4) Wilberforce 293 214 Maxwell 6th Ed 76, Hardcastle 3rd Ed 205 *Claydon v Green* 3 C P 511 *Sutton v Sutton* 22 Ch D 511 (1882) correcting dictum in *In re Venour's Settled Estates* 2 Ch D 522 525.

(5) *Kameshar Prasad v Bhikun Narain* 20 C 609 (1893) per Pigot J at p 629.

(6) *Administrator General Bengal v*

Press Lal 21 C 758 (1894).

(7) *Dulhi Mullah v Halaay* 23 C 55 59 (1895).

(8) *Punardeo Narain v Ram Sarup*, 25 C 858 (1898) *Tiakura n Balraj v Rai Jagatpal* 8 C W N 699 (1904) s. c. 6 A 393.

(9) Maxwell 2 *Gurcebullah Sirkar v Mohin Lal* 7 C 127 (1881) when the terms of an Act are clear and plain it is the duty of the Court to give effect to it as it stands *Pilpott v St George's Hospital* 6 H L Cas 338, *Bu-loor Ruheem v Slumsoonnissa Begum* 8 W R P C 3 12 (1867) s. c. 11 M 1 A 551 604 *R v Bal Krishna* 17 B 577 578 (1893) but many cases may be quoted, in which in order to avoid injustice or absurdity words of general import have been restricted to particular meanings *ib* 578 *Bamasoonderee v Verner* 13 B L R, 193 (18 4) *Wells v L T & S Ry Co* 5 Ch D 126 130 *Fastern Counties etc Compan v Murrage* 9 H L C 32 36.

it such a construction (1) In considering the rules of evidence it is necessary to look to the reason of the matter (2) A construction effecting a most important departure from the English rule of evidence was considered in the under mentioned case (3) Whatever be the meaning of a word in one portion of a section, the meaning of the same word in another portion must, according to the principles of construction, be the same (4) The meaning of a word may be ascertained by reference to the words with which it is associated, and its use

, and to its allocation in a construction making inclusion on a question of construction, it is relevant that the Indian Evidence Act was passed by the Legislature under the direction of a skilled lawyer that the construction of the Act is marked by careful and methodical arrangement, and that many of the more important expressions used in it are plainly interpreted. It would be wholly inconsistent with the plan of such an enactment that a specific rule contained in one part of it should at the same time be contained in or deducible from, one or more other rules relating apparently to topics quite distinct which rules should be at the same time so expressed as to include not merely the specific rule in question, but also matters which that rule taken by itself would specifically exclude (8) A construction may be adopted by reference to the entirety of a section and also to other sections (9) The word "may" in a Statute is sometimes, for the purpose of giving effect to the intention of the Legislature interpreted as equivalent to 'must' or 'shall,' but in the absence of proof of such intention it is construed in its natural and therefore in a permissive and not in an obligatory sense (10) It is not for a Civil Court to speculate upon what was in the mind of the Legislature in passing a law but the Court must be bound by the words of the law judicially construed (11) The intention of the Legislature must be ascertained

(1) *Gureebullah Sirkar v Mohun Lall*, supra 130 as to latent propositions of law see *Leman v Damodaraya* 1 M 158 (1876)

(2) *Gujju Lall v Fateh Lall* 6 C 171, 182 (1880) All rules must be construed with reference to their object per *Erle J in Phelps v Preu* 3 E & B, 441 So also *Couch C J in Beharee Lall v Kannee Soondaree* 14 W R 319 320 (18 0) in dealing with the subject matter of s 92 *post* said in applying the rule we must always consider what is the reason of it

(3) *Ranchoddas Krishnadas v Bapu Narhar* 10 B 439 442 (1886), *Gujju Lall v Fateh Lall* supra 189 (intention to depart entirely from English rule), *Prothabharjat v Visambhar Pandit* 8 B 313 371 (1884) *R v Gopal Dass* 3 M 271 279 283 (1881) [construction from consideration of alteration called for in English Law of Evidence *ib* 279] See remarks of Lord Herschell as to the interpretation of codes in *Bank of England v Vagliano Brothers* L R App Cas (1891) 107 at pp 144 145, cited *ante* in Introduction

(4) *Collector of Gorakhpur v Palakdlari Singh* supra 14 so with reference to ss 26 and 80 of this Act the Court in *R v Nagla Kala* 22 B 235 238 (1896) observed that it would be unreasonable to

hold that the Legislature used the same word in different senses in the same Act

(5) *Gujju Lall v Fateh Lall* supra 166 181

(6) *In re Pjari Lall* 4 C L R 504 506 (1879)

(7) *Gujju Lall v Fateh Lall* supra 183 *In re Pjari Lall* supra 506—508 *Alangamonjori Dabee v Sonanoni Dabee* 8 C 637 640 642 (1882), [no clause sentence or word shall be superfluous void or insignificant] *Mohar Sheikh v R* 21 C 399 400 (1893)

(8) *Gujju Lall v Fateh Lall*, supra, 183 184

(9) *In re Asgar Hossain* 8 C L R 125 (1880)

(10) *Dell and London Bank v Orchard* 3 C 47 (1877) see also *R v Aloo Paroo* 3 M 1 A 488 497 493 (1847) *Anund Chunder v Pinchoo Lall* 14 W R, F B 33 36 (1870) s c 5 B L R 691 699, *Julius v Bishop of Orford* L R 5 App Cas 214 *Ram Dajal v Modan Mohan* 21 A 432 (1899)

(11) *Mohesh Chunder v Madhub Chunder* 13 W R 85 (1870), *Crawford v Spooner* supra 187, *Buclur Raheem v Shumsoonnissa Begum* supra 12 *Eastern Counties etc Companies v Murrage* supra 40 [judicature trespassing on province of Legislature]

from the words of a Statute and not from any general inferences to be drawn from the nature of the objects dealt with by the Statute (1) The Court knows nothing of the intention of an Act except from the words in which it is expressed applied to the facts existing at the time (2) In case of doubt or difficulty over the interpretation of any of the sections of the Evidence Act, reference for help should be made both to the case law of the land which existed before the passing of the Act, and also to juristic principles, which only represent the common consensus of juristic reasoning (3) When the rules of exclusion and the exception to them are definitely laid down, the exception is not to be extended to cases not properly falling within it (4) Where a clause in an Act which has received a judicial interpretation is re enacted in the same terms the Legislature is to be deemed to have adopted that interpretation (5) It is an elementary rule of construction that a thing which is within the letter of a Statute is not within the Statute unless it be also within the meaning of

a subsequent Statute on the same branch of the law it is perfectly legitimate to refer to the under mentioned case (9) Lord Brougham perfectly clear that in an Act of Parliament there is no more than there are such cases as are having a greater retrospective action than its language plainly indicates (10) When an Act does not expressly purport to supersede an earlier one, it should be interpreted so as to avoid conflict with it if possible (11)

(1) *Nanak Ran v Mehini Lall* 1 A, 496 supra *Fordyce v Bridges*, 1 H L Cas 14

(2) *Ib Logan v Courtown* 13 Beav, 22 and see *Crawford v Spooner* supra 187 188 per Lord Brougham as to cases dealing with the intention under this Act see e.g. *Gujju Lall v Fattah Lall* supra 181 In re *Pjari Lall* supra 508 *Framji v Mohansing* 18 B 263 278 279 (1893) [identity of language used in section with that employed in Taylor on Ev] *R v Gopal Doss* supra

(3) *Collector of Gorakhpur v Palak dhari Singh* supra 37 38

(4) *R v Jora Hasji* 11 Bom H C R 242 (1874)

(5) *Re Campbell* 5 Ch App 703 cf

following sections of this Act with those of Act II of 1855 — 18 32 37 57 81, 83 84 118 120 123 124 126 129 131 162 167 and 25 26 27 with ss 148—150 Act XXV of 1861

(6) *R v Bal Krishna* 17 B 577 (1893)

(7) *R v Sitaram Vithal* 11 B 658 (1887)

(8) *Collector of Sea Customs v P Chithambaram* 1 M, 114 (1876)

(9) *Duke of Devonshire v O Connor* L R 24 Q B D 478

(10) *Munshoori Bibi v Akel Mahmud* 27 C L J 316 (1913) *Budhu Koer v Hafiz Husain* 28 C L J 274 (1913)

(11) *Rangacharya v Dasacharya* 37 B 231 (1913)

PART I.

RELEVANCY OF FACTS.

CHAPTER I.

PRELIMINARY.

Short Title,
Commence-
ment of Act,
Extent of
Act.

1. This Act may be called "The Indian Evidence Act, 1872." It extends to the whole of British India, and applies to all judicial proceedings in or before any Court(1), including Court-Martial, "other than Courts-Martial convened under the Army Act" (amended by Act XVIII of 1919) but not to affidavits presented to any Court or Officer, nor to proceedings before an Arbitrator;

and it shall come into force on the first day of September, 1872.

COMMENTARY.

Extent of
Act

The Act extends to the whole of "British India" which means the terri-
tories of
see 5
while
Briti (3).

Provinces Tarai (5) The Act has also been declared to be in force in Upper
Hill District of Arakan(7)
ncy Territories(9); in the
and has been applied to

(1) Defined in s 3, *post* As to the meaning of "judicial enquiry" and "judicial proceeding" see *R v Tulja*, 12 B, 36, 41, 42 (1887), *Atchayya v Ganapaya*, 15 M, 138, 143 (1891), Cr Pr Code, s 4 (m), Mayne's Criminal Law of India, 1896, 4th Ed, pp 372-379, *R v Price*, L R, 6 Q B, 418, *R v Gholam Ismail*, 1 A, 1, 13 (1875)

(2) See Act X of 1897; Act I of 1903, and Act X of 1914

(3) i Acts XIV and XV of 1874 As to Act XIV of 1874 (Scheduled Districts) see Act XXXVIII of 1920, Act II of 1893 and earlier amending Acts As to Act XV of 1874 (Laws Local Extent) see Act I of 1903 and earlier amending

Acts, Bengal Act II of 1913, B & O Act I of 1913

(4) *Gazette of India*, Oct 22 1881, Pt I, p 504

(5) *Ib*, Sept 23, 1876, Pt I, p 505

(6) Act XIII of 1898, s 4 [Burma Code Ed, 1898 p 364], and Act IV of 1909

(7) Reg I of 1916, s 2

(8) Reg II of 1913 s 3, Regs VIII & IX of 1896; Reg II of 1919 (Baluchistan).

(9) Baluchistan Agency Laws Law, 1890 s 4 [ib, p 137]

(10) Reg III of 1872 as amended by Reg III of 1899, s 3

(11) Reg III of 1913, s 3

certain Native States in India or places therein The Act has been made applicable by Her Majesty in Council in certain places beyond the limits of India for the purposes of cases in which Her Majesty has jurisdiction and has been adopted by certain Native States of India as their law

In the *Appendix* will be found a complete list revised by the Legislative Department of the Native States in India or places therein to which the Indian Evidence Act (I of 1872) has been applied by the Governor General in Council

The Act only applies to Native Courts Martial (1) In the case of European Courts Martial, a Court Martial is not, as respects the conduct of its proceedings or the reception or rejection of evidence or as respects any other matter or thing whatsoever, subject to the provisions of the Indian Evidence Act The rules of evidence to be adopted in proceedings before such Courts Martial shall be the same as those which are followed in Civil Courts in England (2) This is therefore an exception to the general rule that the *lex fori* determines the law of evidence (*vide post*) The Act is (subject to such modification as the Governor General in Council may direct) applicable to all proceedings before Indian Marine Courts (3)

Courts-
Martial
and Marine
Courts

The Civil Procedure Code regulates the matters to which affidavits must be confined These are such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications on which a statement of his belief may be admitted, provided that reasonable grounds thereof be set forth (4) The exception here mentioned does not apply to any proceeding where the rights of the parties (5) are given on information at so short a notice (6) So too, in interlocutory proceedings cross-examination will not be allowed on affidavit because it would defeat the object of the whole proceedings which is despatched (7) The costs of every affidavit unnecessarily setting forth matters of hearsay or argumentative matter or copies of or extracts from documents, are (unless the Court otherwise directs) payable by the party filing the same (8) The safeguards for truth in affidavits are the provisions for the production of the witness for cross examination (9), and the provisions of the Penal Law relating to the giving of false evidence (10)

Affidavits

Proceedings before arbitrators are regulated by the Civil Procedure Code (11) As an arbitrator is not in procedure bound by technical rules of Court and is appointed to give an equitable award (12) so also he is unfettered by technical rules of evidence, and it is not a valid objection to an award that

Arbitration

(1) Under Act V of 1869 Repealed by Act VIII of 1911

(2) 44 & 45 Vic cap 58 ss 127 & 128 *et* also ss 163—165 (Army Discipline and Regulation Act 1881)

(3) Act XIV of 1887 s 68 V of 1898 XVII of 1898 I of 1899

(4) Civ Pr Code O XIV r 3 (1) p 851 *see* Whitley Stokes 33 Cr Pr Code s 539 In the matter of the petition of *Iswar Chundra* 14 C 653 On evidence by affidavit, *et* Powell Ev 9th Ed 695—697 Best Ev §§ 101 118 121 *et seq* Taylor Ev § 1394 *et seq* Legal Remembrancer *et* *Matlal Ghose* S B 41 C 173 (1914) A statement on information and belief is not admissible in a case of contempt of Court

(5) *Gilbert v Endean* L R, 9 Ch Div 259 Taylor Ev § 1396 B

(6) *Gilbert v Endean* L R 9 Ch Div 259 at p 266 *per* Jessel M R *see* also *Chard v Jarvis* 9 Q B D 178 180 *Bonnard v Perryman* (1891) 2 Ch 269 *re J L Young Manufacturing Co* (1900) 2 Ch 753 and *Lumley v Osborne* (1901) 1 K B 537

(7) Civ Pr Code *supra*
(8) Civ Pr Code O XIV r 1 2 p 850

(9) O XIV
(10) Penal Code Ch XI

(11) Civ Pr Code The Second Schedule pp 1463—1474

(12) *Reedoy Krasto v Puddo Lochun* 1 W R 17 (1864) But as to stamp *see* now Act II of 1899 ss 33 34 (*See* also the various provincial laws passed in 1922 the law is in Bengal contained in Beng Act II of 1922)

the arbitrator has not acted in strict conformity to the rules of evidence (1) The word "Court" in this Act does not include an arbitrator (2) Though the Act does not apply to proceedings before an arbitrator, yet the latter must not receive and act upon evidence or decide upon grounds which render his award utterly unfair or worthless He must not import his own knowledge into a case or base his decision upon information obtained otherwise than from the evidence submitted to him by the parties to the cause Where on the face of an award it appeared that the arbitrator principally relied on an admission (3) which he alleged was made to him by the defendant when a former suit between the plaintiff's mortgagee and the defendant was pending, and the arbitrator further stated that he relied on enquiries made by him before the reference to arbitration, and that he made further enquiries since the reference not stating of whom these different enquiries were made, and not seeming to have taken evidence and examined witnesses in the ordinary way, it was held that he acted improperly in importing the previous enquiry alleged to have been made by him, and was quite wrong in relying on what he called admissions, made to him by the defendant in the former proceedings, and that an award based upon such a foundation was utterly unfair and useless (4) An arbitrator must not receive affidavits instead of *in a voce* evidence when he is directed to examine the witnesses on oath He must not make his award, or having allowed the party reasonable

He must not, contrary to the principles or a party privately, or in the absence of his opponent, unless the irregularity be waived by the parties If the arbitrator proceed, *ex parte*, without sufficient cause, or without giving the party absenting himself clear notice of his intention so to proceed, the award will be avoided So likewise if he refused to hear the evidence on a claim within the scope of a reference on a mistaken supposition that it is not within it, but not if he erroneously reject admissible, or receive inadmissible, evidence His refusing to hear additional evidence tendered when the whole case is referred back to him by a Court is fatal, but not so when the award is sent back with a view to a particular amendment only being made (5) The rule of law which excludes communications made "without prejudice" is as binding upon arbitrators as upon Courts of Justice, notwithstanding the first section of the Evidence Act, and an arbitrator is wrong in receiving and acting upon such a communication (6) As much as possible the arbitrator should decline to receive private communications from either litigant respecting the subject matter of the reference Except in the few cases where exceptions are unavoidable, as where the arbitrator is justified in proceeding *ex parte*, both sides must be heard and each in the presence of the other (7) Refusal by an arbitrator to call witnesses produced by either party amounts to judicial misconduct (8) Lastly, arbitrators ought only to take such evidence as is required by the terms of the agreement referring the question in dispute to arbitration (9)

(1) *Suppu v Govinda Charjar*, 11 M 87 (1887)

(2) S 3 *post*

(3) As to the use of evidence in a subsequent suit of admissions by parties in a former arbitration see *Huronath Sircar v Preonath Sircar*, 7 W R 249 (1867) and notes to ss 17, 18 33 *post*

(4) *Kanhya Chand v Ram Chander*, 24 W R 81 (1875)

(5) Russell on *The Power and Duty of an Arbitrator*, 4th Ed p 646 cited and adopted in *Gunga Sahai v Lekhraj Singh*

9 A 264 265 (1886) *Cursetji Khambatta v Crowder* 18 B 299 (1894) [arbitrator ought not to receive evidence from one side in the absence of the other]

(6) *Howard v Wilson* 4 C p 231 (1878) See s 23 *post*

(7) Russell *op cit* pp 181 and 182, cited and adopted in *Gunga Sahai v Lekhraj Singh* 9 A 565 (1886)

(8) *Rughoobur Doyal v Maina Koer*, 12 C L R 564 (1883)

(9) *Krishna Kanta v Bidya Sundaree* 2 B L R App 25 (1869)

2. On and from that day the following laws shall be repealed:—

Repeal of
Enact-
ments

- 1 All rules of Evidence not contained in any Statute, Act or Regulation in force in any part of British India;
- 2 All such rules, laws and regulations as have acquired the force of law under the 25th Section of the "Indian Councils Act, 1861" (1), in so far as they relate to any matter herein provided for; and
- 3 The enactments mentioned in the schedule hereto, to the extent specified in the third column of the said schedule

But nothing herein contained shall be deemed to affect any provision of any Statute, Act or Regulation in force in any part of British India and not hereby expressly repealed

Repeal

See Introduction and notes on Preamble

3. In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context —

Interpreta-
tion Clause

"Court" includes all Judges(2) and Magistrates(3), and all persons, except arbitrators, legally authorized to take evidence

Court

s 1 (*Proceedings before Arbitrators*)

s 3 (*Evidence*)

COMMENTARY.

See notes to Preamble

The definition of Court is framed only for the purposes of the Act itself and should not be extended beyond its legitimate scope. Special laws must be confined in their operation to their special object (4). The definition is not meant to be exhaustive (5). The word means not only the Judge in a trial by a Judge and jury (6). A Commissioner is a person herefore the provisions of the Act will under the Civil or Criminal Procedure an enquiry under the Benaul Land

Court

(1) 24 & 25 Vic cap 67 Clause (2) repeals rules relating to evidence enacted in Non Regulated Provinces prior to this Statute and which acquired the force of Law under the 25th section thereof

(2) Penal Code s 19 General Clauses Act

(3) Cf General Clauses Act Cr Pr Code s 3

(4) *R v Tilja* 12 B 43 (1887)
Attorney General v Moore L R 3 Ex Div 276
R v Rani Lall 15 A 141

(1893) but see *Atchayya v Gangayya* 15 M 138 144 147 148 (1891) and *In re Sardars Lall* 13 B L R App 40 (1874) s c 22 W R Cr 10

(5) *R v Asitootosh Chuckerbutty* 4 C. 488 493 (1878)

(6) *Ib* 490

(7) C Pr Code O XXXI r 1—10 pp 1088—1097 Cr Pr Code ss. 503—508 see also *Atchayya v Gangayya* 15 A at p 147

Registration Act, for the purpose of registering the names of rival claimants is a Court within the meaning of this Act and the enquiry held by him is a judicial enquiry (1)

“Fact” means and includes —

Fact

- 1 Any thing, state of things, or relation of things, capable of being perceived by the senses,
- 2 Any mental condition of which any person is conscious.

Illustrations

(a) That there are certain objects arranged in a certain order in a certain place is a fact

(b) That a man heard or saw something is a fact

(c) That a man said certain words is a fact

(d) That a man holds a certain opinion has a certain intention acts in good faith or fraudulently, or uses a particular word in a particular sense or is or was at a specified time conscious of a particular sensation is a fact

(e) That a man has a certain reputation is a fact

s 3 (Relevant fact)

s 3 (Fact in issue)

COMMENTARY

Fact

The first clause refers to *external* facts the subject of perception by the five “best marked” senses, and the second to *internal* facts the subject of consciousness (2), (a), (b) and (c) are illustrations of the first clause (d) and (e) of the second. Facts are thus (adopting the classification of Bentham) (3) either *physical*, e.g., the existence of visible objects, or *psychological*, e.g., the intention or *animus* of a particular individual in doing a particular act. The latter class of facts are incapable of direct proof by the testimony of witnesses, their existence can only be ascertained either by the confession of the party whose mind is their seat or by presumptive inference from physical facts (4). This constitutes their only difference. When it is affirmed that a man has a given intention, the matter affirmed is one which he and only he can perceive, when it is affirmed that a man is sitting or standing the matter affirmed is one which may be perceived not only by the man himself but by any other person able to see and favourably situated for the purpose. But the circumstance that either event is regarded as being or as having been, capable of being perceived by some one or other, is what we mean and all that we mean, when we say that it exists or existed, or when we denote the same thing by calling it a fact. The word “fact” is sometimes opposed to theory, sometimes to opinion, sometimes to feeling, but all these modes of using it are more or less rhetorical (5). Facts may also be either *events* or *states of things*. By an “event” is meant “some motion or change considered as having come about either in the course of nature or through the agency of human will,” in which latter case it is called an “act” or “action”. The fall of a tree is an “event,” the existence of the tree is a “state of things” both are alike facts (6). The remaining division of facts is into *positive* or *affirmative* and *negative*. The existence of a certain state of things is a positive or affirmative fact—the non-existence of it is a negative fact. “This distinction unlike both the former,

(1) *Rana Singh v Harakdhars Singh*
47 I C 710

(2) Steph Introd 19—21 Norton Ev
93 Steph Dig Art. 1 Fact is any
thing that is the subject of testimony
Ram on Facts 3

(3) 1 Benth Jud Ev 45

(4) Best Ev 6 7

(5) Steph Introd 20 21

(6) Best Fv 7 1 Benth Jud. Ev.
47 48

does not belong to the nature of facts themselves but to that of the discourse which we employ in speaking of them' (1) 'Matter of fact has been defined to be anything which is the subject of testimony, "matter of law, is the general law of the land of which Courts will take judicial cognisance (2) The fact sought to be proved or *factum probandum* is termed the principal fact," the means of proof or the facts which tend to establish it 'evidentiary facts' (3)

One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts (4) Relevant

The expression "facts in issue" means and includes— Facts in issue
any fact from which, either by itself or in connection with other facts, the existence non existence nature or extent of any right, liability or disability, asserted or denied in any suit or proceeding, necessarily follows

Explanation —Whenever, under the provisions of the law for the time being in force relating to Civil Procedure, any Court records an issue of fact, the fact to be asserted or denied in the answer to such issue is a fact in issue (5)

Illustrations

4 is accused of the murder of B At his trial the following facts may be an issue —
That A caused B's death
That A intended to cause B's death,
That A had received grave and sudden provocation from B
That A, at the time of doing the act which caused B's death was by reason of unsoundness of mind incapable of knowing its nature

s 3 (Fact)

COMMENTARY

'Relevant in this Act means it has been said admissible (6) Facts may be related to rights and liabilities in one of two ways —(a) They may by themselves or in connection with other facts that the existence of the disputed right or liability from them From the fact that A is the eldest sity the inference that A is by the law of England the heir at law of B and that he has such rights as that status involves From the fact that A caused the death of B under certain circumstances and with a certain intention or knowledge, there arises of necessity the inference that A murdered B and is Relation of facts to rights and liabilities

(1) 1 Benth Jud Ev 49 Best Ev
7 (2) Best Ev 19
(3) 1 Benth Jud Ev 18 cf Steph Dg Art 1 Steph Intro 19—21
Best Ev 6 7 19 Norton Ev 93
Goodeve Ev 4—16
(4) See ss 5—55 post Steph Dig p 2 Relevant cognate expressions occur in ss 8 13 3 3 cl (8) 155 147 148 153 the expression irrelevant occurs in ss 24 29 43 5 54 163 Whitley Stokes 851
(5) Civ Pr Code O XIV rr 1—7 pp 813—872 The expression facts (or fact) in issue occurs in ss 5 6 7 8 9 11 1 21 111 (d) 33 36 43 questions in issue s 33 matter in issue s 132 Whitley Stokes 857
(6) Lala Lakshmi v Sayed Haider 3 C W N 22111 (1899) per Lord Hobhouse

liable to the punishment provided by law for murder. Facts thus related to a proceeding may be called facts in issue, unless their existence is undisputed — (b) Facts which are not themselves in issue in the sense above explained, may affect the probability of the existence of facts in issue and be used as the foundation of inferences respecting them, such facts are described in the Evidence Act as relevant facts (1). All the facts with which it can in any event be necessary for Courts of Justice to concern themselves, are included in these two classes. What facts are in issue in particular cases is a question to be determined by the substantive law, or in some instances by that branch of the law of procedure which regulates the forms of pleading, Civil or Criminal (2). A judgment must be based upon facts declared by this Act to be relevant and duly proved (3).

' Document '

"Document" means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter (4).

s 3 (Document produced for inspection of Court)

Illustrations

- A writing is a document,
- Words printed, lithographed or photographed are documents
- A map or plan is a document,
- An inscription on a metal plate or stone is a document
- A caricature is a document

"Evidence" means and includes —

' Evidence '

1. All statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under enquiry such statements are called oral evidence
2. All documents produced for the inspection of the Court such documents are called documentary evidence (5)

Ch IV (Oral Evidence)

ss 62, 64 165 (Primary Evidence)

Ch V (Documentary Evidence)

ss 63, 65 66 (Secondary Evidence)

s 60 (Direct Evidence)

COMMENTARY.

' Evidence '

The word "evidence" as generally employed is ambiguous (a) It some times means the words uttered and things exhibited by witnesses before a Court of Justice, (b) at other times it means the facts proved to exist by those words or things, and regarded as the groundwork of inferences as to other facts not so proved, (c) again it is sometimes used as meaning to assert that a particular fact is relevant to the matter under enquiry (6). The word in this

(1) For example of a fact in issue and a relevant fact see *Kaung Hla Pru v San Pa* 3 L B R 90

(2) Steph Introd 12, 13 cf Goodeve, Fv 316 *et seq*, Best Ev, 20, Steph Dig 2

(3) S 165 *post*

(4) Cf Indian Code s 29

(5) Steph Introd 3 *ib* D g Art 1

The expression Documentary Evidence occurs only in the headings to Chapters V and VI Whitley Stokes 852, as to oral evidence *v post* ss 59 60 91, Expl (3) 119 44 Expl The meaning of the term is not confined to proof before a judicial tribunal, *Srinivasa v R*, 4 M 395 (1881)

(6) Steph Introd, 3, 4

Act is used in the sense of the first clause. As thus used it signifies only the *instruments* by means of which relevant facts are brought before the Court (viz, witnesses and documents), and by means of which the Court is convinced of these facts (1).

Instruments of evidence or the *media* through which the evidence of facts, either disputed or required to be proved, is conveyed to the mind of a judicial tribunal have been divided into—(a) witnesses, (b) documents, (c) real evidence, including evidence furnished by things as distinguished from persons, as well as evidence furnished by persons considered as things, *i.e.*, in respect of such properties as belong to them in common with things (2).

This real evidence may be (a) reported, or (b) immediate (3). Cl (a) properly falls under the first class of instruments (witnesses). Cl (b) describes that limited portion of real evidence of which the tribunal is the original percipient witness, *e.g.*, where an offence or contempt is committed in presence of a tribunal, it has direct real evidence of the fact (4). The demeanour of witnesses (5), the demeanour, conduct and statements of parties (6), local investigation by the Judge (7), a view by jury or assessors (8), are all instances of real evidence. Cl (b) thus also includes material things other than documents produced for the inspection of the Court (called in the Draft Bill 'material evidence'), *e.g.*, the property stolen, models, weapons or other things to be produced in evidence and which are required to be transmitted to the Court of Sessions or High Court (9). This 'real evidence' does not form part of the definition of 'evidence' given in the Act, inasmuch as the Court is in all cases the original percipient witness, and further in the case of 'material evidence' in so far as it is spoken to by witnesses (10), it falls properly under the first class of instruments. The things so produced are relevant facts to be proved by 'evidence,' *i.e.*, by oral testimony of those who know of them (11). The Court may require the production of such material things for its inspection (12). Professor Wigmore discards the phrase 'real evidence' as misleading, and substitutes 'autoptic preference' explaining that a fact is evidenced autoptically when it is offered for direct perception by the senses of the tribunal

(1) Norton Ev 95, Field Ev 6th Ed 14, as to instruments of evidence see Best Ev § 123.

(2) Best Ev pp 109 196 Goodeve Ev 11. Personal Evidence is that which is reported by witnesses. Another division of evidence is that into 'original or immediate and hearsay or mediate.' The former is that which a witness reports himself to have seen or heard through the medium of his own senses, the latter that which is not arrived at by the personal knowledge of the witness. see Norton Ev 28 29. Best Ev §§ 27 31 and text *post*.

(3) Best Ev pp 183 184 Goodeve Ev 11 12 14 16.

(4) Best Ev p 187.

(5) Woodroffe's Civ. Pr. Code O XXIII r 12 p 846 Cr. Pr. Code s 363. As to the importance of observation of demeanour see *R v Madhub Chunder* 21 W R Cr 13 14 (1874). *Starkie* Ev 818. Best Ev § 21. Field Ev 6th Ed 29. *R v Bertrand L P* 1 P C 515. In all cases in which the evidence is conflicting it is the duty of a Court of Appeal to have great

regard to the opinion formed by the Judge in whose presence the witnesses gave their evidence as to the degree of credit to be given to it. *Woomesh Chunder v Rashmohini Dassi* (1893) 21 C 279. *Shrinani Goroja Mudal ar v Manikka Mudaliar* (P C) 1909 32 M 400, *Imdad Ahmad v Pateshri Parlap Naran Singh P C* (1909) 32 A 241.

(6) *Whitley Stokes* 852.

(7) Woodroffe's Civ. Pr. Code O XXVI r 9 p 1093. *Joy Coomar v Bundhoolall* 9 C 363 (1882). *Oomut Fatima v Bhujjo Gopal* 13 W R 51 (1870). *Harikshore Mitra v Abdul Baki* 21 C 920 (1894). *Lakmidas Khushal v Ba* J Khushal 35 B 317 (1911).

(8) Cr. Pr. Code s 293. See *R v Clutterdare Singi* 5 W R Cr 57 (1866). *Ordh Behari* 1 C L R 143 (1877). *Kailash Chunder v Kari Lal* 26 C 569 (1899).

(9) Cr. Pr. Code s 218. see *Whitley Stokes* 834 ss 60. Prov. (2) 65 (d) *et seq.*

(10) Steph. Introd 15.

(11) *Norton Ev* 95.

(12) *et seq.* 60 *post*.

The definition has been objected to (1) for incompleteness, in so far as by its terms it does not include the whole material on which the decision of the Judge may rest. Thus, in so far as a statement by a witness only is "evidence," the verbal statements of parties and accused in Court by way of admission or confession or in answer to questions by the Judge (2), a confession by an accused person affecting himself and his co-accused (3), the real evidence abovementioned, and the presumptions to be drawn from the absence of producible witnesses or evidence (4), are not "evidence" according to the definition given. The answer to this objection, however, is that this clause is an interpretation clause, and the Legislature only explains by it what it intended to denote whenever the word "evidence" is used in the Act (5). This definition must be considered together with the following definition of "proved." (6) "It seems to follow therefore that if a relevant fact is proved and the law expressly authorises its being taken into consideration that is, considered for a certain purpose or against persons, in a certain situation, the fact in question is 'evidence' for that purpose or against such persons, although

a Munsiff is matter before the Court which may be taken into consideration (8), and the confession of a prisoner affecting himself and another person charged with the same offence is, when duly proved, admissible as evidence against both (See next section) (9).

Evidence has been further divided into direct evidence and circumstantial evidence (10). Direct (11) evidence is the testimony of a witness to the existence or non-existence of the fact or facts in issue by circumstantial evidence is meant the testimony of a witness to other facts (relevant facts) from which the fact in issue may be inferred (12). As regards admissibility, direct and

(1) *v. Thayer's Preliminary Treatise on Evidence* (1898) 263, Whitley Stokes 852

(2) *v. s. 165 post*

(3) *v. s. 30 post*

(4) *v. s. 114 ill (g) post*

(5) *R v Ashootosh Chuckerbutty* 4 C 492 (F B)

(6) *Joy Coomar v Bundhoolall* 9 C 366 and see *R v Ashootosh Chuckerbutty* 4 C 492 *supra*

(7) *Per Jackson J in R v Ashootosh Chuckerbutty* 4 C 492 *supra*

(8) *Joy Coomar v Bundhoolall* 9 C, 366 *supra*

(9) *R v Ashootosh Chuckerbutty*, 4 C 483 *supra* referred to in *R v Krishna Bhat* 10 B, 326 (1885), *R v Dada Ana* 15 B, 459 (1889), *v. s. 30 post*, see also generally as to "evidence" following sections—*Ss. 5* (evidence of facts in issue and relevant facts), 59, 60 (oral), 60 (must be direct), 61—100 (documentary), 91—100 (exclusion of oral by documentary), 114 (g) (produced but not produced), 101—166 (production and effect of), 118—166 (witnesses), 167 (improper admission and rejection of evidence) as to the meaning of "evidence to go to the jury" see *Pratt v Blunt* foot 2 Cox C C 242, *Jewell v Parr*, 13 C B 909 916 *Ryder v Wombell* L. R.,

4 Ex 32 38 *Steward v Young* L. R. 5 C P 122 128, *R v Vajiram* 16 B 414 (1892) as to verdict against evidence *R v Dada Ana* *supra* and *v. post*

(10) See William Wills Essay on Circumstantial Evidence 4th Ed (1862), A M Burrill's Treatise on Circumstantial Evidence 1868 Phillips Famous Cases of Circumstantial Evidence 4th Ed (1879),

it is used in *s. 60 post* which does not exclude circumstantial evidence *Neel Kanto v Juggobundho Ghose* 12 B L R App. 18 (1874) In the latter sense circumstantial evidence must always be direct i.e. the facts from which the existence of the fact in issue is to be inferred must be proved by direct evidence See Steph Introd 8 51 Best Ev. §§ 293—295 Wills Circumstantial Ev. 6th Ed 19 20 The term 'presumptive' is frequently used as synonymous with 'circumstantial' evidence But they differ as genus and species Wills Circ Ev. 6th Ed 22

(12) *v. post* Introduction to Ch II *e.g.* — A is indicted for the murder of B the apparent cause of death being a wound given with a sword If C saw A kill

circumstantial evidence stand, generally speaking, on the same footing(1), and the testimony, whether to the *factum probandum* or the *facta probantia*, is equally as original and direct. As to the several values and cogency of direct and circumstantial evidence much has been both written and said, but both forms admit of every degree of probability. Abstractedly considered, however, the former is of superior cogency; in so far as it contains only one source of error, fallibility of testimony, while the latter has, in addition, fallibility of inference (2) But "when circumstances connect themselves closely with each other, when they form a large and strong body, so as to carry conviction to the minds of a jury, it may be proof of a more satisfactory sort than that which is direct When the proof arises from the irresistible force of a number of circumstances, which we cannot conceive to be fraudulently brought together to bear upon one point, that is less fallible than, under some circumstances, direct evidence may be" (3) It has been said that "facts cannot lie" (4) but men can. And as we only know facts through the medium of witnesses the truth of the fact depends upon the truth of the witness (5) Primary evidence is that which its own production shows to admit of no higher or superior source of evidence. Secondary evidence is that which from its production implies the existence of evidence superior to itself (6)

A fact is said to be proved(7) when, after considering the "Proved" matter before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

B with a sword, his evidence of the fact would be direct If, on the other hand a short time before the murder, D saw A walking with a drawn sword towards the spot where the body was found, and after the lapse of a time long enough to allow the murder to be committed, saw him returning with the sword bloody, these circumstances are wholly independent of the evidence of C (they derive no force whatever from it) and, coupled with others of a like nature, might generate quite as strong a persuasion of guilt" Best, Ev. § 294 *Nibaran Chandra Roy v R* (1907), 11 C W N. 1085, see *Legal Remembrancer v Matilal Ghose*, S B, 41 C 173 (1914) "positive" evidence defined and distinguished from indirect or circumstantial

(1) Best Ev § 294

(2) Phipson, Ev, 5th Ed, 2, Norton, Ev., pp 14 18 *et seq*, 71, Phillips' Famous Cases of Circumstantial Evidence 4th Edition, Introduction, Best Ev § 295, Taylor, Ev §§ 65—69, Wills' Circ Ev 6th Ed, 48, see remarks of Alderson B in *R v Hodges* 2 Lewin C C 227 "*Probatio per existentiam res omnis bus est potentior et inter omnes ejus generis major est illa quae fit per testis de visu*" (Mascardus *De probationibus* v 1 q 3, n 8) So also Menochius who displays a partiality for that circumstantial proof which is the subject of his treatise, yet says "*probatio seu fides quae*

testibus fit, ceteris excelsit" (*De praesumptionibus*, L 1, q 1), Phillips *op cit*, Burrill *op cit*

(3) Per Lord Chief Baron Macdonald in *R v Patch* and *R v Smith*, cited in Wills' Circ Ev, 6th Ed 46 47, 39—52, Norton, Ev, 18, *et seq*, Cunningham, Ev 16, and *v Surendra Narayan Adhichary v R* (1911), 39 C, 522, See also charge of Bullen, J., in the trial of Captain Donnellan cited and criticised in Phillips' Circ Ev, xv, but evidence of a circumstantial nature can never be justifiably resorted to except where evidence of a direct and therefore of a superior nature is unattainable, Wills Circ Ev, 6th Ed 39, 40 308, "if men have been convicted erroneously on circumstantial evidence so have they on direct testimony, but is that a reason for refusing to act on such testimony?" Greenleaf Ev 1 c 4, as to the disregard of circumstantial evidence by Mofussil junes see remarks in *R v Elahi Bux B L R Sup Vol 481 482* (1866)

(4) Per Baron Legge in the trial of Mary Blandy, State Trials (1752)

(5) Phillips' Circ. Ev xiv xvii

(6) Best Ev pp 70 416

(7) Cognate expressions occur in the following sections—68 104—111; 22, 50 101 101—4 101 102 165, 77, 91, 82 Whitley Stokes 853 *Balmakand Ram v Ghansam Ram*, 22 C, 407 (1894),

Disprov-
ed

A fact is said to be disproved(1) when, after considering the matters before it, the Court either believes that it does not exist, or considers its non existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist

Not prov
ed

A fact is said not to be proved when it is neither proved nor disproved

Part II (Of Proof)

Part III (Production and Effect of Evidence)

Ch VII (Of the Burden of Proof)

COMMENTARY.

Proof

Whether an alleged fact is a fact in issue or a relevant fact the Court can draw no inference from its existence till it believes it to exist, and it is obvious that the belief of the Court in the existence of a given fact, ought to proceed upon grounds altogether independent of the relation of the fact to the object and nature of the proceeding in which its existence is to be determined *Ev*

in strictness

he establish

legal means

to the satisfaction of the Court is effected by —(a) evidence or statements of witnesses, admissions or confessions of parties and production of documents(3), (b) presumption(4), (c) judicial notice(5) (d) inspection,—which has been defined as the substitution of the eye for the ear in the reception of evidence(6), as in the case of observation of the demeanour of witnesses(7) local investigation(8) or in the inspection of the instruments used for the commission of a crime(9) The extent to which any individual material of evidence aids in the establishment of the general truth is called its *probative force* This force must be sufficient to induce the Court either (a) to believe in the existence of the fact sought to be proved, or (b) to consider its existence so probable that a prudent man ought to act upon the supposition that it exists Thus it has been recently held that in this country the proof necessary to establish a Will is not an absolute or conclusive one, but such a proof as would satisfy a reasonable man (10) So if after examining a fair number of samples taken from different portions of a bulk, it is found that the samples are all of inferior quality, the probability that the bulk is of the same quality is so great that every prudent

and if that is so

forior quality is

is not, whether

it is possible that the testimony may be false, but whether there is sufficient

(1) The expression 'disproved' occurs only in ss 3 and 4 the expression not to be proved or not proved does not occur at all, Whitley Stokes 853

(2) Steph Introd 13 *id* Dig, 67, Art 58 Goodeve Ev 3 4 judgment is to be based on facts duly proved *r* s 165 *post* burden of proof *r* ss 101—114

(3) See ss 3 5—55 58 59 60 (oral proof) 61—100 (documentary proof) 15* (former statement) 158 (statements under ss 32 33) *R v Asiatosh Chuc kerbitz* 4 C 492 (1878) *v ante* "Evidence

(4) *Ss* 4 79—90 117 114 *post*

(5) *Ss* 56 57 *post*

(6) Wharton Ev s 345 Phipson Ev

5th Ed 3 Best Ev 5 *v ante*, *v s* 60 *post*

(7) *r* Civ Pr Code O XVIII *r* 12 p 846 Cr Pr Code s 363 (*v ante*) as to demeanour of witnesses and discrepancies see remarks of Lord Langdale in *Johnston v Todd* 5 Beav, 601

(8) *r* Woodroffes Civ Pr Code O XXVI *r* 9 p 1093 *Joy Coomar v Bundhoolall* 9 C 363 *supra* remarks in *Lecl v Schiedor* 43 L J Ch 232, Cr Pr Code s 293 (*v ante*)

(9) *r* s 60 *post* Cr Pr Code s 218

(10) *Jarat Kumari Dassi v Bissessar Dutt* (1911) 39 C 245

(11) *Boisgommoff v Nahapiet Jute Co* 6 C W N 495 at p 505 (1902)

probability of its truth, that is, whether the facts are shown by competent and satisfactory evidence" (1) When there is sufficient evidence of a fact, it is no objection to the proof of it that more evidence might have been adduced (2) The incidence of the burden of proof of a fact means that the person on whom it lies must prove the same But the meaning of 'proof' in this section is not affected by the incidence of the burden of proof (3)

The expression "matters before it" includes matters which do not fall within the definition of "evidence" in the third section Therefore, in determining what is evidence other than "evidence" in the phraseology of the Act, the definition of 'evidence' must be read with that of "proved" "It would appear, therefore, that the Legislature intentionally refrained from using the word 'evidence' in this definition, but used instead the words 'matters before it' For instance a fact may be orally admitted in Court The admission would not come within the definition of the word 'evidence' as given in this Act, but still it is a matter which the Court before whom the admission was made would have to take into consideration in order to determine whether the particular fact was proved or not" (4) So the result of a local investigation under the Civil Procedure Code, must be taken into consideration by the Court though not "evidence" within the definition given by the Act (5) The judgment must be based on facts before the Court relevant and duly proved (6) upon a consideration of the whole of the evidence and the probabilities of the case (7) It must not be based on the personal knowledge of the Judge or on materials which are not in evidence or have been improperly admitted (8) The Judge may not, without giving evidence as a witness, import into a case his own knowledge of particular facts (9), and should decide the rights of the parties litigating *secundum allegata et probata* (according to what is averred and proved) (10) But a Judge is entitled to use his general knowledge and experience, as in determining the value of evidence, and to apply them to the facts in dispute (11) The Court should abstain from looking at what is not

Matters
before the
Courts

(1) Greenleaf on Ev 5th Ed, p 4, cited in Goodeve Ev 6 Probability, in the words of Locke is likelihood to be true—see Ram on Facts Ch VIII As to the probabilities of a case v *Bunwaree Lal v Maharajah Helnarain* 7 I A, 155, s c 4 W R 128, *Sri Raghunadha v Sri Brojo* 3 I A, 176, *Mudhoo Soodun v Suroop Chunder*, 4 M I A 441, s c, 7 W R 37, *Lala Jha v Bibee Tulleb-matool* 21 W R 436, *Meer Usdoolah v Beeby Imaman*, 1 M I A, 44 45, s c, 5 W R 29, *Mussamut Edun v Mussa-mut Bechun* 11 W R, 345, *Uman Parshad v Gandharp Singh*, 15 C 20, 23, Best Ev §§ 24, 100, see also *Wills Circ Ev* 6th Ed, 7; *Steph Intro* 46 *Glassford's Essay on the Principles of Evidence* 105

(2) *Ramalinga Pillai v Sadasiva Pillai*, 9 M I A 506, s c 1 W R (P C), 20 (1864), see *Field Ev*, 6th Ed, 22—23

(3) *Muhammad Yunus v Emp*, 50 C, 318

(4) *Per Mitter, J Joy Coomar v Bundhoolall* 9 C 366 (1882), and see *R v Ashootosh Chuckerbutty*, 4 C, 492 *supra*

(5) *Id* For local inspection by Judge see *Rakishori Ghose v Kumudini Kant Ghose* 15 C L J, 138 (1912)

(6) S 165, *post*

(7) See remarks of Mitter, J, in *Leela-nund Singh v Basheeroomissa*, 16 W R, 102 (1871), v *Field, Ev*, 6th Ed, p 41, see notes to s 16 *post*

(8) *Durga Prasad Singh v Ram Doyal Chaudhuri*, 38 C 153 (1910), *per Woodroffe J*

(9) *Hurpurshad v Sheo Dyal* 3 I A, 286 *Mstham Bibi v Bashir Khan* 11 M I A, 213, s c 7 W R, 27, *Sooraj Kant v Khodee Narain* 22 W R 9, *Kanhai Chand v Ram Chandra* 24 W R 81 (arbitrator), *R v Ram Charan* 24 W R Cr 28 (assessor), v s 294 Cr Pr Code, *Rousseau v Pinto* 7 W R, 190, see notes to s 21, *post*

(10) *Eshan Chandra v Shama Charan* 11 M I A 20, 6 W R, P C, 57, see *Ramdayal Khan v Ajoodhia Khan* 2 C, 15, *Joytara Dassee v Mohamed Mobaruck* 8 C, 975, *Ranga Claria v Yegna Dikshatour*, 1 M, 526, *Chooa Kara v Isa bin Khalifa* 1 B, 213, *Mukhoda Soon-dury v Ram Churn* 8 C 875, *Athar Reza v Hydar Reza* 16 C 291 *Thirika sami v Gafala*, 13 M, 33 Best Ev, §§ 78 *et seq*, notes to s 165 *post*

(11) *Lakshmayya v Sri Raja Veredaraya Appareu*, 36 M, 168 (1913) See Best on Ev s 187, p 176

strictly evidence In this connection may be noted the *dicta* of two English Judges "In this case I have found myself upon two different occasions where it has come before me, in that difficulty into which a Judge will always bring himself when his curiosity or some better motive disposes him to know more of a cause than judicially he ought"(1) Again, "I shall decline to look at what is not regularly in evidence before the Court The proceedings before the Commissioners are, in my opinion, no evidence of an act of bankruptcy I purposely abstain in all these cases from looking at the proceedings, for my mind is so constituted that I cannot in forming my judgment on any matter before me separate the regular from the irregular evidence"(2)

Proof in
Civil and
Criminal
Cases

Certain provisions of the Law of Evidence are peculiar to Criminal trials, *e.g.*, the provisions relating to confessions(3) character(4), and the incompetency of parties as witnesses(5), but apart from these, the rules of evidence are the same in Civil and Criminal cases(6) But there is a strong and marked difference as to the effect of evidence in Civil and Criminal proceedings(7) 'The circumstances of the particular case' must determine whether a prudent man ought to act upon the supposition that the facts exist from which liability is to be inferred. What circumstances will amount to proof can never be matter of general definition(8) But with regard to the proof required in Civil and Criminal proceedings there is this difference that in the former a mere *preponderance* of probability is sufficient(9), but in the latter (owing to oth to the accused and a moral certainty as beyond all reasonable doubt'(10) 'It is the business of the prosecution to bring home guilt to the accused to the satisfaction of the minds of the jury, but the doubt to the benefit of which the accused is entitled must be such as rational thinking sensible doubts of a vacillating mind lters itself in a vain and idle honestly and conscientiously

entertain (11) the same principle which requires a greater degree of proof

(1) *Per The Lord Chancellor in Rich v Jackson* note to 6 Ves 334

(2) *Per Sir John Cross Ex parte Foster*, 3 Deacon 178

(3) Ss 24—30 *post*

(4) Ss 53 54 *post*

(5) S 120 *post* and note

(6) *R v Murphy*, 8 C & P 297 306
R v Burdett 4 B & A 95 112 *per Best*
J Leach v Simson 5 M & W 309 312
per Park B Trial of William Stone
25 How St Tr 1314 Trial of Lord
Melville 29 id 764 Best Ev § 94

(7) Best Ev § 95

(8) *Starkie Ev* 865 differences in the proof required of the same fact in different cases very often arise out of the circumstances of the case, *R v Madhub Chunder* 21 W R Cr 13 17 (1874) See Arthur P Wills Treatise on the Law of Circumstantial Evidence (1896) Ch IV (quantity of evidence necessary to convict)

(9) *Cooper v Slade* 6 H L Cas 77
per Willes J *Starkie Ev* 818 and see remarks of Sir Lawrence Peel in *R v Hedger Mutty Lall v Michael* (1852) pp 132 133 *R v Madhub Chunder* *post*

(10) *Per Parke B* in *R v Sterne* cited

in Best Ev p 76 *v Starkie Ev* 817 865 Taylor J-v § 112, *R v White* 4 Fost & Fin 383 see same principle laid down in *R v Madhub Chunder* 21 W R Cr 13 19 20 (1874) *R v Hedger* supra 132 133 135 *per Sir Lawrence Peel C J* quoting and adopting *Starkie Ev* 817 818 *R v Sorob Roy* 5 W R Cr 28 31 (1866), *R v Beharee* 3 W R 23 25 (1865) [prisoner not to be convicted on surmise] It is a maxim of English law that it is better that ten guilty men should escape than that one innocent man should suffer *per Holroyd J.* in *Sarah Hobson's* case 1 Lewin C C 261 see also Best Ev §§ 49 440

(11) *R v Castor* Vol II 816 *per Cockburn C J* If said L C Baron Pollock to the jury in *R v Manning and Wife* (cited in Wills Circ Ev 6th Ed 318 319) the conclusion to which you are conducted be that there is that degree of certainty in the case that you would act upon it in your own grave and important concerns that is the degree of certainty which the law requires and which will justify you in returning a verdict of guilty See also the other cases cited in Wills *ib* and the *R v Madhub*

demands a strict adherence to the formalities prescribed by the law of procedure. For "in a Criminal proceeding the question is not alone whether substantial justice has been done, but whether justice has been done according to law. All proceedings in *panam* are, it need scarcely be observed, *strictissimi juris*" (1) Criminal proceedings are bad unless they are conducted in the manner prescribed by law, and if they are substantially bad, the defect will not be cured by any waiver or consent of the prisoner (2) Sir Elijah Impey in his charge to the jury in *Nuncomar's Case* said "You will consider on which side the weight of evidence lies, always remembering that, in Criminal, and more especially in capital, cases you must not weigh the evidence in golden scales, there ought to be a great difference of weight in the opposite scale before you find the prisoner guilty. In cases of property the stake on each side is equal and the least preponderance of evidence ought to turn the scale, but in a capital case, as there can be nothing of equal value to life, you should be thoroughly convinced that there does not remain a possibility of innocence before you give a verdict against the prisoner (3) Even as between Criminal cases a distinction has been declared to exist. Thus "the fouler the crime is, the clearer and plainer ought the proof of it to be (4) 'As the crime is enormous, and dreadfully enormous, indeed it is, so the proof ought to be clear (5) But the more atrocious the more flagrant the crime is, the more clearly and satisfactorily you will expect that it should be made out to you' (6) "The greater the crime, the stronger is the proof required for the purpose of conviction" (7) These and the like *dicta*, however, in so far as they may be said to imply that the rules of evidence may be modified according to the enormity of the crime or the weightiness of the consequences which attach to conviction (for if they may be made more stringent in one direction, it is said they may be relaxed in another) have been severely criticised (8) To quote the language of L. C. J. Dallas in the *Director of Public Prosecutions v. Hitchcock* (1892) 139 All E.R. 1011, "The *dicta* of the judges in the *Nuncomar* case, and in the *Director of Public Prosecutions v. Hitchcock* case, are of the nature of mere observations, and do not bind the jury in the absence of the *dicta* of the judges in the *Nuncomar* case, and in the *Director of Public Prosecutions v. Hitchcock* case, against the prisoner."

Every Criminal charge involves two things *first*, that a crime has been committed, and *secondly*, that the accused is the author of it. If a Criminal fact is ascertained—an actual *corpus delicti* established—presumptive proof is admissible to fix the criminal (10) A restriction has been said to exist against the use of circumstantial evidence in the case of the well known rule that the *corpus delicti* (that is, the fact that a crime has been committed) should not in general be inferred from other facts, but should be proved independently. But it is not necessary (and indeed in the case of some crimes it would be

Chunder supra 20 *R v Gokool Kahar*, 25 W. R. Cr. 36 (1876) *Weston v Peary Mohan Dass* 40 C. 898 (1913)

(1) *Per Cockburn C. J.* in *Martin v Mackonochie* L. R. 3 Q. B. D. 730 775 (1892) *R v Kola Lalang* 8 C. 214 (1881) *R v Bhista Bin* 1 B. 308 (1876) *Jetha Parkha v Ram Chandra* 16 B. 693 694 (1892) *R v Bholanath* 2 C. 23—27 (1876) 25 W. R. Cr. 57, but see also ss 529—538 Cr. Pr. Code

(2) *R v Bholanath* 2 C. 23 (1876) *R v Allen* 6 C. 83 (1880), *Hossein Buksh v R* 6 C. 96 99 see also notes to ss 5 121 post

(3) The story of *Nuncomar* and the impeachment of Sir Elijah Impey by Sir James Fitzjames Stephen Vol 1 p 168 See also Lord Cowper's speech on the

Bishop of Rochester Trial Phillips Circ. Ev. xxvii

(4) Trial of Lord Cornwallis 7 State Trials 149

(5) Trial of R. T. Crossfield 26 State Trials 218

(6) Trial of Mary Blandy 18 State Trials 1186

(7) *Sarah Hobson's case per Holroyd J* 1 Lewin's Crown cases 261 See also *R v Ings* 33 St. Tr. 1135 and *Madeleine Smith's case* cited in Wills Circ. Ev. 6th Ed. 319—322

(8) Wills Circ. Ev. 6th Ed. 319—322 (9) *R v Ings* 33 St. Tr., 1135

(10) *R v Ahmed Ally* 11 W. R. Cr. 25 29 (1869) *R v Ram Ruchea*, 4 W. R. Cr. 27 (1865)

impossible) to prove the *corpus delicti* by direct and positive evidence. If the circumstances are such as to make it morally certain that a crime has been committed, the inference that it was committed, is as safe as any other inference. More accurately stated, the rule is that no person shall be required to answer or be involved in the consequences of guilt without satisfactory proof of the *corpus delicti* either by direct evidence or by *cogent and irresistible* grounds of presumption (1).

(a) The *onus* of proving everything essential to the establishment of the charge against the accused lies upon the prosecutor. Every man is to be regarded as legally innocent until the contrary be proved. Criminality is therefore never to be presumed (2). (b) The evidence must be such as to exclude, to a moral certainty, every reasonable doubt of the guilt of the accused. (3) If there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted (4). *The above hold universally*, but there are two others peculiarly applicable when the proof is presumptive (*v ante*). (c) There must be clear and unequivocal proof of the *corpus delicti* (*v ante*) (5). (d) In order to justify the inference of guilt, the inculcating facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other *reasonable hypothesis* than that of his guilt (6). While the concurrence of though the
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The
principle is a fundamental one and of universal application in cases dependent

(1) Steph Introd 66, Wills' Circ Ev, 6th Ed, 323—411, Arthur Wills Circ Ev (1896), Part V (Proof of the *corpus delicti*) and cases there cited, Norton, Ev, 74, Cunningham, Ev, 17, Best Ev, § 441, *et seq*, Powell, Ev, 72. See *Evans v Evans*, 1 Hagg, C R, 35 105, the Courts may act upon presumptions as well in Criminal as in Civil cases. *Burdett's case* 4 B & Ald 95. So in cases of adultery it is not necessary to prove the fact by direct evidence, *Lovedon v Lovedon*, 2 Hagg, C R, 1, *Williams v Williams* 1 ib, 299, followed in *Allen v Allen*, L R P D (1894), 248 252, even in a criminal case, *R v Madhub Chunder*, 21 W R Cr 13 16 17 (1874). See provision of Cr Pr Code s 174, and also Bengal Reg XX of 1817 s 14, and generally as to the *corpus delicti*, *R v Petta Gazi*, 4 W R Cr, 19 (1865), *R v Ram Ruckea* ib, 29 (1865), *R v Poorosullah Sikkhar*, 7 W R, Cr, 14 (1867), *R v Budder-uddeen* 11 W R, Cr, 20 (1869), *R v Ahmad Ally*, supra, *R v Dredge*, 1 Cox, C C, 235, *Adu Shikdar v R*, 11 C, 642 (1885), *R v Behari Singh* 7 W R Cr 3 4 (1867), in which case the alleged dead man re-appeared upon the scene at the cutcherry.

(2) Lawson's Presumptive Ev, 93, 432, Wharton Cr Ev §§ 319, 717, Best Ev § 440, Greenleaf, Ev I, 314, Wills' Circ Ev 6th Ed, 305, Powell Ev, 9th Ed 403. Best Treatise on Presumptions

of law and fact (1844), see ss 101, 102 103, 105, 106 114, *post*. As to the meaning of the presumption of innocence in Criminal cases see Thayer's Preliminary Treatise on evidence (1898) 551. See also *R v Ahmed Ally* 11 W R, Cr, 25 27 (1869), where facts are as consistent with a prisoner's innocence as with his guilt. Innocence must be presumed, and criminal intent or knowledge is not necessarily imputable to every man who acts contrary to the provisions of the law, *R v Nobokisto Ghose*, 8 W R, Cr, 87 (1867), *R v Madhub Chunder*, 21 W R Cr, 13 20 (1874) [the accused is entitled to the benefit of the legal presumption in favour of innocence, the burden of proof is undoubtedly upon the prosecutor]. *The Deputy Legal Remembrancer v Karuna Bostobi*, 22 C, 174 (1894), *Panchu Das v R* (1907) 34 C 698, 11 C W N, 666.

(3) Best Ev ib and *v ante*.

(4) Wills' Circ Ev, 6th Ed 315, Best, Ev, § 440 and *v ante*, *Lohit Mohun v R*, 22 C, 323 (1894), *R v Madhub Chunder*, supra, 20, *R v Panchanun*, 5 W R Cr, 97 (1866).

(5) Best Ev, §§ 440 441, Wills' Circ Ev 6th Ed 323—411.

(6) Wills' Circ Ev 6th Ed, 311, Best Ev, § 451, rule approved in *Balmakund v Ghansam*, 22 C, 409 (1894), *R v Ishri* (1907) 29 A 46.

on circumstantial evidence that in order to justify the inference of guilt the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt (1) It is not, however, correct to say that before circumstantial evidence can be made the basis of a safe inference of guilt it must exclude every possible hypothesis except that of the guilt of the accused (2) But if the possibility is remote and one which he is able to explain the absence of explanation may be taken into account (3)

"Even where the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to re hear the case, and the Court must re consider the materials before the Judge with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it, but not shrinking from overruling it, if, on full consideration, the Court comes to the conclusion that the judgment is wrong. When, as often happens, much turns on the relative credibility of witnesses, who have been examined and cross examined before the Judge, the Court is sensible of the great advantage he has had in seeing and hearing them. It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions, and when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is and must be guided by the impression made on the Judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not, and these circumstances may warrant the Court in differing from the Judge even on questions of fact turning on the credibility of witnesses whom the Court has not seen" (4) But it has been laid down in a recent decision of the Privy Council that it is always difficult for Judges who have not seen or heard the witnesses to refuse to adopt the conclusions of those who have done so, and that the difficulty is all the greater when the latter have formed an opinion adverse to the witnesses in question (5) In a recent case in the Allahabad High Court it was said that as a general rule a trial Judge
 importance to the demeanour
 this country many trials are
 written some time after the
 evidence is heard (6)

"The sound rule to apply in trying a Criminal appeal where questions of fact are in issue is to consider whether the conviction is right, and in this respect
 a Court must
 be at the find
 in before him

(1) *Hurjee Mull v Iman Ali Sircar* 8 C W N 278 (1904) 1 All L J 28
Emp v Jagat Ram 19 Cr L J 987

(2) *Balnakund v Ghansam* supra
 'the hypothesis of the prisoners guilt should flow naturally from the facts proved and be consistent with them all
R v Belarce 3 W R Cr 23 26 (1865)

(3) *Smith v Emp* 19 Cr L J 189
 see S 106 post

(4) *Per Barnes J in Coghan v Cumberland* (1898) 1 Ch. 705 *Bombay Cotton Manufacturing Co v Motilal Shilal* 42 I A. 110 (1915)

(5) *Siumnugaroya Mudaliar v Manikka Mudaliar* P C (1909) 32 M 400 and
Imdad Ahmad v Pateshri Parlap

Narain Singh P C (1909) 32 A 241

(6) *Mauladad Khan v Abdul Sattar* 39 A 476 (1917)

(7) *Protap Chunder v R* 11 C L R. 25 (1882) *per White J* referred to in *Pohimudd v R* 20 C 353 357 (1892), but see *R v Ramlochan* 18 W R Cr. 15 (1872) The case of *Protap Chunder v R* 11 C L R. 25 (1882) was followed in *Milan Khan v Sagai Bepari* 23 C 347 349 (1895) *Laljee Mahomed v Gudar*, 43 C 838 (1914) The Court is bound in forming its conclusions as to the credibility of the witnesses to attach great weight to the opinion which the Judge who heard them has expressed upon that matter *R v Madhub Chunder* 21 W R Cr. 13 (1874)

more as if it was a special appeal than a regular appeal, and because he did not find sufficient on the record to convince him that the Magistrate was entirely wrong, he therefore affirmed his decision. But the Judge was in the situation of an Appellate Court in which the matter came before him on regular appeal, and he ought to have judged as best he could, from the materials put before him in the Magistrate's written judgment, whether or not as a matter of fact the prisoners had committed the offence of which they had been convicted. If the evidence which came before him—whatever its shape—was not sufficient to reasonably satisfy him that the prisoners had been rightly convicted, he ought to have acquitted them' (1). An Appellate Court is bound precisely in the same way as the Court of first instance to test evidence extrinsically as well as intrinsically (2).

While there is a prerogative right in the Crown to review the course of Justice in Criminal Cases the Privy Council will only exercise it when injustice of a serious or substantial character has occurred and will not intervene merely because some evidence has been improperly admitted when without such evidence, the same conclusion might have been properly reached (3).

As for the admissibility of additional evidence on appeal under O. XLII, r. 27, of the Civil Procedure Code, it has been held that the legitimate occasion for this arises only when on examining the evidence as it stands some defect becomes apparent (4) and that the refusal by an Appellate Court to admit such additional evidence in the exercise of its discretion will not afford ground for a Second Appeal (5) and that a defendant who did not object at the time cannot object on the ground that the admission of such evidence is not in accordance with O. XLII, r. 27 (6), and that if it impeaches testimony it should not be admitted without giving the impeached witness an opportunity to contradict it (7). As for the 'strict proof' required in Review under section 626 of the Civil Procedure Code of 1882 (now represented by O. XLVII, r. 4), it has been recently held by the Calcutta High Court that the word 'strict' here refers to the formality and not to the sufficiency of the evidence (8), and it was said that strict proof means anything which may serve directly or indirectly to convince a Court and has been brought before it in strict compliance with this Act.

4. Whenever it is provided by this Act that the Court may presume (9) a fact, it may either regard such fact as proved, unless and until it is disproved (10), or may call for proof of it.

(1) *Kheraj Mullah v Janab Mullah* 20 W R Cr 13 (1873) *per* Phear J referred to in *Rahimuddin v R*, *supra* see also remarks of Mitter J in the petition of *Goomanee* 17 W R Cr 59 (1872) *Shitappa v Shidlingappa* 15 B 11 (1891), *Kanchan Mallik v Emperor* 42 C, 374 (1915).

(2) *In re Goomanee* 17 W R Cr 59 (1872).

(3) *Dal Singh v King Emperor* 44 I A 137 (1917) see *Chiford v King Emperor* 19 C L J 107 (1914) *In re Dillet* 12 App Cas 459 (1887).

(4) *Krishna a Chariar v Narasimha Chariar* (1908) 31 M 114 *Daji Babaji v Sakharam Krishna* 38 B 665 (1914) *Jeremiah v Vas* 36 M 457 (1911) *Garden Reach Spinning Co v Secretary of State* 42 C 675 (1915).

(5) *Durga Prasad v Jas Narain* (1911)

33 A 379 *Ram Piar v Kallu* (1910) 23 A 121.

(6) *Jagannath Pershad v Hanuman Pershad* (1909) 36 C 833 and on this question of admissibility of additional evidence on appeal see also *Kessowji Issur v Great Indian Peninsular Railway Co P C* (1907) 31 B 381, and 34 I A, 115, and *Secretary of State for India v Manjeshwar Krishnaya* (1908) 31 M 415.

(7) *Jagrani Koer v Kuar Durga Prasad* 41 I A 76 (1913) 36 A 93.

(8) *Ahid Khondkar v Mahendra Lal De* 42 C 831 (1915) *Jenkins C. J* and *Woodroffe J*.

(9) *Shafiqunnissa v Shaban Ali* 26 A 581 586 (1904).

(10) That which rebuts or tends to rebut a presumption which is not declared to be conclusive is relevant and may be proved *v s 9 post*.

"May presume"

Whenever it is directed by this Act that the Court shall presume a fact it shall regard such fact as proved, unless and until it is disproved

" Shall presume "

When one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it

' Conclusive proof '

ss 86, 87, 88 90, 114 (' May presume ')
ss 79, 80, 81 82, 83, 84 85, 89 105
(' Shall presume ')

ss 112 113 (" Conclusive proof ')
s 41 (Judgment when conclusive proof)

COMMENTARY

Inferences or presumptions are always necessarily drawn wherever the testimony is circumstantial, but presumptions, specially so called, are based upon that wide experience of a connection existing between the *facta probantia* and the *factum probandum* which warrants a presumption from the one to the other

Presump-
tions

to E

Presumptions according
fact

are arbitrary inferences Of law
from particular facts and

while
may be either *conclusive* or *rebuttable* They are founded either on the connection usually found by experience to exist between certain things, or on natural law, or on the principles of

Con-
clusive

clusive presumptions of law are ' evidence

requisite for the support of any p mitted

to be overcome by any proof that the fact is otherwise They consist chiefly of those cases in which the long experienced connection just alluded to has been found so general and uniform as to render it expedient for the common good that this connection should be taken to be inseparable and universal They have been adopted by common consent, from motives of public policy, for the sake of greater certainty, and the promotion of peace and quiet in the community, and therefore it is that all corroborating evidence is dispensed with and all opposing evidence is forbidden" (2) Rebuttable presumptions of law are as well as the former, " the result of the general experience of a connec

" found to be the com
, in this class is not
o exist in every case ,
a jury, infers the one

fact from the proved existence of the other in the absence of all opposing evidence In this mode the law defines the nature and the amount of the evidence which is sufficient to establish a *prima facie* case and to throw the burden of proof upon the other party, and if no opposing evidence is offered the jury are bound to find in favour of the presumption (3) A contrary verdict might be set aside as being against evidence The rules in this class of presumptions,

(1) Norton Ev 97 see Best Ev 55
299 42 43 296 et seq pp 58 281, and
Wills Circ Ev 6th Ed 22 Powell
Ev 9th Ed 385—387 See s 114 post

(2) Taylor Ev § 71 Best Ev p
58 § 304 the Evidence Act notices two
cases of conclusive presumptions (ss 112
113) It is a question however whether
the presumption mentioned in s 112 is
not after all a rebuttable presumption
for the section permits of evidence being

offered of non access (Norton Ev., 97)
and s 113 is *ultra vires* (Whitley Stokes
835) see also Field Ev 6th Ed 362,
Steph Introd 174 and notes to ss. 112-3
post and proceedings of the Legislative
Council 12th March 1872 pp 234 235 of
the supplement to the *Gazette of India*
20th March 1872

(3) Ch VII of the Act deals with this
subject (of presumptions) as follows —
First it lays down the general principles

as in the former, have been adopted by common consent from motives of public policy, not as in the former class, forbids with it till some proof is given, raised. Thus, as men do not generally violate the Penal Code, the law presumes every man innocent; but some men do transgress it; and therefore evidence is received to repel this presumption"(1)

Of fact

Presumptions of fact or natural presumptions are inferences which the mind naturally and logically draws from given facts without the help of legal direction (2) They are always rebuttable They can hardly be said with propriety to belong to that branch of the law which treats of presumptive evidence (3) "They are in truth but mere arguments of which the major premiss is not a rule of law, they belong equally to any and every subject-matter, and are to be judged by the common and received tests of the truth of propositions and the validity of arguments (4) They depend upon their own natural efficacy in generating belief, as derived from those connections which are shown by experience, irrespective of any legal relations They differ from presumptions of law in this essential respect, that while those are reduced to fixed rules, and constitute a branch of the system of jurisprudence, these merely natural presumptions are derived wholly and directly from the circumstances of the particular case by means of the common experience of mankind, without the aid or control of any rules of law Such, for example, is the inference of guilt drawn from the discovery of a broken knife in the pocket of the prisoner, the other part of the blade being found sticking in the window of a house which, by means of such an instrument, had been burglariously entered These presumptions remain the same under whatever law the legal effect of the facts, when found, is to be decided"(5) So again it has been held that when from a certain set of facts a Court infers a lost grant the process is one of inference of fact and not of legal conclusion (6) Presumptions of law are based, like

which regulate the burden of proof (ss 101—106) It then enumerates the cases in which the burden of proof is determined in particular cases not by the relation of the parties to the cause but by presumptions (ss 107—111) Such presumptions affect the ordinary rule as to the burden of proof that he who affirms must prove He who affirms that a man is dead must usually prove it, but if he shows that the man has not been heard of for seven years he shifts the burden of proof upon his adversary, who must displace the presumption which has arisen Steph Introd, 173, 174 see Norton, Ev, 97 and proceedings of the Legislative Council cited *ante*

(1) Taylor, Ev, §§ 109, 110 Best, Ev, § 314 See observations as to the treatment of rebuttable presumptions by this Act in Whitley Stokes 835

(2) Phipson Ev, 5th Ed, 3. "Such inferences are formed not by virtue of any law but by the spontaneous operation of the reasoning faculty all that the law does for them is to recognise the propriety of their being so drawn if the Judge think fit" Cunningham, Ev, 84, Wills' Circ. Ev 6th Ed 29—30

(3) Taylor Ev, § 214

(4) Sir James Fitzjames Stephen

divides presumptions of fact in English law into two classes —(1) Bare presumptions of fact which are nothing but arguments to which the Court attaches whatever value it pleases, (2) certain presumptions which though liable to be rebutted, are regarded as being something more than mere maxims though it is by no means easy to say how much more An instance of such a presumption is to be found in the rule that recent possession of stolen goods unexplained raises a presumption that the possessor is either the thief or a receiver, Steph Introd, 174 In this Act presumptions of fact partake of the character of class (1), *v post*, see Taylor Ev § 111

(5) Taylor, Ev, § 214, see Wills' Circ Ev *passim* see also other instances of this class of presumptions in s 114, *post*, and Best, Ev, § 315 English text writers also deal with mixed presumptions or presumptions of mixed law and fact see Norton, Ev, 97, Best Ev, § 324

(6) Kashinath Bhattacharjee v Murari Chandra Pal, 31 C L J, 501 where it is stated that the gist of the principle upon which a lost grant is presumed, is that the state of affairs is otherwise unexplained

presumptions of fact, on the uniformity of deduction which experience proves to be justifiable; they differ in being invested by the law with the quality of a rule, which directs that they *must* be drawn; they are not permissive, like natural presumptions, which *may* or may not be drawn.(1)

The abovementioned section appears to point at these two classes of presumptions, those of fact and those of law. The first clause points at presumptions of fact, the second at rebuttable presumptions of law, and the third, at conclusive presumptions of law (2) As has been already mentioned, presumptions of fact are really in the nature of mere arguments or maxims. The sections which deal with such presumptions have been noted above (3) Of these sections, s. 114 is perhaps the most important "The terms of this section are such as to reduce to their proper position of mere maxims which are to be applied to facts by the Courts in their *discretion*, a large number of presumptions, to which English law gives, to a greater or less extent an artificial value. Nine of the most important of them are given by way of illustration"(4) Of course others besides those specified may be, and are in fact frequently, drawn (5) In respect of such presumptions Courts of Justice are enjoined to use common sense and experience in judging of the effect of particular facts and are subject to no technical rules whatever This section renders it a judicial discretion to decide in each case whether the fact which under section 114 may be presumed has been proved by virtue of that presumption. Circumstances may, however, induce the Court to call for confirmatory evidence (6) Sections 79-85, 89 and

Scope of the section.

presumptions described by these text-writers as conclusive presumptions of law The Evidence Act appears to create two such presumptions by ss 112 and 113(8), and there are some others to be found in the Indian Statute Book (9)

English text-writers have, it has been said, in treating of the subject of presumptions, engrafted upon the Law of Evidence many subjects which in no way belong to it, and numerous so-called presumptions are merely portions of the substantive law under another form (10) "All notice of certain general legal principles, which are sometimes called presumptions but which in reality belong rather to the Substantive Law than to the Law of Evidence, was designedly omitted" (from this Act) "not because the truth of those principles was denied, but because it was not considered that the Evidence Act was the proper place for them The most important of these is the presumption, as it is sometimes called, that every one knows the law The principle is far more correctly stated in the maxim, that ignorance of the law does not excuse a breach of it, which is one of the fundamental principles of Criminal Law" Of

(1) Norton, Ev, 97

(2) Norton, Ev, 96, Field, Ev, 6th Ed, 63, 362, 363

(3) Ss 86, 87, 88, 90, in fact all the sections from ss 79 to 90 inclusive are illustrations of, and founded upon, the maxim, *Omnia esse rite acta* Norton, Ev, 260, Powell, Ev, 9th Ed, 386

(4) Steph Introd, 174 175 Proceedings of the Legislative Council, cited in App AA, see s 114, post

(5) See notes to s 114, post

(6) *Raghunath v Hoti Lal*, 1 A L J, 14 (1904)

(7) Field, Ev 6th Ed, 363

(8) But see pp 118 119 ante

(9) See for example, Act XXI of 1879, s 5 (Foreign Jurisdiction and Extra

dition) Cr Pr Code s 87 (Proclamation for person absconding) Act I of 1894 s 6 (Land Acquisition) s 8, Act I (B C) of 1895 (Recovery of Public Demands) Now see (B C) Act III of 1913 and (B and O) Act IV of 1914 see *Bal Vokond v Jirushun* 9 C 271 (1882) Act II (B C) of 1869 s 26 and Act I of 1903 (Chota Nagpore Tenures) see s 35 post Act XXVII of 1871, s 6 (Criminal Tribes) Act XIV of 1874, s 4

(10) See notes to s 114, post

(10) Sir J Fitzjames Stephen, Proceedings of the Legislative Council, ante

such a kind also is the presumption that every one must be held to intend the natural consequences of his own acts (1) The like presumptions and others of a similar character belong to the province of Substantive Law, and have been dealt with by Statute (2), or have gradually come to be recognised as binding rules through the course of judicial decision (3) In this sense the subject of presumptions is co-extensive with the entire field of law, and each particular presumption must in each case be sought under the particular head of Law to which it refers (4)

Inference.

This Chapter, as originally drafted, contains the following section—
 “ Courts shall form their opinions on matters of fact by drawing inferences. (a) from the evidence produced to the existence of the facts alleged, (b) from facts proved or disproved to facts not proved; (c) from the absence of witnesses who, or of evidence which, might have been produced (5), (d) from the admissions, statements, conduct and demeanour of the parties and witnesses, and generally from the circumstances of the cases ” “ The Select Committee decided to omit this section ‘ as being suitable rather for a treatise than an Act ’ The object of its introduction was originally stated to be to point out and put distinctly upon record the fact that to infer and not merely to accept or register evidence is in all cases the duty of the Court ” (6) Further, as has been already observed, a distinction must be drawn between the general act of inferring facts in issue from relevant facts, and those inferences which, for the reasons above given, are specifically known as presumptions (7) (*v ante*)

(1) Steph Introd 175, Powell, Ev 82

(2) See for example Act V of 1869 Art 114 Act VIII of 1911 (Indian Articles of War, Presumptive Evidence of Desertion) Act XXI of 1866 s 21 (Native Converts Marriages, Presumptive Evidence of Marriage), Act IV of 1872, ss 10, 11 (Punjab Laws, Presumption as to existence of right of pre-emption) and subsequent repealing and amending Acts up to Acts IV and XVII of 1914 Act I of 1877 s 12 repealed and amended in parts by various Acts up to Act VII of 1912 (Specific Relief, Presumption that breach of contract to transfer immovable property cannot be adequately relieved by compensation in money) For an instance of the conversion of

presumptions of the substantive law into statutory rules see s 38, Act X of 1865 (Succession Act as amended by Act XVIII of 1919) In England the rules as to substantial or cumulative gifts are treated as rules of presumption, the abovementioned section deals with these rules without any reference to a presumption see G S Henderson The Law of Wills in India p 192

(3) See notes to s 114 *post*

(4) See Cunningham, Ev, 301—303

(5) See s 114 ill (g), *post*

(6) Cited in Field Ev 6th Ed, 63

(7) As to the ambiguity attending the use of the term “presumption,” see Best, Ev p 306 *ib* § 299

CHAPTER II

OF THE RELEVANCY OF FACTS

As with many other questions connected with the Law of Evidence, the theory of relevancy has been the subject of varying opinions. Relevancy has been said by the framer of the Act to mean the connection of events as cause and effect (1). But this theory as was admitted afterwards, "was expressed too widely in certain parts, and not widely enough in others" (2). For the former definition the following was substituted "The word 'relevant' means that any two facts to which it is applied are so related to each other that, according to the common course of events, one either taken by itself or in connection with other facts, proves or renders probable the past, present or future existence or non-existence of the other" (3). But this is "relevancy" in a logical sense. Legal relevancy, which is essential to admissible evidence, requires a higher standard of evidentiary force. It includes logical relevancy, and for reasons of particular convenience, demands a close connection between the fact to be proved and the fact offered to prove it. All evidence must be logically relevant—that is absolutely essential. The fact, however, that it is logically relevant does not insure admissibility, it must also be legally relevant, a fact which 'in connection with other facts renders probable the existence of a fact in issue,' may still be rejected, if in the opinion of the Judge and under the circumstances of the case it be considered essentially misleading or remote" (4). The tendency, however, of modern jurisprudence is to admit most evidence logically relevant. Logical relevancy may not thus be assumed to be the sole test of admissibility, relevancy and admissibility are not co extensive and interchangeable terms. "Public policy, considerations of fairness the particular necessity for reaching speedy decisions,—these and similar reasons cause constantly the necessary rejection of much evidence entirely relevant. All admissible evidence is relevant, but all relevant evidence is not admissible" (5). The question of relevancy strictly so called presents as a rule, little difficulty. Any educated person, whether lay or legal, can say whether a circumstance has probative force, which is the meaning of relevancy. This is an affair of logic and not of law. It is, otherwise, with the question of admissibility which must be determined according to rules of law. A fact may be relevant, but it may be excluded on grounds of policy as already noted. A communication to a legal adviser may be in the highest degree relevant, but other considerations exclude its reception as a privileged communication. Again a fact may be relevant but the proof of it may be such as is not allowed

(1) Steph Introd 63 see generally as to Relevancy Introduction

(2) Steph Dig p 158 see Whitley Stokes 820 851 note

(3) Steph Dig, Art 1 'I have substituted the present definition for it not because I think it (the former definition) wrong but because I think it gives rather the principle on which the rule depends than a convenient practical rule' ib p 158

(4) Best Ev p 251

(5) *ib* 251 thus a communication to a legal adviser or a criminal confession improperly obtained may undoubtedly be relevant in a high degree. They are none the less inadmissible. *ib* See also Taylor Ev §§ 292—316 Powell Ev, 52* 578 Steph Introd Steph Dig, Arts 1 and 2 and Appendix Note 1, The Theory of Relevancy by G C Whitworth Bombay 1881

as in the case of the "hearsay" rule (1) In this Chapter the word "relevancy" seems to mean the having some probative force In the title to this Part it appears to denote admissibility (2) However, the considerations mentioned go merely to the theory of relevancy and to the construction of, or definitions given in, the Act as based on that theory For practical purposes one fact is relevant to another and admissible (3) when the one is connected with the other in any of the ways mentioned in the Act, is fully

specifically the different instances of the connection between cause and effect which occur most frequently in judicial proceedings They are designedly

each other Thus a motive subsequent conduct influenced under s 11 would, in most cases, be relevant under other sections (5) Not only may the acts and words of a party himself, if relevant, be given in evidence, but when the party is, by the substantive law, rendered liable, Civilly or Criminally, for the acts, contracts, or representations of third persons, and such facts are material, they may generally be given in evidence for or against him as if they were his own (6) The chief instances of such relationships (which must in the first instance be proved *aliunde* to the satisfaction of the Courts) are agency (7), partnership (8)

(1) As to the meaning of the expression 'hearsay is no evidence' see Steph Dig p 180 Arts 14 and 62 and notes to s 60 *post*

(2) Whitley Stokes § 49

(3) *Lala Lakmi v Sajed Haider*, 3 C W N cclxviii (1899). ['Relevant' in this Act means admissible]

(4) S 3 *ante*, s 5—55 *post*

(5) Steph Intro 72 see criticism of these sections in Whitley Stokes p 819, "two of these sections are so drawn (ss 7 11) as to permit evidence of matter wholly irrelevant, *ib* and see notes to s 11 *post* but see also Steph Intro 160 and Best Ev. 522 In the sections mentioned in the text the subject of circumstantial evidence is distributed into its elements *First Report of the Select Committee*, 31st March 1871

(6) See Phipson Ev 5th Ed 74

(7) In Civil cases the acts and representations of the agent will bind the principal if made within the scope of the authority conferred upon him or subsequently ratified by the principal (Act IX of 1872 ss 182—189 196 226) as to implied authority see *In re Cunningham* 36 Ch D 532 *Waltan v Fenwick* (1893), 1 Q B 346, and generally as to agency Contract Act, ss 182—238, as to responsibility in a tort and the doctrine of *respondent superior* see remarks of Jessel M R in *Smith v Keal* 9 Q B D 340 351 and judgment of Willes J in *Barnick v English Joint Stock Bank*, L R, 2 Ex 259 265 266, *Thorne v Heard* (1894), 1 Ch 599 *Malcolm Brunner & Co v Waterhouse & Sons* (1903) Times L R, v 24 p 855 a party is not in general criminally responsible for the acts of his agents

and servants unless such acts have been directed or assented to by him *Cooper v Slade* 6 H L C 746 793 794 *per* Lord Vensleydale Lord Melville's case 29 How St. Tr 764 *The Queen's case* 2 B & B 306 367 *Cheshire v Bailey* (1905) 1 K B 237 See, generally Taylor Ev 115 602—605 905—906, Best Ev § 532 Phipson Ev, 5th Ed. 74 Powell Ev 9th Ed 421, Evans Principal and Agent 123—200 and *passim* 2nd Ed Beven on Negligence 271—312 Roscoe Cr Ev 12th Ed. 46 Roscoe N P Ev 69—71 T A Pearson The Law of Agency in British India 1890 Bowstead Dg of Agency Arts 79—87 103 104 Norton Ev, 144 as to admissions by agents see ss 17, 18 *post* and as to notice given to agents s 14 *post* The Madras High Court has held in several cases that an acknowledgment or payment by one partner does not bind others in absence of proof that it was authorized by them See *Valesubramania Pillai v Ramanathan Chettiar* 32 M 421 (1909), *Shank Mohideen v Official Assignee* 35 M, 142 (1912) *K R V Firm v Seetharamaswami* 37 M, 146 (1914) But see *Shen muganatha Chettiar v Srinivasa Ayyar* 40 M 722 (1917) following *Karmeli Abdulla v Karimji Jitaji* P C 39 B, 261 (1915)

(8) The liability of co partners for the act of their partner is established on the ground of agency each partner being the agent for the others for all purposes within the scope of the joint business, *Re Cunningham* supra Lindley on Partnership 5th Ed. 80—90 124—263 Pollock on Partnership, Taylor Ev., §§ 743—752,

the liability of Companies for the acts and representations of their directors or other agents(1) and conspiracy in tort or crime (2)

The following sections have been considered by the author and others to admit, they are the most original part of the law that facts may be proved whereas the English law merely declares negatively that certain facts shall not be proved. In the opinion of many others the English law proceeds upon sounder and more practical grounds. While importance is claimed for these sections in that they are said to make the whole body of law to which they belong easily intelligible, yet such importance cannot, owing to the provisions of ss 165 and 167, cause an undue weight to be attached to their strict applications when a failure to so strictly apply them has not been the cause of an improper decision of the case. For the improper admission or rejection of evidence in Indian Courts has no effect at all unless the Court thinks that the

5 Evidence may be given in any suit or proceeding of the existence or non existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others

Evidence may be given of facts in issue and relevant facts

Explanation—This section shall not enable any person to give evidence of a fact which he is disentitled to prove by any provision of the law for the time being in force relating to Civil Procedure

Illustrations

(a) A is tried for the murder of B by beating him with a club with the intention of causing his death

At A's trial the following facts are in issue —

A's beating B with the club,

A causing B's death by such beating

A's intention to cause B's death

(b) A suitor does not bring with him and have in readiness for production at the first hearing of the case a bond on which he relies. This section does not enable him to produce the bond or prove its contents at a subsequent stage of the proceedings otherwise than in accordance with the conditions prescribed by the Code of Civil Procedure

Principles—The reception in evidence of facts other than those mentioned in the section tends to distract the attention of the tribunal and to waste its time. *Frustra probatur quod probatum non relevat*. The laws of evidence

Roscoe N P Ev 71 Act IX of 1872 (Contract Act) ss 239—266 as to admissions by partners see ss 17 18 post

(1) As to the general principles of the agency as applied to Companies in the course of or after formation see Lindley on Company Law 5th Ed 143—181. Companies can only be bound by the acts of their real or ostensible agents ib 181 liability for torts ib 203 see also Act VII of 1913 (as amended by Acts V and VI of 1914 and Act XLII of 1920)

Ind a Companies Companies on the same by L P Russell (1888) a Company is not liable for acts done *ultra vires* Russell 12 Brice on *ultra vires* as to admissions by the officers of a Company see ss 1 18 post

(2) See s 10 post and notes thereto (3) Steph Introd 77 73 *aliter* in England

(4) Ib 77 73 167 s 165 post Best, E 86 as to indicative evidence ib § 91

are framed with a view to a trial at *Nisi Prius*, and a proceeding at *Nisi Prius* ought to be restrained within practical limits (1)

- s 3 ('Evidence') ss 138, 162 (Judge to decide as to admissibility)
 s 3 ('Fact in issue')
 s 3 ('Fact') ss. 145 146, 148, 153, 155, 163 (Relevancy of questions to witness)
 s 3 ('Relevant') s. 165 (Judge's power to put questions)
 ss 555 ('Of the Relevancy of facts')
 s 60 (Oral Evidence must be direct)
 ss 64 165, PROV 2 (Proof of document by primary evidence) s 167 (Improper admission or rejection of evidence)

Woodroffe and Amir Ali's Civil Procedure Code, (2nd Ed.) O XIII, pp 805 812, Criminal Procedure Code, s. 298, Civil Procedure Code, O XVIII, pp 842 849, Criminal Procedure Code, s. 359, Steph. Introd., 12, Chs II, III, Steph. Dig., Art 2, Best, Ev., § 201, p 251 Taylor Ev., § 316 Wigmore, Ev. §§ 9 21

COMMENTARY.

'And of no others'

This section therefore excludes everything which is not covered by the purview of some other section which follows in the Statute (2) All evidence tendered must therefore be shown to be admissible under this or some one or other of the following sections (3), or the provisions of some other Statute saved by (4), or enacted subsequent to this Act These words in conjunction with the language of other portions of the Act further tend to show that the Court should, of itself, and irrespective of the parties, take objection to evidence tendered before it which is not admissible under the provisions of this Act (5) This section must be read as subject to the restrictions of Part II as to proof, and Part III as to the production of evidence Thus the terms of a contract between the parties might be relevant, but oral evidence of it will be excluded if those terms have been reduced to writing (6) Though a document may not be legal evidence of a fact within the provisions of this Act it may yet be a document which the parties by their contract have made proof of that fact (7)

Admissibility

All questions as to the admissibility of evidence are for the Judge (8) Where a Judge is in doubt as to the admissibility of a particular piece of evidence, he should declare in favour of admissibility rather than of

(1) Best, Ev. 201 *R v Parbhudas* 11 Bom H C R 90 91 (1874) *ante*, Taylor Ev. § 316 *Managers of the Metropolitan Asylum District v Hill* 47 L T (H L) 29, 34 *per* Lord O'Hagan, *see* also judgment of Lord Watson as to the distinction between evidence having a direct relation to the principal question in dispute and evidence relating to collateral facts which will if established tend to elucidate that question, and *ante* Introduction "Facts which are not themselves in issue may affect the probability of the existence of facts in issue and these may be called collateral facts" *First Report of the Select Committee*, 31st March 1871

(2) *The Collector of Gorakhpur v Palakdhari* 12 A (1899), at p 43, *Emp v Panchu Das*, 47 C, 671 (F B), *per* Mookerjee J s c 24 C W N 501, but the principle of exclusion should not be so applied as to exclude matter which

may be essential for the ascertainment of truth *R v Abdullah* 7 A 40 (1885), and *see* observations on the modern rule as to admissibility in *Blake v Albion Life Assurance Society* L R 4 C P D, 109 But the question in India is whether the Act permits the particular evidence If it is essential in any case for the ascertainment of the truth probably it does But the question again is does the Act allow the evidence sought to be produced

(3) *Lekhray Kuar v Mohpal Singh* 7 I A 70 *ante*, *Abinash Chandra v Paresk Nath* 9 C W N 402 406 (1904)

(4) S 2 *ante*

(5) Field Ev 6th Ed, 482, Whitley Stokes 854 *See* following paragraphs

(6) S 91, *post*, and *cf* ss 92 115—117, 121—127

(7) *Oriental Government Security Life Assurance Company, Ltd v Sarat Chandra* 20 B 103 (1895)

(8) S 136 *post*

non admissibility (1) "Under the Evidence Act admissibility is the rule, and exclusion the exception, and circumstances which under other systems might operate to exclude are, under the Act, to be taken into consideration only in judging of the value to be allowed to evidence when admitted" (2) "The object of a trial in every case is to ascertain the truth in respect of the charge made. For this purpose it is necessary that the Court should be in a position to estimate, at its true worth, the evidence given by each witness, and nothing that is calculated, unless, for reasons of public policy, to be excluded" (3) "The Judges' apprehension cannot create a rule for the future, and does not consider evidence given on another occasion and between other parties appropriate and valuable, for the decision of the case which is before it, is not of itself a reason for the admission or rejection of such evidence. The Court is bound to try the matter between the parties who are before it upon such evidence as those parties in their discretion produce for the purpose, and at the time when the evidence is tendered to decide whether or not it is legally admissible" (5) The value of evidence cannot affect its admissibility (6) Questions as to the admissibility of evidence should be decided as they arise and should not be reserved until judgment in the case is given (7) Where the question was as to the admissibility of certain documents, it was remarked — "What, if all such documents are excluded, shall we have left but oral evidence? That this is not a desirable result probably no one will deny, and in all discussions on the law of evidence, it seems to me very desirable to consider how that result can be avoided" (8) No argument in favour of the exclusion of evidence can be founded on the inability of Judicial Officers to perform the task of attributing to it its proper influence in the decision to exclude evidence because in some cases Judges might find upon it a wrong conclusion would be utterly inconsistent with the

(1) *The Collector of Gorakhpur v Palak dhar* supra at p 26 and *Moriarty v. London C & D Ry Co* L R 5 Q B 314 323 per Lush J. I also think on further consideration the evidence was receivable. I had formed no definite opinion on the subject at the trial. It was a new point and I adopted what I considered to be the usual and the safer course where evidence is pressed by one party and objected to by the other of receiving the evidence at the peril of the party presenting it. But see also *R v Parbhudas* the tendency to stray from the issues is so strong in this country that any indulgence of it beyond the clear provisions of the law is certain to lead to future embarrassment per West J 11 Bom H C R 90 95 (1874) and in Criminal proceedings it has been observed that the necessity of confining the evidence to the issue is stronger if possible than in Civil cases for when a prisoner is charged with an offence it is of the utmost importance that the facts proved should be such as he can be expected to come prepared to answer 3 Russ Cr 368 5th Ed cited in *R v Parbhudas* 11 Bom H C R 93 (1874) Roscoe Cr Ev 85 12th Ed 78—79. It is of high importance that no security for truth especially in Criminal cases should be weakened. On our rules of evidence said Lord Abinger

the property the liberty and the lives of men depend per Jardine J in *R v Ramchundra Govind* 19 B 755 (1895) For subordinate Courts whose judgment is subject to appeal the safest course in cases of doubtful relevancy of evidence is to contemplate the possibility of the evidence being admissible and to deal with the case on such a supposition—*Madhavrao v Deonak* 21 B 698 (1896)

(2) *R v Monapuna* 16 B 661 668 (1892)

(3) *R v Uttan Chand* 11 Bom H C R 121 (1874)

(4) *Per Lord Denman in Wright v Beckett* 1 Moo & R 414

(5) *Gorachand Sircar v Ram Narain* 9 W R 587 (1868)

(6) *R v Roden* 12 Cox 630

(7) *Jadu Rai v Bhubataran Aundy* 17 C 1 (1837) *Ramji ban Serougy v Oghur Nath* 2 C W N 183 (1898) *Rama Karansingh v Mangal Singh* 1 A L J Diary 224 (1904) See Wigmore Ev. § 19

(8) *Gopeknath Singh v Anundmoyee* 8 W R at p 169 (1867) per Markby J for the procedure with regard to the admission of documentary evidence see *Manson v Golan Aebria* 15 W R, 490 (1871) *Issur Chunder v Russtek Lall*, W R 576 (1868)

assumption, on which all rules of law are founded, that the constituted tribunals are fairly competent to carry them out (1) "To admit documents, not strictly evidence at all, to prop up oral evidence too weak to be relied upon is not a course which their Lordships would be inclined to approve, and none of the *chittahs* which have been laid aside by the High Court are shown to have been admissible in evidence according to the laws of evidence regulating the decisions of those Courts. It would expose purchasers to much danger if their possession could be disturbed by inferences from, or statements in, documents not legally admissible in proof against them" (2) Where a Judge is influenced in his estimate of parol testimony by the result of his consideration of documents which he ought not to have dealt with as evidence there is no proper trial of the case (3) Where certain decisions of the Privy Council were referred to, in which it was said that with regard to the admissibility of evidence in the native Courts in India no strict rule can be prescribed it was remarked as follows — "But these cases it must be borne in mind, occurred many years ago, at the time when the practice in the Mofussil in this respect was very lax and before the Evidence Act was passed and the observations of the Privy Council (4) were made, as I humbly conceive not as approving of this laxity of practice, but rather as excusing it upon the ground that the Mofussil Courts were not at the time so sufficiently acquainted with our English rules of evidence as to be able to observe them with anything like accuracy. I conceive that one great object of the Evidence Act was to prevent this laxity and to introduce a more correct and uniform rule of practice than had previously prevailed" (5) "In deciding the question whether certain evidence be admissible or not, it is necessary to look at the object for which it is produced and the point it is intended to establish for it may be admissible for one purpose and not another" (6) "In Civil and Criminal cases there is no difference in the rules as to the admissibility of evidence, though there may be a difference in their application, and it may be that a piece of evidence admissible in either class of cases may not be sufficient in a Criminal case that is without further evidence" (7) In cases tried by jury it is the duty of the Judge to decide all questions of admissibility, and in his discretion to prevent the production of inadmissible evidence, whether it is or is not objected to by the parties (8) It is the duty of the Appellate Court to see that this judicial discretion is exercised in a proper manner (9) "The moment a witness commences giving evidence which is inadmissible, he should be stopped by the Court. It is not safe to rely on a subsequent exhortation to the jury to reject the hearsay

(1) *Ib* (and as to standard of value as applied to evidence *ib* at p 169)

(2) *Eckowrie Singh v Heeralal Seal* 11 W R (P C), 2 (1868) s c 12 Moo I A 136 (Each relaxation is apt to be come a precedent for another *ib* at p 4) see notes to s 36 *post*

(3) *Bodonath Paroooye v Russick Lall* 9 W R 274 (1868)

(4) *Unide Rajah v Pemmasamy Venkatadry* 7 M I A 128 at p 137 (1858) s c 4 W R (P C) 121, *Naraguntty Lutchmeedavamah v Vengama Na doo* 9 M I A 66 at p 90 (1891) s c 1 W R (P C), 30 *Boodhnarain Singh v Omrao Singh* 13 M I A 529 (1870) s c, 15 W R (P C) 1

(5) *Gurpy Lall v Fattah Lall* 6 C at p 193 (1880), *per* Garth C J, and as to the reception of loose evidence, *v ib Harcehur Majoomdar v Churn Majhee*,

72 W R 355 356 357 (1874)

(6) *Taylor v Willans* 2 B & Ad 845 855 *per* Lord Tenterden C J

(7) *R v Mallory* 15 Cox 456 460 *per* Grove J *v ante* notes to s 3 and cases there cited and see also *R v Francis* 12 Cox C C 612 616, *Lord Melville's Trial* 29 How St Tr 746 764 [a fact must be established by the same evidence whether it is to be followed by a Criminal or Civil consequence but it is a totally different question in the consideration of Criminal as distinguished from Civil justice how the accused may be affected by the fact when so established], *per* Lord Erskine, L C Best Ev § 94

(8) Cr Pr Code s 298 See Best, Ev § 97, cited *post*

(9) *R v Amrita Govinda* 10 Bom H C R 498 (1873)

evidence and to decide on the legal evidence alone"(1) The duty of a Judge in Civil cases is nowhere laid down so distinctly as this, and it has been said that there may be some doubt as to whether, and, if at all, to what extent, a Judge ought to interfere where no objection is raised by the parties. But if the Courts themselves be passive in this respect the utility of the Code of Evidence may be seriously impaired. Further, having regard to the imperative language of 5th, 60th, 64th, 136th, and 165th sections(2) and of other portions of the Act, it would appear that it was the intention of the Legislature that a Civil Court should irrespective of objections made by parties, compel observance of the provisions of the law(3) Procedure as to admission and rejection of documents is dealt with in the undermentioned Order of the Code(4) The Judge is to decide as to the admissibility of evidence, and may ask in what manner any evidence which is tendered is relevant. He is bound to try a collateral issue when the reception of evidence depends on a preliminary question of fact(5) The rules of evidence cannot be departed from because there may be a strong moral conviction of guilt(6) The moral weight of evidence is not the test(7)

The proper time to make an objection is in the Court of first instance. For if it is made at the time when the evidence is tendered it may be in the power of the party tendering the evidence to obviate the objection if a valid

Objections
by parties

(1) *R v Pittambur Sirdar* 7 W R Cr 25 (1867) Where hearsay is not admissible as evidence it should not be taken down. *Pitamber Doss v Rutun Bullab* W R 1864 213, an *a priori* consent to abide by the testimony of a certain witness cannot bind the consenting party to hearsay testimony, but only to such evidence as is legally admissible. *Lickemonee v Shunkuree* 2 W R 252. *R v Sheik Magon* 5 W R Cr 1. *R v Ramgopal* 10 W R Cr 75 (1868). *R v Kally Churn* 7 W R Cr 2 [hearsay evidence prohibited]. *Re Kedar Nath* 18 W R Cr 16 (1872). *R v Chunder Koomar* 24 W R Cr 77 (1875).

(2) *V s 5 and of no others s 60* oral evidence must be direct s 64. Documents must be proved by primary evidence except etc s 165. "nor shall he dispense with primary evidence etc," s 136 shall admit evidence if relevant and not otherwise.

(3) Field Ev 6th Ed see pp 482 484—486 where the question is discussed, and see Whitley Stokes 854. On the other hand it has been said that subject to certain well recognised exceptions the general principle *Omnis consensus tollit errorem* applies to evidence in Civil cases a maxim which is in one sense of doctful application under this Act as to Criminal cases. Much inadmissible evidence is constantly received in practice because the opposing counsel either deems it not worth while to object or thinks its reception will be beneficial to his client. Best, Ev § 97. In *Sheetul Pershad v Junnejoy Mullick* 12 W R 244 (1869) the Court said. It is

somewhat difficult to ascertain exactly how matters stood before the Judge but it rather appears that the objection now taken as to there being no evidence to bring the case within cl 1 s 17 Act X of 1859 was not taken before the Judge. There is no doubt that even if the evidence on the record were in itself sufficient the Judge might properly have decided the case upon the evidence such as it was if the defendant had waived his objection to its insufficiency and consented to its being taken as sufficient. In this case it seems the party dispensed with proof and the case was not one in which evidence was wrongly admitted. As to objections by parties and admissibility of evidence on appeal see next paragraph.

(4) Woodroffe and Amir Ali's Civ Pr Code (2nd Ed) O XVIII pp 842—849.

(5) S 136 post and see s 162 post. *Cleave v Jones* 7 Ex 421. *Phillips v Cole* 10 A & E 106.

(6) *Barindra Kumar Ghose v R* (1909) 37 C 91.

(7) *R v Baijoo Chowdhree* 25 W R Cr 43 (1876) when it was objected that the moral weight of certain evidence not legally admissible was almost irresistible Lord Campbell C J said "The moral weight of evidence is not the test. Many facts are excluded by law which might be important on account of the inconvenience of admitting them." *R v Oddy* 5 Cox C C 210 213. convictions must be based on substantial and sufficient evidence not merely on oral convictions. *R v Soroh Roy* 5 W R Cr 28 (1856), as to judicial belief see dictum in *Re Aboodoo* (1880) 1 L R 391 (1880).

one (1) It has been held that where a valid objection is taken to the admissibility of evidence, it is discretionary with the Judge whether he will allow the objection to be withdrawn (2) Some latitude should be allowed to a member of the Bar, insisting in the conduct of his case upon his question being taken down or his objections noted where the Court thinks the question inadmissible or the objection untenable There ought to be a spirit of give and take between the Bench and Bar in such matters, and every little persistence on the part of a pleader should not be turned into the occasion of a Criminal trial unless the pleader's conduct is so clearly vexatious as to lead to the inference that his intention is to insult or to interrupt the Court (3)

An objection may be waived, but waiver cannot operate to confer on evidence the character of relevancy (*v post*) If the objection is *prima facie* sustainable, then the opponent must show the Court that the evidence satisfies it to be *prima facie* his objection The evidence violates a named principle or rule of evidence The cardinal principle is that a general objection, if overruled, cannot avail The only modification of this broad rule being that if on the face of the evidence in its relation to the rest of the case there appears no purpose whatever for which it could have been admissible, then a general objection, though overruled, will be deemed to have been sufficient The opposing counsel can make no reply to a general objection except to throw the whole responsibility upon the Judge at once or else begin systematically and argue that under any possible objection the testimony should come in Many trials under such a system would practically never end (5)

When dealing in appeal with the admissibility of evidence admitted by the Lower Court, a distinction has been drawn between the cases (a) in which evidence *wholly irrelevant* has been erroneously admitted by the Lower Court, and (b) those cases in which a *relevant* fact has been erroneously allowed to be proved in a manner different from that which the law requires (6), *e.g.*, where secondary evidence of the contents of a document has been admitted without the absence of the original having been accounted for (7) In the first case it is obvious that the decree can be supported upon relevant evidence only (*cf s 165, Prov 2, post*) An erroneous omission to object to the admission of irrelevant testimony does not make it available as a ground of judgment (8)

(1) *Assen Kaminee v Ram Chunder*, 12 W R 13 (1869), *Sheetul Pershad v Junmejoy Mullick*, 12 W R, 244 (1869), *Wigmore Ev* § 18

(2) *Barbat v Allen*, 7 Exch 609

(3) *Per Cur in In re Dattatraya* 6 Bom L R, 541 (1904)

(4) *See* *Wigmore Ev*, § 18

(5) *See* *Wigmore Ev*, § 18, and see *per Lord Brougham in Bain v Whitehaven F P Co*, H L C 1, 16

(6) *Field Ev*, 6th Ed, 482, *Ambar Ah v Lufte Ah*, 45 C, 159, and note to s 167, *post*

(7) As to parol evidence of written contract admitted without objection see Article in 14 *Mad L J*, 189

(8) *Muller v Madho Das*, 19 A 76 s c L R, 23 I A, 106 (1896), *Sri Rajah Prakasavaravannam Garu v Venkata Rau* 38 M 160 (1915), and see *Sreenath Roy v Goluck Chunder Sein*, 15 W R 348 (1871), *Ramaya v Devappa*,

30 B 109 (1906) In *Pudmatate v Doolar Singh*, 4 M I A at pp 285, 286 (1847) s c 7 W R P C, 41, the Privy Council observed that the evidence was however received below, and therefore we do not apprehend that we can treat it as not being evidence in the cause These observations appear, however to have referred to the weight and not to the admissibility of the evidence See also *Ningaua v Bharmappa* 23 B, 69 (1897) It has been said that a party who has filed an exhibit cannot plead its inadmissibility if the other party seeks to use the document against him *Raman v Secretary of State*, *Mad L J Dig* 65 But apart from any question of estoppel as where the objection is to the proof or where the reception of the evidence has affected the position of the other party the question of admissibility must be determined by the provisions of the Act

Nor can evidence be given which the law excludes as that a person who is liable on a note of hand signed it as surety only (1) Where a piece of evidence not proved in the proper manner has been admitted without objection it is not open to the opposite party to challenge it at a later stage of the litigation. But where evidence has been received without objection in direct contravention of an imperative provision of the law the principle on which unobjected evidence is admitted, be it acquiescence, evasion, or estoppel (none of which is available against a positive legislative enactment) does, not apply (2) The Act (s 165) also enacts that the judgment must be based upon facts *duly proved*, that is, proved in accordance with the provisions relating to proof contained in the Act. Where no proof has been offered, as where a document has been admitted in the Lower Court without being proved, the Court of Appeal may reject the document notwithstanding want of objection by the other party (3) Where proof has been given of a document but the proof is *prima facie* improper, an apparent exception exists in Civil suits based on principles akin to estoppel, as where no objection is taken to secondary evidence of documents being given (4) In this case want of objection may mislead the party tendering the evidence and prevent him from producing primary evidence, or from showing that the secondary evidence offered is admissible (5) So it has been held that if no objection is taken in the Court of first instance to the reception of a document in evidence (e.g., as being the copy of a copy) it is not within the province of the Appellate Court to raise or recognise it in appeal (6) Where also the Court of first instance admitted in evidence the depositions of certain witnesses in a previous litigation and no objection was taken, but in appeal it was objected

examined and
as in conse
had cancelled
Appellate Court
once, or if it required the party tendering
fore it for examination, it was bound to
and that in no case was it justified in
d deciding the case on the remaining
evidence on the record. The appeal was remanded (7) But of course the

(1) *Harak Chand v. Bishun Chandra* 8 C W N 101 102 (1903) [In admissibility of oral evidence question not raised in either of Lower Courts but taken and allowed in appeal]

(2) *Sudhanja Kumar Singha v. Gour Chandra Pal* 35 C L J 473. See also *Luchram Motilal Boid v. Radha Charan Poddar* 49 C 93 (1922)

(3) *Kanto Prashad v. Jagat Chandra* 23 C 335 338 (1895) in this case the contention that a map was admissible in evidence was held to be open to the appellant on special appeal although he had not appealed against an order or remand made by the lower Appellate Court rejecting the map as not being admissible, but see *Girindra Chandra v. Rajendra Nath*, 1 C W N 530 (1897)

(4) See *Robinson v. Davies* 5 Q B D, 26 (1879) where secondary evidence of the contents of written documents was received under a commission to take evidence abroad without objection

(5) *Kissen Kaminee v. Ram Chander supra*.

(6) *Chimnaji Govind v. Dhunkar Dhan*

dev 11 B 320 (1886) followed in *Lakshman v. Anrit* 24 B 596 (1900) in this the copy from which the copy was taken had been filed in a suit between the predecessors in title of the parties *Akbar Ali v. Bhyca Lal* 6 C (1880) at pp 669 670. *Kissen Kaminee v. Ram Chander* 12 W R 13 (1869) in which suit the case was remanded with liberty to supply the necessary proof see *Ningta v. Bharnappa* 23 B 65 (1897) see note to s 165 post. No objection should be allowed to be taken in the Appellate Court as to the admissibility of a copy of a document which was admitted in evidence in the Court below without any objection. *Ashori Lal v. Rakhai Das* 31 C 155 (1903) dissenting from *Kameshar Pershad v. Amanutulla* 26 C 53 (1898) *Shahadi Begam v. Secretary of State for India* P C (1907) 34 C 1059 L R 34 I A, 194 *Tiet She v. Maung Pa* 3 L B R., 49 *Sri Rajah Prabhara om Garu v. Venkata Rao* 38 M 160 (1915)

(7) *Lakshman v. Anrit* 24 B 56 (1900)

Appeal Court has a perfect right to attach such weight to the documents as it thinks proper, or to say whether they ought to be treated as evidence as against particular parties to the suit (1). Where a document is admitted without proof but without objection in the trial Court, no objection to its admissibility on the ground of want of formal proof can be taken in appeal (2). Where no objection is taken in the first Court to the admission in evidence of documents not *inter partes*, objection cannot be taken in second appeal that it has not been proved that the conditions exist which make any particular section applicable (3).

Objections to the admissibility of documents attached to the return of a commission if not previously made cannot be taken at the hearing of the suit (4). If when evidence is taken before Commissioners a document is tendered and objected to on any ground, the opposite party is not precluded from objecting
s not necessary to state
hen it is first tendered,
objection whenever the

In the undermentioned case(6), the Privy Council held that the examination of a material witness of the plaintiff in the absence of the defendant, his *vakil* having been removed and no other *vakil* then acting for him was such an irregularity that if objected to at the proper time would have been fatal to the reception of such evidence, but that no objection having been urged during the time or until an appeal was interposed, the objection came too late and could not be sustained as, notwithstanding such irregularity, that fact did not taint the whole proceedings so as to prevent the plaintiff recovering upon the other evidence which was sufficient to establish his case.

The Appellate Court has no jurisdiction to reject a copy of a document Exhibited in the lower Court with the consent of both parties at any rate without giving the parties an opportunity of producing the original (7). It has been held that the ground of waiver cannot be allowed to prevail in a Criminal case, (8) and that a prisoner on his trial can consent to nothing (9) as to objections to the reception of evidence by the Court itself see the preceding paragraph, and as to the procedure when a question is objected to and allowed by the Court, see the Civil Procedure Code (10). A Court is bound to decide upon the evidence without reference to any previous arrangement between the parties as to the mode in which the evidence is to be dealt with (11). Upon the question of placing a favourable construction on doubtful evidence so as

- (1) *Akbar Ali v Bhyra Lal* supra
- (2) *Carstter Rai v Kalash Belari* 4 Pat L. W 213 44 I C. 422 see *Narhari Hari v Ambakon Bafkrisina* 44 B 192
- (3) *Reajaddi Sarkar v Ganga Charan Bhattacharya* 531 C 863
- (4) *Struthers v Wheeler* 6 C L R 109 (1880)
- (5) *Ralli v Gau Kim* 9 C 939 (1883)
- (6) *Bommarauze Bahadur v Rangasamy Mudaly* 6 M I A 232 (1855)
- (7) *Kamulammal v Athekari Sangari* 35 M L J 11, s c 481 C 615
- (8) *R v Amrita Gowda* 10 Bom H C R 497 498 (1873). On the question how far the rule of evidence may be relaxed by consent Mr Best remarks — In Criminal cases at least in treason and felony it is the duty of the Judge to see that the accused is condemned according to law and the rules of evidence forming

part of that law no admissions from him or his counsel will be received § 97, see also s 58 post

(9) *R v Bishonath* 12 W. R. Cr 3 (1869) *Attorney General of New South Wales v Bertrand* 36 L J P C 51 s c L R I P C 535 see also *R v Nairoji Dadabhai* 9 Bom H C R 308 383 (1872) *R v Bholanath* 2 C 23 (1876) *R v Allen* 6 C 83 (1880), *Hossein Buksh v R* 6 C 96 99 as to objections see observation of Trevelyan J in *Gurish Chunder v R* 20 C 861 (1893) Best Ev § 97, as to admissions of fact by legal practitioners see ss 17 18 58 post

(10) Civ Pr Code O XVIII r 11 p 846 cf also s 359 Cr Pr Code of Act XIV of 1882

(11) *Gooroo Pershad v Bykunto Chander* 6 W R 87 (1866)

to entitle the Court to treat it as substantive evidence in the case and not exclude it as inadmissible(1), and as to the case where both parties have put indifferent portions of inadmissible proceedings and rested arguments thereon,(2) see the cases noted below

6. Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different(3) times and places

Relevancy of facts forming part of same transaction

Illustrations

(a) A is accused of the murder of B by beating him. Whatever was said or done by A or B, or the bystanders at the beating, or so shortly before or after it as to form part of the transaction is a relevant fact (4)

(b) A is accused of waging war against the Queen by taking part in an armed insurrection in which property is destroyed, troops are attacked and jails are broken open. The occurrence of these facts is relevant as forming part of the general transaction though A may not have been present at all of them (5)

(c) A sues B for libel contained in a letter forming part of a correspondence. Letters between the parties relating to the subject out of which the libel arose and forming part of the correspondence in which it is contained are relevant facts though they do not contain the libel itself

(d) The question is whether the certain goods ordered from B were delivered to A. The goods were delivered to several intermediate persons successively. Each delivery is a relevant fact (6)

Principle.—If facts form part of the transaction which is the subject of enquiry manifestly evidence of them ought not to be excluded (7). Moreover, such facts forming part of the *res gestæ* in most cases could not be excluded without rendering the evidence unintelligible(8), for every part of a transaction is connected with every other part as cause or effect. The point for decision will always be whether they do form part, or are too remote to be considered really part of the transaction before the Court (9)

s 3 ('Fact')

s 3 (Fact in issue)

s 3 (Relevant)

(1) *Duarka Das v Sant Baksh* 18 A 92 (1895)

(2) *Bir Chander v Bhanst Dhar* 3 B L R A C 217 (1869)

(3) Thus where a man committed three burglaries in one night and stole a shirt at one place and left it in another and they were all so connected that the Court heard the history of all three burglaries Lord Ellenborough remarked that if crimes do so intermix the Court must go through the detail. Case cited without name in *R v Wiley*, 2 Lea 985 which is also reported as *R v Wiley* 1 B & P (N R.), 92

(4) See *In re Surat Dhoobi* 10 C 302 (1884). *R v Fakirapa* 15 B 491 496 (1890) as to exclamations of mere bystanders see *R v Fowler* cited Steph D & Art 3 illust (a) *Mine v Lester* 7 H & N 786 *Bennison v Cartwright* 5 B & S 1 *The Schwalba* Swab 521 Wharton Ev., § 260.

(5) *v s 10 post*. That war was waged is one of the facts in issue. These occurrences are part of that fact.

(6) As being part of the fact in issue, did the goods pass to A.

(7) See Norton Ev 101

(8) Roscoe Cr Ev 13th Ed 78. Acts declarations and circumstances which constitute or accompany and explain the fact or transaction in issue are admissible as forming part of the *res gestæ*. The term *res gestæ* though generally applied to a fact or transaction in issue may be used in the above connection of any material fact. Phipson Ev 5th Ed., 44 45

The earlier term was *res gestæ* or *pass res gestæ* as to the history of this catch all phrase Thayer's Cases on Evidence 629 same in American Law Review XV 5 81 Wigmore Ev § 1795, and Phipson in 19 Law Quart Rev 435

(9) Norton Ev., 101

Steph Dig, Art 3 Roscoe, Cr Ev, 86, 13th Ed, 78, Steph Introd, Ch III, Phipson Ev, 5th Ed, 44 45, Norton Ev, 111 Cunningham Ev, 87 Whitley Stoles 854, Taylor, Ev, §§ 320, 326—328, Wharton Ev, § 258, Thayer's Cases on Evidence 629, Rice on Evidence, 369—392

COMMENTARY.

Facts forming part of same transaction

A transaction is a group of facts so connected together as to be referred to

Judges have given different decisions (1) The area of events covered by the term *res gestæ* depends upon the circumstances of each particular case The *res gestæ* may be defined as those circumstances which are the automatic and undesigned incidents of a particular litigated act and which are admissible when illustrative of such act These incidents may be separated from the act by a lapse of time more or less appreciable A transaction may last for weeks The incidents may consist of sayings and doings of any one absorbed in the event whether participant or by stander, they may comprise things left undone as well as things done They must be necessary incidents of the litigated act in the sense that they are part of the immediate preparations for or emanations of such act and are not produced by the calculated policy of the actors They are the act talking for itself, not what people say when talking about the act In other words, they must stand on an immediate causal relation to the act—a relation not broken by the interposition of voluntary individual wariness, seeking to manufacture evidence for itself Incidents that are thus immediately and unconsciously associated with an act whether such incidents are doings or declarations, become in this way evidence of the character of the act They are admissible though hearsay, because in such cases it is the act that creates the hearsay, not the hearsay the act It is the power of perception unmodified by recollection that is appealed to, not of recollection modifying perception Whenever recollection comes in, whenever there is opportunity for reflection and explanations—then statements cease to be part of the *res gestæ* Declarations to be admissible must be made during the transaction If made after its completion they are too late (2) but it is no objection that they are self serving (3) Whenever a fact is a link in a chain of facts necessary to establish another fact, it is, of course, admissible In some cases an offence consists of a series of transactions in such cases evidence is admissible of any act which goes to make up the offence (4) A fact besides being relevant under this section, by virtue merely of its being so connected with a fact in issue as to form part of the same transaction, may also be relevant on the grounds mentioned in one or other of the succeeding sections So where several offences are connected together and form part of one entire transaction, then the one is evidence to show the character of the other (5) And where the only evidence against a prisoner charged with having voluntarily caused grievous hurt was a statement

(1) Steph Dig Art. 3 *R v M J Vyapoory Moodelkar* 6 C 655 662 (1831), cf use of word in ss 235 239 Cr Pr Code and see *R v Fakirapa* 15 B 496 502 *supra* *R v Vajirani* 16 B 414 424 (1892) *R v Dwarakanath* 7 W R Cr 15 (1867), *R v Sami* 13 M 426 (1890) The term 'transaction' occurs in s 13 *post* and as used in that section was defined in *Gujju Lall v Fatteh Lall* 6 C at p 186 (1880)

(2) *Chan Mahio v R* (1907) 11 C W N 266

(3) Wharton Ev §§ 258 262 See definitions of Supreme Court of Georgia cited in Rice Ev 375 'the circumstances facts and declaration which grew out of the main fact are contemporaneous with and serve to illustrate its character as part of the *res gestæ*'

(4) Roscoe Cr Ev 13th Ed 77, 78, Norton Ev, 102

(5) *R v Ellis* 6 B & C 145 cited in *R v Parbhudas* 11 Bom H C R 94 (1874) t s 14 *post* See also Introductions *ante*

made in the presence of the prisoner by the person injured to a third person immediately after the commission of the offence and the prisoner did not, when the statement was made, deny that she had done the act complained of, it was held that the evidence was admissible under this section and s 8, illust (g) of this Act (1) But where it did not appear how long an interval had elapsed between a murder and the statement of an alleged bystander, whose condition of mind did not seem to have been such as to exclude the supposition that his evidence was fabricated, it was held that his statement was inadmissible under this section (2) One *P* came to a police station with a written report in which there were allegations that certain persons including *M* had committed the offence of riot. The report was read out to *P* and as soon as he heard it, he informed the police that *M* was not present at the riot and stated that the report was written by one *J*. Subsequently *M* prosecuted *J* and *P* for an offence under s 121, Indian Penal Code. Held, that the statement made by *P* to the police was not admissible against *J*, either as a part of a confession or as a part of the transaction under investigation under this section (3) The doctrine of election (in Criminal trials) is closely connected with that about the admissibility of collateral facts which, though not in issue, may be relevant under this section if they form part of the same transaction (4) The cases cited below may be further consulted in connection with this section (5) Certain persons were convicted of robbing and murder, and on its appearing that the two offences constituted parts of the same transaction, held that recent and unexplained possession of the stolen property, which would be presumptive evidence of robbing was similarly evidence. Besides being part of the *res gestæ* ration (7) as evidence of intention (8) and so forth

7 Facts which are the occasion, cause or effect, immediate or otherwise, of relevant facts, or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant

Illustrations

(a) The question is, whether *A* robbed *B*

The facts that shortly before the robbery *B* went to a fair with money in his possession, and that he showed it, or mentioned the fact that he had it, to third persons are relevant (9)

(1) In *re Surat Dhobis* 10 C 302 (1884) *supra*

(2) *Chain Mahito v R* (1907) 11 C W N 266

(3) *Jalpa Prasad v Emp* 17 A L J 760 s c 50 I C 487 20 Cr L J 311

(4) *R v Fakirapa* 15 B 496 502 *supra* see also ss 235 239 Cr Pr Code Taylor Ex § 329

(5) *R v Birdseye* 4 C & P 386 *R v Rearden* 4 Fost & Fin 76 *R v Ellis*, *supra* *R v Cobden* 3 Fost & Fin 833 *R v Young* R & R C C R 280 note *R v Westwood* 4 C & P 547 *R v Williams* Dears C C 188 *R v Rooney*, 7 C & P 517, *R v Wiley*, 2 Lex. 953.

R v Long 6 C & P 179 *R v Firth* L R 1 C C R 172 *R v Salisbury*, 5 C & P 155 157 see cases cited in Steph Dig Art 3 2 East P C 934

(6) *R v Sami* 13 M 476 (1890)

(7) *Naaga Sanpa v Emp* 19 Cr L J 155 43 I C 443 s c (Statement by complainant as to rape)

(8) *Mathu Krishna v Ramchandra*, 37 M L J 489 (Statement by testator), and see 47 I C 611

(9) As giving occasion or opportunity or being the cause see Norton, Ex. 103, Cunningham Ex 90, Whitley Stokes, 855

Facts which are the occasion cause or effect of facts in issue

- (b) The question is whether *A* murdered *B*

Marks on the ground, produced by a struggle at or near the place where the murder was committed are relevant facts (1)

- (c) The question is, whether *A* poisoned *B*

The state of *B*'s health before the symptoms ascribed to poison and habits of *B*, known to *A*, which afforded an opportunity for the administration of poison are relevant facts (2)

Principle.—The reason for the admission of facts of this nature is that, if it is desired to decide whether a fact occurred or not, almost the first natural step is to ascertain whether there were facts at hand calculated to produce or afford opportunity for its occurrence, or facts which its occurrence was calculated to produce. Further, in order to the proper appreciation of a fact, it is necessary to know the state of things under which it occurred (3)

s 3 ("Fact.")

s 3 ("Relevant")

s 3 ("Fact in issue.")

Steph Dig, Art 9, and note, Steph Introd., Ch III, Phipson, Ev, 5th Ed, 44, 45 142, Norton, Ev, 103, Cunningham, Ev, 90, Wigmore, Ev, §§ 131-134, Best, Ev, § 453 Wills' Circ Ev, *passim*.

COMMENTARY.

Causation

Leaving the transaction itself, the present section embraces a larger area and provides for the admission of several classes of facts, which though not possibly forming part of the transaction, are yet connected with it in particular modes (*viz*, as occasion, cause, effect, as giving opportunity for its occurrence or as constituting the state of things under which it happened), and so are relevant when the transaction itself is under enquiry. These modes—occasion, cause, effect, opportunity—are really different aspects of causation. When an act is done and a particular person is alleged to have done it (not through an agent but personally) it is obvious that his physical presence, within a proper range of time and place, forms one step on the way to the belief that he did it. If it be asked whether the mere possibility involved in opportunity is not too slender and whether something more than mere opportunity, for the answer is that these are negative, one of innumerable limited number who

were in a position to do this particular act. In short, opportunity alone, and not exclusive opportunity, is a sufficient showing for admissibility (4). On the other hand no circumstance can be more informative of a charge than that the accused had no opportunity of committing the crime. On the strength of this rests the force of a defence founded on an *alibi* (5). But care must be taken against a hasty inference from opportunity for, to commission of, a crime. There can be no crime without the opportunity, but there is a wide gulf to be bridged over by evidence between opportunity and commission (6).

Similar unconnected facts

Generally speaking, it is not admissible to prove the fact in issue by showing that facts similar to it, but not part of the same transaction, have occurred

(1) As effects of the fact in issue this is an instance of real evidence, see Norton, Ev, 103, Best, Ev, § 92, as to proof from foot mark, see Wills' Circ Ev 6th Ed, 96 214—221 436

(2) As constituting the state of things under which the alleged fact happened and as affording opportunity

(3) Cunningham Ev 90 91 Steph

Introd, Ch III knowledge of circumstances enabling a person to do the act is thus also relevant [illustr (c)].

(4) Wigmore Ev, § 131

(5) See s 11, post

(6) Norton Ev 104 Best, Ev, § 453, see case cited in Starkie Ev 4th Ed, 864 note, Wills' Circ Ev, 6th Ed, 82 356.

on other occasions. Facts which are sought to be made relevant merely from their *general similarity* to the main fact or transaction and not from some specific connection therewith are not admissible to show its existence (1). The meaning of the rule excluding transactions similar to but unconnected with the facts in issue is that inferences are not to be drawn from one transaction to another which is not specifically connected with it merely because the two resemble one another. They must be linked together by the chain of cause and effect in some assignable way before an inference may be drawn (2). They are not facts in issue and are therefore excluded by the fifth section. They are not parts of the same transaction so as to be admissible under the sixth section and there is no principle of causation which would render them relevant under this section. The maxim *res inter alios acta* is frequently supposed to express the principle of exclusion in such cases but this is incorrect for similar transactions *inter partes* would be equally inadmissible in this relation. The maxim has its principal utility in the domain of substantive law (3). And so when as in a well known case the question was whether *A* a brewer sold good beer to *B* a publican the fact that *A* sold good beer to *C* *D* and *E* other publicans, was held to be irrelevant (4). Nor when an act has been proved to show that a given party did the act may evidence be tendered of similar acts done either by *himself* with the object of showing a disposition habit or propensity to commit and a consequent probability of his having committed the act in question or by *others* though similarly circumstanced to himself to show that he would be likely to act as they (5). And so when the question is whether *A* committed a crime the fact that he formerly committed another crime of the same sort and had a tendency to commit such crimes is irrelevant (6). The so called exceptions (though they are not strictly speaking such) to this rule consist in the admissibility of evidence of acts showing intention

facts in issue (9). On the other hand and on the same principle in cases where causation is well known and regular as in the case of physical and mechanical agencies the conditions of mental disease the propensities of animals and the

(1) Steph Dg Art 10 Phipson Ev 5th Ed 155 156 Best Ev §§ 506—510 Taylor Ev §§ 317—326 Brooms Legal Max ms 908 Roscoe N P Ev 84—86 Powell Ev 9th Ed 60—64 and *v post* Mak n v Attorney-General N S W 1894 A C. 57 65 per Lord Herschell

(2) Steph Dg p 163

(3) Phipson Ev 5th Ed 157 Steph Dg Art 10 and n vi p 162 Best Ev § 112 506—510 Taylor Ev 317—326 Brooms Legal Max ms 954—968

(4) *Holcombe v Heason* 2 Camp 391 *alter f t* had been shown that the beer sold to all was of the same brewing Steph Dg Art 10 Illust (b) so (unless a general custom be proved) the terms on which *A* let land to *B* are no evidence of the terms on which *A* let lands to other tenants *Corier v Pryke* Peake 130 see *Hollingham v Head* 4 C. B N S 388 *Spencely Dell Holt* 7 East 108 *Smith v W Ik ns* 6 C & P 180 Taylor Ev §§ 317—326

(5) Phipson F 5th Ed 121 and

text books cited *ante* and notes to s 14 *post* as to the converse cases of character and course of business *v post* ss 52—55 16

(6) Steph Dg Art 10 Illust (a) *R v Cole* 1 Phil ps E 508 Steph Dg pp 16—164 see s 14 *post* illusts (n) (o) (p) *Mak n v Attorney-General* N S W 1894 A C 57 65

(7) See s 14 *post* cf Steph Dg Art 11 and pp 162—164 *id* Phipson, 5th Ed 157 As to evidence of intention see *Narsing Dyal v Ram Nara* 30 C 883 896 (1903) *R v Bond* C C R (1906) 21 Cox p 252

(8) See s 15 *post* cf Steph Dg Art 12 Lawson's Presumptive Evidence 187 Steph Dg 162—164 see also Taylor Ev §§ 327—348 Roscoe Cr Ev 13th Ed 79 *et seq* Best Ev p 463 Roscoe N P Ev 85 *R v Hyatt* 1 K. B. 188 (1904) 1 All L J 42 *Hales v Kerr* (1908) 2 K. B 601 Times L. R. 24 p 779

(9) Steph Introd. 164 see ss. 40—44 *post*

like evidence of similar but unconnected acts is often admissible (1) Where in an action brought in respect of a nuisance alleged to be caused by the construction and maintenance of a hospital for infectious diseases, the plaintiff proposed to call evidence as to the effect of other similar hospitals on the surrounding neighbourhood, it was *held* that evidence of facts by which the effect (or absence of effect) of such hospitals could be either positively or approximately ascertained was admissible and material (2) Where the discharge of gaseous matter from the chimney of a chemical work was complained of as a nuisance by the proprietor of land in its vicinity it was *held* that the effect of

matter

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doings of animals are in question it is admissible to prove the general character, of the species or of the particular animals as well as the doings of the same, or similar animals, on other occasions (5) Further, similar facts may become admissible in confirmation of testimony as to the main fact which would be inadmissible as direct proof So an admission of liability on one bill accepted by the same agent is no evidence of a general authority to accept, though it is admissible to confirm independent proof of such authority (6) And proof of

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showing that he is consistent with himself (8) Similar facts may be admissible in proof of agency Where the question is whether one person acted as agent for another on a particular occasion the fact that he so acted on other occasions

(1) Phipson Ev 5th Ed, 144—149 Best Ev pp 463 464 Taylor Ev 319 so in an American case it being in dispute whether a horse was or was not frightened by a certain pile of lumber evidence that other horses were frightened by the same pile under a variety of circumstances was held admissible Best Ev p 464 for a similar case see *Brown v E C R Co* 22 Q B D 391 "so where the question was whether *As* dog killed a sheep belonging to *B* the fact that the same dog had killed other sheep on different occasions belonging to other people was held admissible *Leuts v Jones* 1 T L R 153, *Wharton Ev* § 1295 so also the question being whether *As* premises were ignited by sparks escaping from a railway engine proof that (1) the same engine and (2) other engines of similar construction belonging to the same Company had previously caused fires along the same line is admissible *Aldridge v G W R Co* 3 M & Gr 522 *Piggott v E C R Co* 3 C B 229 the question being whether *A* was insane at a certain time evidence that he exhibited symptoms of insanity prior and subsequent to such time and that his ancestors and collaterals had been insane is admissible 'Pope on Lunacy 392 Phipson Ev 5th Ed 149—156 as to the presumption of regularity in the case of scientific instruments see Taylor Ev § 183 As to Manorial and Trade Customs see Taylor Ev, §§ 320—322

Roscoe N P Ev 85 86 Phipson Ev, 5th Ed 147 s 13 post acts showing title see s 11 post

(2) *The Managers of the Metropolitan Asylum District v Hill* 47 L T (H L) 29 per Lord Selborne L C 'Evidence relating to collateral facts is only admissible when such facts will if established establish reasonable presumption as to the matter in dispute and when such evidence is reasonably conclusive' per Lord Watson, see also *Foulkes v Chadd* 3 Doug 157

(3) *Hamilton v Tennant & Co* 1 Rob 871 7 C & F 122 *R v Neville* 1 Pea N P C 125 but see as to this last case *R v Farie* 8 E & B 486

(4) *Metropolitan Asylum District v Hill*, supra 35 per Lord Watson

(5) Phipson Ev 5th Ed 148 177 *Osborne v Clacquell* 2 Q B (1896) 109 *Williams v Richards* (1907) 2 K B, 88

(6) *Llewelllyn v Winchworth* 13 M & W 598 *Hollngram v Head* 4 C B N S 388 *Morris v Bethel* L R 4 C P, 765 Phipson Ev 5th Ed 83

(7) *Bourne v Gathiff* 11 C & F 45 see as to similar facts admissible in corroboration of the main fact *R v Pearce Peake* N Pr R 106 *R v Egerton R. & R* 175 cited in *R v Ellis* 6 B & C 148 *Cole v Manning* 2 Q B D 611 and cases in preceding note

(8) S 157 post

idence of acts of adultery,
petition are admissible,
previous acts of improper
familiarity (2)

8 Any fact is relevant which shows or constitutes a motive(3) or preparation(4) for any fact in issue or relevant fact

The conduct of any party, or of any agent to any party, to any suit or proceeding, in reference to such suit or proceeding(5) or in reference to any fact in issue therein or relevant thereto(6), and the conduct of any person an offence against whom is the subject of any proceeding(7), is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous(8) or subsequent(9) thereto

Explanation 1—The word “conduct” in this section does not include statements, unless those statements accompany and explain acts other than statements(10), but this explanation is not to affect the relevancy of statements under any other section of this Act (11)

Explanation 2—When the conduct of any person is relevant any statement made to him or in his presence and (12) hearing which affects such conduct, is relevant (13)

Illustrations

(a) *A* is tried for murder of *B*

The facts that *A* murdered *C*, that *B* knew that *A* had murdered *C*, and that *B* had tried to extort money from *A* by threatening to make his knowledge public, are relevant (14)

(b) *A* sues *B* upon a bond for the payment of money. *B* denies the making of the bond

The fact that, at the time when the bond was alleged to be made, *B* required money for a particular purpose is relevant

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|---|---|
| <p>(1) Steph Dig Art 13 <i>Blake v Albion Life Assurance Society</i> L R 4 C P D 94 see also <i>Courteen v Toise</i> 1 Camp 42n <i>Neal v Erling</i> 1 Esp 60 <i>Hatkins v Vince</i> 2 Starkie 368</p> <p>(2) <i>Boddy v Boddy</i> 30 L J P & M 23 Taylor Ex § 340 see remarks on this case in <i>Phipson Ex</i> 80 1st Ed omitted in 2nd Ed It has been held that ante nuptial incontinence is relevant to prove post nuptial misconduct charged between the same parties <i>Cantello v Cantello</i> Times March 2 1896 cited in <i>Phipson Ex</i> 3th Ed 146</p> <p>(3) Illustrs (a) (b) and <i>post</i> <i>Emf v Panchu Das</i> 47 C 671 (F B) <i>R v M J Vajapoori Moodelkar</i> 6 C 655 662 as to the admissibility of similar facts to prove motive for a crime see for its admission <i>R v Heeson</i> 14 Cox 40 <i>R v Stephens</i> 16 Cox 387 <i>R v Clewes</i> 4 C & P 221 contra <i>R v Flanagan</i> 15 Cox,</p> | <p>403 <i>R v Debendra Prosad A C</i> (1909) 36 C 573</p> <p>(4) Illustrs (c) (d) and <i>post</i></p> <p>(5) Illustr (e)</p> <p>(6) Illustrs (d) (e) (i) <i>R v Abdulla</i> 7 A 40 (1885)</p> <p>(7) Illustrs (i) (k)</p> <p>(8) Illustrs (d) (e)</p> <p>(9) Illustrs (e) (i) <i>Dalip Singh v Naal Annur P C</i> (1908) 30 A 259</p> <p>(10) Illustrs (j) (k) and <i>post</i></p> <p>(11) See ss 10 14 illustrs (k) (l) (m) 17—39 155 157</p> <p>(12) Not or but for English rule see <i>Neale v Jakle</i> 2 C & L 709</p> <p>(13) Illustrs (f) (g) (h) <i>R v Edmunds</i> 6 C & P 164</p> <p>(14) See also <i>R v Buckley</i> 13 Cox, 293 <i>R v Skiffes</i> 12 Cox 161, <i>R v Clewes</i> 4 C & P 221 5 Cox C C. 214, Best Ex § 92</p> |
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- (c) *A* is tried for the murder of *B* by poison

The fact that, before the death of *B*, *A* procured poison similar to that which was administered to *B* is relevant.(1)

- (d) The question is, whether a certain document is the Will of *A*

The facts that, not long before the date of the alleged Will, *A* made inquiry into matters to which the provisions of the alleged Will relate, that he consulted vakils in reference to making the Will, and that he caused drafts of other Wills to be prepared, of which he did not approve, are relevant.(2)

- (e) *A* is accused of a crime

The facts, that either before, or at the time of, or after the alleged crime, *A* provided evidence which would tend to give to the facts of the case an appearance favourable to himself or that he destroyed or concealed evidence, or prevented the presence or procured the absence of persons who might have been witnesses, or suborned person to give false evidence respecting it, are relevant (3)

- (f) The question is, whether *A* robbed *B*

The facts that, after *B* was robbed, *C* said in *A*'s presence—'the police are coming to look for the man who robbed *B*'—and that immediately afterwards *A* ran away, are relevant (4)

- (g) The question is, whether *A* owes *B* rupees 10,000

The facts that *A* asked *C* to lend him money, and that *D* said to *C* in *A*'s presence and hearing,—'I advise you not to trust *A*, for he owes *B* 10 000 rupees,'—and that *A* went away without making any answer, are relevant facts (5)

(1) See *R v Palmer* Steph Introd, 107—158, Steph Dig, Art 7, Illust. (b)

(2) Where the factum of a Will is in dispute the question whether the testator had made a Will before is relevant to show that he had disposing mind In the goods of *Bhuggobutty* (deceased) Cal H C 9th February 1900

(3) "A party who gives or produces false evidence may by so doing give rise to a general presumption against the truth of his case." *Girish Chunder v Iswar Chandra* 3 B L R A C J, 341 (1869) See also *R v Patch* in Steph Introd, 99—106 and Wills' Circ Ev, 6th Ed., 445, *R v Palmer*, supra, Steph Dig, Art 7, Illust (c) see s 114, Illust. (g), *post* Where the question was whether *A* suffered damage in a railway accident, the fact that *A* conspired with *B*, *C* and *D* to suborn false witnesses in support of his case was held to be relevant, as conduct subsequent to a fact in issue tending to show that it had not happened *Moriarty v L C & D Ry Co*, L R, 5 Q B, 314 "The conduct of a party to a cause may be of the highest importance in determining whether the cause of action in which he is plaintiff or the ground of defence, if he is defendant is honest and just, just as it is evidence against a prisoner that he has said one thing at one time and another at another, as showing that the recourse to falsehood leads fairly to an inference of guilt So if you can show that a plaintiff has been suborning false testimony, and has

endeavoured to have recourse to perjury, it is strong evidence that he knew perfectly well that his case was an unrighteous one I do not say that it is conclusive it does not always follow because a man not sure he shall be able to succeed by righteous means has recourse to means of a different character, that that which he desires namely the gaining of the victory, is not his due or that he has not good ground for believing that justice entitles him to it It does not necessarily follow that he has not a good cause of action, any more than a prisoner making a false statement to increase his appearance of innocence is necessarily a proof of his guilt, but it is always evidence which ought to be submitted to the consideration of the tribunal which has to judge of the facts and therefore, I think that the evidence was admissible inasmuch as it went to show that the plaintiff thought he had a bad case' *Ib*, per Cockburn C J see *Taylor* Ev, § 804, as to conduct of a party in a case of malicious prosecution see *Taylor v Williams* 2 B & Ad 857 as to admission inferred from the conduct of parties see s 58 *post* see also *Taylor* Ev § 804 *Roscoe* N P Ev 62, *Melhuish v Collier* 15 Q B 878, Best Ev § 524

(4) *R v Abdullah* 7 A, 600 (1895) v *post* notes

(5) See in the petition of *Surat Dhoobi*, 10 C 302 (1884) v *post* notes, *Besela v Stern* 2 C P C 265

(h) The question is whether A committed a crime

The fact that A absconded after receiving a letter warning him that inquiry was being made for the criminal and the contents of the letter are relevant (1)

(i) A is accused of a crime

The facts that, after the commission of the alleged crime, he absconded or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it, are relevant (2)

(j) The question is whether A was ravished.

The facts that, shortly after the alleged rape, she made a complaint relating to the crime, the circumstances under which and the terms in which the complaint was made are relevant (3)

The fact that, without making a complaint, she said that she had been ravished is not relevant as conduct under this section, though it may be relevant—as a dying declaration under section thirty two clause (one) or as corroborative evidence under section one hundred and fifty seven

(k) The question is, whether A was robbed.

The fact that, soon after the alleged robbery, he made a complaint relating to the offence, the circumstances under which and the term in which the complaint was made are relevant (4)

The fact that, he said he had been robbed without making any complaint, is not relevant as conduct under this section though it may be relevant—as a dying declaration under section thirty two clause (one) or as corroborative evidence under section one hundred and fifty seven

Principle—This section is an amplification of the preceding one. A motive is strictly what its etymology indicates that which moves or influences the mind. It has been said that an action without a motive would be an effect without a cause, and as, to take for example Criminal cases, the particulars of external situation and conduct will in general correctly denote the motive for Criminal action, the absence of all evidence of an inducing cause is reasonably regarded where the fact is doubtful as affording a strong presumption of innocence (5). Preparation is also relevant it being obviously important in the consideration of the question whether a man did a particular act or — measures calculated to bring it about. Preparation be preceded not only by impelling motives. The existence of a design or plan is usually the subsequent doing of the act planned

(1) As to the inferences to be drawn from absconding see *R v Sorob Roy* 5 W R Cr 28 30 (1866)

(2) Steph Dig Art 7 illust (d) see s 9 illust (c) post

(3) See *R v Lillyman* 2 Q B (1896) 167 C C R *R v Osborne* 1 K B (1905) 551

(4) *R v MacDonald* 10 B L R App 2 (1872) the absence of the accused at the time when a complaint is made against him in cases coming within this Illustration does not affect the relevancy of such complaint and therefore does not exclude it. In England evidence of complaint is now admissible only in cases of rape and kindred offences against females. *Phipson* Ev 5th Ed 99. This Illustration shows that the rule is otherwise in this country. See *R v Pink* 6 C & P,

39 *R v Ridsdale* Starkie Ev 469 note *Roscoe* Cr Ev 13th Ed 23 24 Steph Dig Art 8 *Phipson* Ev, 5th Ed 99. wife's complaint in Ecclesiastical Courts see *Lockwood v Lockwood* 2 Curt 281 and complaints as evidence of mental and bodily feeling see *R v Vincent* 9 C & P 91 *R v Conde* 10 Cox 547 cf s 14 post

(5) See notes to s 3 ante. But it is held that the fact of the evidence of the motive not being clear is no reason for disbelieving a plain straightforward case — *Emp v Balaram Das* 49 C 358

(6) *Wills* Circ. Ev 6th Ed, 79 *Norton* Ev 109 *Cunningham* Ev, 93 94 Best Ev §§ 454—457, the case of *Patch* cited in and in Steph. Introd, §§ 99—106 *Burrill* Circ. Ev., 343 also in, 546

or designed (1) Preparation is an instance of previous conduct of the party influencing the fact in issue or relevant fact, but other conduct also, whether of a party or of an agent to a party, whether previous or subsequent, and whether influencing or influenced by a fact in issue or relevant fact, is also admissible, the conduct of a party being always extremely relevant, for reasons some of which appear in the Commentary to the section See Introduction, *ante*, and Notes, *post*

s 3 ('Fact in issue')

(Statements relevant under other sections)

s 3 ('Relevant')

ss 17-31 (Oral and Documentary admission.)

s 3 ('Fact')

s 50 (Opinion on relationship expressed by conduct)

ss 10 14, 17-39, 155 157

Motive, Preparation and Conduct—Steph. Dig., Art 7, Wills' Circumstantial Evidence *passim*, Best, Ev., §§ 91, 92 457-467, Burrill on Circumstantial Evidence, Athol Wills on Circumstantial Evidence, Phillips Famous Cases on Circumstantial Evidence *passim*, Phipson, Ev., 5th Ed., 121, Norton, Ev., 107, Cunningham Ev., 93, Taylor, Ev., §§ 104, 1204, 1205, Roscoe, N P Ev., 28, 67, Roscoe, Cr Ev., 13th Ed., 7, 14-22, 83, Wills, Ev., 2nd Ed., 63, Wigmore, Ev., §§ 117, 237, *et seq* *Statements accompanying Acts*—Steph. Dig., Arts 7, 8, 16, Note V, Best Ev., § 495, Greenleaf Ev., § 108, Wharton, Ev., §§ 238, 239 Phipson, Ev., 5th Ed., 47, Starkie, Ev., 51-53, 87-89, 166-171, Taylor, Ev., §§ 583-589, Roscoe, N P Ev., 51-53, Powell, Ev., 9th Ed., 68-73, Roscoe, Cr Ev., 13th Ed., 23, *Statements affecting Conduct*—Steph. Dig., Art 8, Taylor, Ev., §§ 809-816, Best, Ev., §§ 574 575, Phipson, Ev., 5th Ed., 241, Norton, Ev., 106, Roscoe, N P Ev., 64-66, Powell, Ev., 9th Ed., 439-439, Wharton, Ev., §§ 1136 1155

COMMENTARY.

Motive in the correct sense is the emotion supposed to have led to the act. The external fact, which is sometimes styled the motive, is merely the possible existing cause of this "motive" and not identical with the motive itself, and the evidentiary question is not whether that external fact is admissible as a motive, but whether it is admissible to show the probable existence of the emotion or motive (2). Generally the voluntary acts of sane persons have an end in view, and it has already been observed that the motive is to be regarded, where the act is voluntary, as a fact of innocence (4). If there

(1) See Wigmore Ev. 237. Design or plan should be distinguished from intent. The latter in the substantive law is a proposition in issue. Design or plan is evidence of intent. Design should also be distinguished from emotion or motive though the same facts may be evidence of either.

(2) Wigmore Ev. § 117.

(3) See Wigmore Ev., § 118. Norton, Ev. 107. In *Palmer's case* (see Steph. Introd. 107-158) Rolfe B., in addressing the jury said—"Had the prisoner the opportunity of administering poison, that was one thing. Had he any motive to do so, that is another." Wills' Circ. Ev. 6th Ed. 356.

(4) Wills' Circumstantial Evidence 6th Ed. 260, Burrills Circ. Ev. 281, *et seq*. Best Ev. § 453, see illustrs. (a), (b). The absence of all motive for a crime when corroborated by independent evidence of the prisoner's previous

insanity is not without weight. *R v Sheikh Mustaffa* 1 W R Cr 19 (1864), *R v Sorob Roy* 5 W R Cr 28, 31 (1866). *R v Bahar Ali* 15 W R Cr, 46 (1871). *Dil Ga v R* (1907) 34 C, 686 (absence of motive). *R v Jaichand Mundle* 7 W R Cr 60 (1867), proof of motive not necessary. In estimating probabilities motives cannot in a general sense be safely left out of the account. Where the motive is a pecuniary one, the wealth of the offender is no unimportant consideration. *Per Sir Lawrence Peel C J* in *R v Hedger*, 131 (1852). Evidence as to the motives with which a prisoner commits an offence should be direct evidence of the strictest character. *R v Zuhir*, 10 W R Cr 11 (1868). The motives of parties can only be ascertained by inference drawn from facts. *Taylor v Williams*, 2 B and Ad, 845 857.

be any motive which can be assigned, the *adequacy* of that motive is not in all cases necessary. Atrocious crimes have been committed from very slight motives (1) The mere fact, however, of a party being so situated that an advantage would accrue to him from the commission of a crime, amounts to nothing, or next to nothing, as a proof of his having committed it (2) A letter written by the solicitors of a Company to the plaintiff stating that the Company declined to continue the negotiations for a contract because of the defendant's threats, was *held* admissible (though not necessarily conclusive) evidence that the negotiations were in fact discontinued because of the defendant's threats (3) Further, the existence of motives invisible to all except the person who is influenced by them must not be overlooked (4) 'It is sometimes' (Professor Wigmore points out) 'popularly supposed that in order to establish a charge of crime, the prosecution must show a possible motive. But this notion is without foundation.' Assuming for purposes of argument that

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mere absence of any one kind cannot be fatal. There must have been a plan to do the act (we may assume) the accused must have been present (assuming it was done by manual action) but there may be no evidence of preparation, or there may be no evidence of presence, yet the remaining facts may furnish ample proof. The failure to produce evidence of some appropriate motive may be a great weakness in the whole body of proof, but it is not a fatal one as a matter of law. In other words there is no more necessity in the law of evidence to discern and establish the particular existing emotion or some possible one, than to use any other particular kind of evidential fact' (5) An emotion may impel *against*, as well as *towards*, an act. Thus a defendant's strong feelings of affection for a deceased person would work against the doing of violence upon him and would thus be relevant to show the not doing (6)

The reasons which exist for the relevancy of evidence of preparation or design have been already given. Design may be proved by an utterance in which it is asserted, by conduct indicating the inward existence of design, by evidence of prior or subsequent existence of the design as indicating its existence at the time in question (7) Previous attempts to commit an offence are closely allied to preparations for the commission of it, and only differ in being carried one step further and nearer to the Criminal act, of which, however, like the former, they fall short (8) Preparation and previous attempts (9) are instances of previous conduct of the party influencing the fact in issue or relevant fact, but other conduct also, whether of a party or of an agent to

(1) *Per* Lord Campbell C J in *R v Palmer* cited in *Wills Circ Ev* 6th Ed 63 *R v Hedger* supra 131

(2) *Best Ev* § 453

(3) *Skinner & Co v Sieu & Co L R* 2 Ch D (1894) 581

(4) As to acts *apparently* motiveless see *R v Haynes* 1 F & F 666 667 *R v Michael Stokes* 3 C & K 185 188 and next note

(5) *Wigmore Ev* § 118 citing *Pointer v U S* 151 U S 396 (Amer) [the absence of evidence suggesting a motive is a circumstance in favour of the accused but proof of motive is never indispensable

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(6) *Wigmore Ev* § 118

(7) *Id* § 237 *et seq* e.g. possession of tools materials preparations journeys experiments enquiries and the like

(8) *Best Ev* § 455 s. 14 *post* *illustra.*

(9) (i) (a) as to the probative force of and infirmative circumstances connected with preparation and previous attempt see *Best Ev* §§ 456 457

(9) See *illustra.* (c) (d), & s. 14 *illustra.*

(i) (j) (o)

or designed (1) Preparation is an instance of previous conduct of the party influencing the fact in issue or relevant fact, but other conduct also, whether of a party or of an agent to a party, whether previous or subsequent, and whether influencing or influenced by a fact in issue or relevant fact, is also admissible, the conduct of a party being always extremely relevant, for reasons some of which appear in the Commentary to the section See Introduction, *ante*, and Notes, *post*

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Motive, Preparation and Conduct—Steph Dig, Art 7, Wills' Circumstantial Evidence, *passim*, Best, Ev. §§ 91, 92, 452-467, Burrill on Circumstantial Evidence, Arthur Wills on Circumstantial Evidence, Philip's Famous Cases on Circumstantial Evidence *passim*, Phipson, Ev, 5th Ed, 121, Norton, Ev, 107, Cunningham, Ev, 93, Taylor, Ev, §§ 104, 1204, 1205, Roscoe, N P Ev, 28, 67, Roscoe, Cr Ev, 13th Ed, 7, 14-22, 83, Wills, Ev, 2nd Ed, 63, Wigmore, Ev, §§ 117, 237, *et seq* Statements accompanying Acts—Steph Dig, Arts 7, 8, *ib*, Note V, Best, Ev, § 495, Greenleaf, Ev, § 108, Wharton, Ev, §§ 258, 259 Phipson, Ev, 5th Ed, 47, Starkie, Ev, 51-53, 87-89, 166-171, Taylor, Ev, §§ 583-589, Roscoe, N P Ev, 51-53, Powell, Ev, 9th Ed, 68-73, Roscoe, Cr Ev, 13th Ed, 23, Statements affecting Conduct—Steph Dig, Art 8, Taylor, Ev, §§ 809-816, Best, Ev, §§ 574, 575, Phipson, Ev, 5th Ed, 241, Norton, Ev, 106, Roscoe, N P Ev, 64-66, Powell, Ev, 9th Ed, 430-439, Wharton, Ev, §§ 1136, 1155

COMMENTARY.

Motive,
prepara-
tion,
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Motive in the correct sense is the emotion supposed to have led to the act. The motive, is merely the possible emotional with the motive itself, and it external fact is admissible as a motive, but whether it is admissible to show the probable existence of the emotion or motive (2) Generally the voluntary acts of sane persons have an impelling emotion or motive (3) It has, therefore, already been observed that the absence of all evidence of an inducing cause is reasonably regarded, where the fact is doubtful, as affording a strong presumption of innocence (4) If there

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(2) Wigmore, Ev, § 117

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be any motive which can be assigned, the adequacy of that motive is not in all cases necessary. Atrocious crimes have been committed from very slight motives (1). The mere fact, however, of a party being so situated that an advantage would accrue to him from the commission of a crime amounts to nothing or next to nothing as a proof of his having committed it (2). A letter written by the solicitors of a Company to the plaintiff stating that the Company declined to continue the negotiations for a contract because of the defendant's threats, was held admissible (though not necessarily conclusive) evidence that the negotiations were in fact discontinued because of the defendant's threats (3). Further, the existence of motives invisible to all except the person who is influenced by them must not be overlooked (4). It is sometimes (Professor Wigmore points out) popularly supposed that in order to establish a charge of crime, the prosecution must show a possible motive. But this notion is without foundation. Assuming for purposes of argument that every act must have a motive, i.e. an impelling emotion (which is not strictly correct) yet it is always possible that this necessary emotion may be undiscoverable and thus the failure to discover it does not signify its non-existence. The kinds of evidence to prove an act vary in probative strength and the absence of one kind may be more significant than the absence of another, but the mere absence of any one kind cannot be fatal. There must have been a plan to do the act (we may assume) the accused must have been present (assuming it was done by manual action) but there may be no evidence of preparation or there may be no evidence of presence, yet the remaining facts may furnish ample proof. The failure to produce evidence of some appropriate motive may be a great weakness in the whole body of proof, but it is not a fatal one as a matter of law. In other words there is no more necessity in the law of evidence to discern and establish the particular existing emotion or some possible one than to use any other particular kind of evidential fact (5). An emotion may impel against, as well as towards, an act. Thus a defendant's strong feelings of affection for a deceased person would work against the doing of violence upon him and would thus be relevant to show the not doing (6).

The reasons which exist for the relevancy of evidence of preparation or design have been already given. Design may be proved by an utterance in which it is asserted, by conduct indicating the inward existence of design, by evidence of prior or subsequent existence of the design as indicating its existence at the time in question (7). Previous attempts to commit an offence are closely allied to preparations for the commission of it, and only differ in being carried one step further and nearer to the Criminal act, of which, however, like the former they fall short (8). Preparation and previous attempts (9) are instances of previous conduct of the party influencing the fact in issue or relevant fact, but other conduct also, whether of a party or of an agent to

(1) *Per Lord Campbell C J in R v Palmer* cited in *Wills Circ Ev* 6th Ed 63. *R v Hedger* supra 131.

(2) *Best Ev* § 453.

(3) *Skinner & Co v Shev & Co L R* 2 Ch D (1894) 581.

(4) As to acts apparently motiveless see *R v Haynes* 1 F & F 666 667. *R v Michael Stokes* 3 C & K 185 188 and next note.

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(6) *Wigmore Ev* § 118.

(7) *Id* § 237 et seq e.g. possession of tools materials preparations journeys experiments enquiries and the like.

(8) *Best Ev* § 455 s. 14 post illustrates (i) (j) (o) as to the probative force of and infirmative circumstances connected with preparation and previous attempt see *Best Ev* §§ 456 457.

(9) See illustrations. (c) (d) & s. 14 illustrates (i) (j) (o).

a party, whether previous(1) or subsequent(2), and whether influencing or influenced by a fact in issue or relevant fact, is also made admissible under this section

The second clause applies to the party's agents as well as the party himself "Party" includes not only the plaintiff and defendant in a Civil suit, but parties in a Criminal prosecution, as for instance, a prisoner charged with murder (3) The conduct need not, to be relevant, be contemporaneous Though concurrence of time must always be considered as material to show the connection, it is by no means essential (4) "If such conduct influences or is influenced" means "if such conduct directly and immediately influences or is influenced" (5) The conduct of a party is extremely relevant (6) It should be remembered that a man's conduct is not only what he does but also what he refrains from doing and that the latter is often the more significant (7) The illustrations given are so many instances of natural presumptions which the Court or jury may draw From preparations prior, or flight subsequent to, a crime, may be inferred or presumed the guilt of the party against whom such conduct is proved (8) Other presumptions from conduct arise in the case of flight(9), silence(10), evasive or false response(11) (*v. post*), possession of documents, or property connected with the offence(12), change of demeanour in or in the circumstances of, the accused(13) as his becoming suddenly rich his squandering unusual sums of money and the like, attempts to stifle or evade justice or mislead enquiry(14) (as flight, keeping concealed concealing things, obliteration of marks, subornation of evidence, bribery, collusion with officers and the like) and fear indicated by passive deportment(15), as by trembling, stammering starting, etc., or by a

(1) See *illusts (d) (e)* as to previous and subsequent conduct see *Best Ev* § 452

(2) See *illusts (e) (i)*

(3) *R v Abdullah* 7 A 380 399 (1885) (F B) in which the terms of this section are discussed see *R v Arnall* 8 Cox C C 439 3 Russ Cr 489

(4) *Field* Ex 6th Ed § 58 Whitley Stokes 856 Taylor Ev §§ 588 589 *Rouch v G W R* 1 Q B 60 but see also *R v Bedingfield* 14 Cox 341 *Agasiz v London Tram Co* 21 W R (Eng) 199 *R v Goddard*, 15 Cox 7 *Lees v Marton* 1 M & R, 210 *Thompson v Trean on Skin* 402 *v post*

(5) *R v Abdullah* supra 390 396 contra *per* Mamood J ib 400

(6) *Ib* 394, *Balmakand v Ghansam* 22 C 391 404 406 (1894) *R v Ishri* (1907) 29 A, 46 *Dalip Singh v Naual Kunwar* P C (1903) 30 A 258 [intention inferred from subsequent conduct of accused] *R v Heraun* 5 W R Cr 5 (1866) *R v Malik* 37 A 395 (1915) [presumption of guilty intent] *Karali Prasad Ginn v King Emperor* 44 C 359 (1917) See as to conduct *R v Jora Hasji* 11 Bom H C R 245 (1874) and *Wigmore* Ex *sub toc*

(7) *Ram Narain Singh v Chota Nagpur Banking Association* 43 C 332 (1915) *per* Woodroffe J See *Watson v Moleshe Nara v Roy* 24 W R 176 (1875)

(8) *Norton* Ev 107

(9) *Illust (i) ante* absconding is usually but slight evidence of guilt *R v Sorob*

Roy 5 W R Cr 28 (1866), *R v Gobardhan* 9 A 528 568 (1887) as to the obsolete maxim *fatetur facinus qui iudicium fugit* (he who flies judgment confesses his guilt) see *Best Ev* §§ 460—465 *Norton* Ev 110 see s 9 *illust (c) post*

(10) *v post*

(11) *Norton* Ev 106 107 and *post*, *Best Ev* 574 see *Moriarty v L C & D R* ante for an example of inferences from conduct of the character above mentioned see *R v Sami* 13 M 426 432 (1890)

(12) *Illust (i) ante* see *R v Coir toiser* *Norton* Ev 111 Taylor Ev § 595 *R v Cooper* 1 Q B D, 15 Letters etc found in a man's house after his arrest are admissible in evidence if their previous existence has been proved, *R v Amir Khan* 9 B L R 36 70 71 (1871)

(13) *Best Ev* § 459

(14) *Arthur P Wills' Circ* Ev 138* *Best Ev* § 460, *Norton* Ev, 110 111, *Illusts (e) (i) ante* *R v Dunellan* in *Steph* *Introd* 75—81 and *Wills' Circ* Ev 6th Ed 376 380, destruction of marks see *R v Cook* and *R v Green* *acre* cited in *Wills' Circ* Ev 6th Ed 134—136 and *Norton* Ev 111

(15) *Best Ev* § 466 Trial of *Eugene Aram* cited in *Wills' Circ* Ev 6th Ed 121 122 and *Norton* Ev 111 112 *R v Peter Ram* 3 W R Cr 11 (1860) [conduct of accused before and after crime] *R v Belaree* 3 W R Cr.

de re for secrecy(1), e.g., as by disguising the person or choosing a spot supposed to be out of the view of others. Where a woman charged with a murder led the Police to a place where she produced ornaments which the victim had worn at the time of the murder, this was held to be conduct admissible in evidence against her(2). The conduct or demeanour of a prisoner on being charged with the crime, or upon allusions being made to it, is frequently given in evidence against him(3). But evidence of this description ought to be regarded with caution(4). Again in order to ascertain the real intention of parties to an instrument evidence of what they have done under it since its execution is relevant. The principle upon which such evidence is admitted, is contained in the maxim *optimus interpret rerum usus* (5). And so in the case of the *Attorney General v. Drummond*, (6) Lord Chancellor Sugden said — "Tell me what you have done under such a deed, and I will tell you what that deed means." As to the admissibility of judgments under this section see case noted below(7) and as to the admissibility of opinion on relationship, expressed by conduct see section 50, *post*. Instances of admission by the conduct or acts of a party to Civil suits are of frequent occurrence. A party's admission by conduct as to the existence or non existence of any material fact may always be proved *against* him(8) and evidence on his part

23 24 (1865) [conduct of the prisoner since arrest, feigning insanity general demeanour]

(1) Best Ev. § 467 Norton Ev. 113

(2) *R. v. Muri* (1909) 31 A. 592

(3) *R. v. Smithers* 5 C. & P. 332, *R. v. Bartlett* 7 C. & P. 832 *R. v. Mallory* 13 Q. B. D. 33 *R. v. Tattershall* 2 Leach 984 *R. v. Phillips* 1 Lew. C. C. 103 *R. v. Tate* C. C. A. (1908) 2 K. B. 680 at p. 915 *R. v. Cramp* 14 Cox 390

(4) 1 Phillips and Arnold 10th Ed. 403 Roscoe Cr. Ev. 53 12th Ed. 48

(5) *Robert Watson & Co. v. Mohesh Aara* 24 W. R. 17 (1875) in which the question was whether a *pottah* conveyed an estate for life only or an estate of inheritance their Lordships of the Privy Council said — "In order to determine this question their Lordships must arrive as well as they can at the real intention of the parties to be collected chiefly, no doubt from the terms of the instrument itself but to a certain extent also from the circumstances existing at the time of its execution and further by the conduct of the parties since its execution. In this case the *pottah* was less than 20 years old at the time of the institution of the suit from which it appears that in India the maxim is not restricted to ancient documents see documents at least 30 years old (see Field Ev. 6th Ed. 68 Taylor Ev. §§ 1204 1205 Roscoe N. P. Ev. 28) See also *Girdhar Naggisshet v. Ganpat Moroba* 11 Bom. H. C. R. 129 (1874) *Nadhikrishna v. Astarani* 13 Bom. L. R. 416 420 (1874) s. c. 21 W. R. 386 *Cheetun Lall v. Chutterdhar* Lall 19 W. R. 437 (1873) *Rani Radha Lall v. Gureedhar Sahoo* 20 W. R. 243 (1873) [boundary dispute] *Narsingh Djal v. Rani Aara* 30 C. 883 896

(1903) as to usage affecting contracts see s. 92 Prov. 5 *post* and note with respect to the course of dealing between the parties when the meaning of a document is doubtful *Bourne v. Galliff* 11 C. & F. 45 [evidence of former transactions] *Harrison v. Barton* 30 L. J. Ch. 213, *Forbes v. Watt* L. R. 2 H. L. Sc. & D. 214 *Royal Exchange Ass. Corp. v. Tod* 8 T. L. R. 669 Taylor Ev. § 1198 but not when it is clear (*Marshall v. Berridge* 19 Ch. D. 233 241 *Iggulden v. May* 9 Ves. 233), the sense in which both but not one only of the parties have acted on it is admissible in explanation *Phipson* Ev. 5th Ed. 591 Evidence of previous dealings is admissible only for the purpose of explaining the terms used in a contract and not to impose on a party an obligation as to which the contract is silent *Haji Malomed v. E. Spiller & Co.* 2 B. L. R. 691 (1900) *Kulada Prasad Deghoria v. Kahi Das Naik* 42 C. 536 (1915) For conduct showing intention not to be bound by contract see *Mallura Molan Saha v. Ram Kumar Saha* 43 C. 790 (1916) See generally as to the admissibility of extrinsic evidence to affect documents the introduction to Chapter VI *post*.

(6) Dru & War 368

(7) *The Collector of Gorakhpur v. Palakdhari Singh* 12 A. 1 17 45 (1889) and notes to s. 13 *post*.

(8) Taylor Ev. §§ 804 806 and cases there cited. The original draft of the Evidence Act contained the following section. A conduct of any party to any proceeding upon the occasion of anything being done or said in his presence in relation to matters in question, and the things so said or done are relevant facts when they render probable or improbable any relevant fact alleged or denied in

to explain or rebut such admissions is also receivable (1) The plaintiff's title to sue, or the character in which the plaintiff sues or in which the defendant is sued, is frequently admitted by the acts and conduct of the opposite party, and in some cases the admission though not strictly an estoppel, is practically conclusive. Thus, if *B* has dealt with *A* as farmer of the post-horse duties, it is evidence in an action by *A* against *B* to prove that he is such farmer and payment of money is an admission against the payer, that the receiver is the proper person to receive it (2) So also suppression of documents is an admission that their contents are unfavourable to the party suppressing them (*v ante*). When *A* brings an action against *B* to recover possession of land he thereby admits *B*'s possession of the land (3) Mere subscription of a paper, as witness is not in itself proof of his knowledge of its contents (4) When a landlord quietly suffers a tenant to expend money in making alterations and improvements in the premises it is evidence of his consent to the alterations (5) And when a party is himself a defendant (whether in a Civil or Criminal proceeding) and is charged as bearing some particular character, the fact of his having acted in that character will in all cases be sufficient evidence, as an admission that he bears that character without reference to his appointment being in writing. Thus upon an indictment against a letter carrier for embezzlement, proof that he acted as such was held to be sufficient without showing his appointment (6) Delay in suing to enforce alleged rights may be construed as an admission of their non existence (7) Conversations that explain a man's conduct are admissible in evidence (8) As to written and oral admissions see s 17 *post* and for further instances of admissions by conduct, see the next paragraph but one

Statements
accompany
ing and
explaining
acts

In English law such statements are said sometimes to be admissible as forming part of the vague and unsatisfactory term *res gestæ*. The first Explanation declares that mere *statements* as distinguished from *acts* do not constitute *conduct*. It points to a case in which a person whose conduct is in dispute mixes up together actions and statements, and in such case those actions and statements may be proved as a whole. For instance a person is seen running down a street in a wounded condition and calling out the name of his assailant, and the circumstances under which the injuries were inflicted. Here what the person says and what he does may be taken together and proved as a whole (9) A statement may be admissible not as standing alone, but as

respect of the person so conducting himself. The provisions of this proposed section are however incorporated in other parts of the present Act see present sections s 11 *post* s 114 illustrates (g) (h) Field Ev 6th Ed 120 as to conduct of family showing recognition of family arrangement see *Bhubaneswari Devi v Harisaran Surma* 6 C 724 (1881) (1) *Melhuish v Collier* 15 Q B 878 and s 9 *post* Powell Ev 9th Ed 430—439

(2) *Roscoe N P Ev 67 Radford v McIntosh* 3 T R 632 *Peacock v Harris* 10 East 104 *James v Bion* 2 S N & St 606 Taylor Ev p 567 note Norton Ev p 114 as to estoppel arising from the acts of a party see s 115 *post* (3) *Stanford v Hurlstone* L R, 9 Ch 116

(4) *Harding v Crethorn* 1 Esp 58
(5) *Doe v Allen* 3 Taunt 78 80
Doe v Pae 1 Esp 366 *Neale v Parkin*

1 Esp 229 *Stasley v Wiste* 14 East 332

(6) *Roscoe Cr Ev 7 R v Borrett* 6 C & P 124 see s 91 exception (1) *post* and notes thereto See Taylor Ev § 173

(7) *Juggurnath v Syid Shah Malomed* 14 B L R 386 (1874) *Rajendra Nath v Jogendra Nath* 14 M I A 67 (1871) s c 15 W R (F C.) 41

(8) *R v Gandfield* 2 Co C C 43
(9) *F v Abdullah* supra 395 396 *per*

Petheram C J. But the case would be very different if some passer by stopped him and suggested some name or asked some question regarding the transaction. If a person were found making such statements without any question on first being asked then his statements might be regarded as a part of his conduct. But when the statement is made merely in response to some question or objection it shows a state of things introduced not by the fact

explaining conduct in reference to relevant facts. So it was held that the answers to his superior officer given by an accused person in explanation of an official irregularity could be proved against him if subsequently ascertained to be false (1). Conduct may be equivocal without statements explanatory and elucidatory of it. Statements accompanying acts are in fact part of the *res gestæ* just as much as the acts themselves. They are often absolutely necessary to show the *animus* of the actor. They have been styled verbal acts (2). Thus a payment by a debtor may be explained by his request to apply it to a certain debt. If a debtor leaves home his intent to avoid his creditors may be shown by what he said when leaving (3). The declarations are not admissible simply because they accompany an act; the latter itself must be in issue or relevant; the admissibility of such a statement depends upon the light it throws upon an act which is itself relevant (4). The Evidence Act makes 'those statements admissible and those only which are the essential complements of acts done or refused to be done so that the act itself or the omission to act requires a special significance as a ground for inference with respect to the issues in the case under trial' (5). It is not every declaration that accompanies and purports to explain a fact that will be received; e.g., a declaration that is equivocal (6), or is a mere expression of opinion (7), or is obviously concocted to serve a purpose (8), in other words the statements must really explain the acts (9), and the declaration must relate to and can only be used to explain the fact it accompanies and not previous or subsequent facts (10), unless the transaction be of a continuous nature (11). It is sometimes said that the declaration and act must be by the same person (12). But though such declarations are often the only ones material the rule is by no means so strictly confined. It is an every day practice in Criminal cases to receive the declarations of the victim as well as those of the assailant. So in cases (13) where the victim is concerned in the common assault, the declarations of the victim are admissible. It has, indeed, been held that the declarations of participants if neither parties nor agents are inadmissible (14), but this limitation cannot be taken as invariable for the exclamations of mere bystanders may sometimes be both material and admissible evidence (15). The declarations are no proof of the fact they accompany, the existence of the latter must be

in issue but by the interposition of some thing else. *Ib* but see *ib* 400 *per* Mahmood J. and *ante*

(1) *S v Ganesh* 4 Bom L R 784 (1902)

(2) Norton Ev 106 *Bates v Bailey* 5 T R 512 *Hyde v Palmer* 3 B & S 657 32 L J Q B 176 *Bennison v Cartwright* 5 B P & S 1

(3) *Bateman v Bailey* supra *Roscoe N P Ev* 52

(4) *Wright v Tatha* 1 (1838) 5 Cl & Fin 670 *R v Bliss* *ib* 550 *Hyde v Palmer* supra *Roscoe N P Ev* 53

When any facts are proper evidence upon an issue all oral or written declarations which can explain such facts may be received in evidence. *Wright v Tatham* supra *per* Baron Parke. See Steph Dig p 161

(5) *R v Rana Birappa* 3 B 12 17 (1878) *per* West J

(6) *R v Bliss* supra *R v Hain* *Wright* 13 Cox 171 *Roscoe N P Ev* 53

(7) *Wright v Tatha* supra

(8) *Tolson v Trevanion* supra *R v Abrahams* 2 C & K 550 *Brodie v Brodie* 44 L T N S 307 *Starkie Ev* 89 and see *American cases and authorities* in *Pherson Ev* 5th Ed 47

(9) See remarks in *R v Rana Birappa* supra

(10) *Hyde v Palmer* supra

(11) *Bennison v Cartwright* supra *Roscoe N P Ev* 52

(12) *House v Malkin* 27 W R (Eng) 340 40 L T 196

(13) *R v Gordon* 2 How St Tr 520 *R v Hain* 3 B & Ald 54 *R v O'Connell* Arm & Tr R 775 the present section deals only with statements by parties; the declarations mentioned in the text would be admissible under s. 10 *post*

(14) *R v Petcher* 7 Cox 9 *Bruce v Nicolopole* 11 Ex 129

(15) See note (12) supra *ante* such evidence may be admissible under s. 6 *ante* see s. 6 illust (a) and note *ante*

established independently”(1) As to the admissibility of declarations as evidence of mental and physical conditions, *see* the fourteenth section, *post* Illustrations (j) and (k) are illustrations of statements accompanying and explaining the conduct of a person an offence against whom is being enquired into Under these illustrations, the *terms* in which the complaint was made are relevant (2) “A distinction is to be marked here between a bare *statement* of the fact of rape or robbery, and a *complaint* The latter evidences conduct, the former has no such tendency There may be sometimes a difficulty in discriminating between a statement and a complaint It is conceived that the essential difference between the two is that the latter is made with a view to redress or punishment and must be made to some one in authority—the Police, for instance, or a parent, or some other person to whom the complainant was justly entitled to look for assistance and protection For instance, a petition impugning the conduct of a Police officer and begging that he may be put on trial is a complaint within the meaning of the Criminal Procedure Code (3) The distinction is of importance, because while a *complaint* is always relevant under particular used as corroborative statement as included in the word “conduct” must be read in connection with the 25th and 26th sections, *post*, and cannot admit a statement as evidence which would be shut out by those sections (5)

In England it is now held that in prosecutions for rape and offences of a similar character, a statement in the nature of a complaint made by the prosecutrix to a third person, not in the presence of the accused, may be given in evidence provided such statement is shewn to have been made at the first opportunity which reasonably offered itself after the commission of the offence (6) It was formerly doubted whether the particulars of the complaint could be disclosed by the witnesses for the Crown, either as original or as confirmatory evidence, but it is now settled that they may be so given in evidence in this class of cases, but only in this class, not as being evidence of the truth of the charge against the accused, but as evidence of the consistency of conduct of the prosecutrix with the story told by her in the witness box and as negativing consent on her part (7) It was at one time thought that this evidence was only admissible in cases where non consent was a material element (8) This however is not now the law (9)

In the second Explanation “statement” includes documents addressed to a person and shown to have come to his actual knowledge (10) The statements whether oral or written *must affect the conduct* if they cannot be shown to have done so they are inadmissible under this section “Statements made in the presence of a party are admissible as the groundwork of his conduct” (11) “Statements made by a party in the presence of another party, and which are not of a false or evasive nature of an admission or a false responsibility”

(1) Phipson Ev, 5th Ed, 47 *et seq*

(2) As to the English rule on this point see Steph Dig, p 162, Taylor Ev, §581, Roscoe Cr Ev, 25, see *R. v MacDonald* supra Norton Ev, 114, Whitley Stokes 827, *R v Lillyman*, 31 L J 383 (June 20th, 1896), 2 Q B (1896) 167, *R v Osborne* (1905), 1 K B, 551

(3) *Gangadhar Pradhan v Emperor*, 43 C 173 (1915), but see *Emperor v Phulel* 35 A 102 (1913) (accusation not made as a complaint)

(4) Norton Ev, 114 See Wills' Ev,

11, for meaning of ‘complaint’ with Cr Pr Code s 196 see *Apurba Krishna Bose v R* (1907) 35 C, 141, *R v Sham Lal* (1889), 14 C, 707

(5) *R v Nana* 14 B, 260 (1889)

(6) *R v Osborne* (1905), 1 K B, 551

(7) *R v Osborne* (1905), 1 K B, 551.

R v Lillyman (1896), 2 Q B, 167, *R v*

Roland (1898), 62 J P 459

(8) *R v Kingham* (1902), 66 J P, 393

(9) Taylor, 581

(10) Illustr. (k), *ante*, *Wright v Tatham* (1838), 5 Cl and Fin, 670

would be equivocal *per se*, and might be unintelligible without our knowledge of what led to it. His act upon the statement and the statement are so blended together, that both form part of the *res gestæ*, and on this ground again, the statement is as receivable as the act. In point of fact, it is the conduct of the party upon the statement being made, that is the material point, the statements themselves are only material as leading up to and explaining that (1) The mere fact that statements have been made in a party's presence or documents found in his possession, though it may render them admissible against him as original evidence—*e.g.*, as showing knowledge or complicity—will afford no proof *per se* of the truth of their contents, the ground of reception for the latter purpose is that the party has by his conduct or silence admitted the accuracy of the assertions made (2) And in a recent case it has been held that to render documents found in the possession of a prisoner admissible against him in proof of the contents it must be shown that by some act, speech or writing he has manifested a knowledge of all or any of them and it has been also held that this would apply more strongly when of the documents in question some had been received by him and others written by him (3) In the case of statements made to or in a party's presence he may either reply to them or keep silent (4), or his conduct may be otherwise affected by them (5) When the statement in reply accompanies and explains an act other than the statement, it may be relevant under this section or the section relating to oral or documentary admissions, when it is unaccompanied by any act, it may be relevant under the latter sections. Such statements made in a party's presence and replied to will be evidence against him of the facts stated to the extent that his answer directly or indirectly admits their truth (6) But pre-ence evidence against ill on to reply to such of the maxim *qui tacet* cases but little reliance on silence or acquiescence

1

(1) Norton Ev 106 107 It is a general rule that a statement made in the presence of the prisoner and which he might have contradicted if untrue is evidence against him *per Field J* in *R v Mallory* 15 Cox 456 458

(2) Phipson Ev 5th Ed 241 and authorities cited at head of commentary A party may on similar grounds be affected by the acquiescence of his agents or others for whose admissions he is responsible *ib Haller v Worman* 3 L T N S 741 *Price v Woodhouse*, 3 Ex 616 and see section *supra*

(3) Lalit Chandra Choudhury v R (1911) 39 C 119 *Barindra Kumar Ghose v R* (1909) 37 C 91 *Wright v Tatham* (1838) 5 Cl and Fin 670

(4) Illust (g) ante *Neile v Jakle* 2 C & K 709 *supra*

(5) Illusts (f) (h) ante (6) *post* s 17 *et seq* Phipson Ev 5th Ed 241 Taylor Ev § 815 *Jones v Morrell* 1 C & K, 266 *R v John* 7 C & P 324 *Child v Grace* 2 C & P 193 *R v Welsh* 3 F & F 275 and note to this case in 3 Russ Cr 489

(7) *Neile v Jakle* *supra* *Hayslep v Gymer* 1 A & E 163 *Price v Burta* 6 W R (Eng) 40, *R v Cox*, 1 F & F,

90 *R v Mallory* 15 Cox 458

(8) See *Child v Grace* 2 C & P 193 *per Taddy Serjt* The not making an answer may under some circumstances be quite as strong as the making one *per Best C J* Really it is most dangerous evidence A man may say this is impertinent in you and I will not answer your question See also *Moore v Smith* 14 Serg & R 393 *Lucy v Mowflet* 5 H & N 229 *Wiedemann v Walpole* (1891) 2 Q B 534 Norton Ev 113 So statements made in a party's presence during a trial are not generally receivable against him merely on the ground that he did not deny them for the regularity of judicial proceedings prevents the free interposition allowed in ordinary conversation *Melen v Andreas* 1 M & M 336 *R v Appleby* 2 Starkie N P C 33 *R v Turner* 1 Moo C C 347 *Child v Grace* *supra* Even here however cases may occur in which the refusal of a party to repel a charge made in a Court of Justice *Simpson v Robinson* 1 Q B 512, or to cross examine or contradict a witness, *R v Coyle* 7 Cox 74 or to reply to an affidavit *Morgan v Evans* 3 C & F, 159, 203 *Freeman v Cox* 8 Ch D 148, *Ha pden v Hc lis*, 27 Ch. D, 251, "may

frequently occur with reference to unanswered letters or failure to object to an account. Here the question will also be whether there was any duty or necessity to answer or object. The rule has been stated by Bowen, L. J., to be that, "silence is not evidence of an admission, unless there are circumstances which render it more reasonably probable that a man would answer the charge made against him than that he would not" (1). A man is not bound to answer every officious letter written to him. Though unanswered, a letter may be evidence of a demand (2). The mere failure to answer or object will not generally imply an admission (3). But it is otherwise if the writer is entitled to an answer, so, in the case of a letter written by A to B, to which the position of the parties

when the subject of it is a contract or —the silence of B may be important in as much as it has been held in certain old

cases that an account rendered will be regarded as allowed if it is not objected to within a second or third post or at least if it is kept for any length of time by the addressee without his making an objection, it becomes a stated account. It is said however in Taylor on Evidence to be doubtful how far these cases would be followed at the present day, and whether (apart from any special circumstances under which the account is sent in) any valid distinction can be drawn between accounts rendered between merchants and those between other

afford a strong presumption that the imputations made against him are correct. In *Sookram Misser v W. Croudy* 19 W R 283—285 (1873) Phear J said: "It is true that silence on the part of defendant during the trial of a case in regard to any matter brought against him in the course of the case might possibly be of some value afterwards irrespective of the decree as amounting to an admission on his part that that which was alleged and with regard to which he had kept silence was true." See Phipson Ev 5th Ed 241 and see American cases there cited and *Cunningham v E* 95 and 96. So when a Judge at a trial made a proposal as to the course of proceedings in the presence of counsel who raised no objection it was held not open to counsel subsequently to question the propriety of the course to which he had impliedly given his assent. *Morrish v Murray*, 13 M & W, 52 and if a client be present in Court and stand by and see his solicitor enter into terms of an agreement he is not at liberty afterwards to repudiate it. *Swinfen v Swinfen* 24 Beav 549 559 *Asiatic Steam Navigation Co v Bengal Coal Co* (1908) 35 C 751.

(1) *Wiedemann v Walpole* supra at p 539 and see per Willes J in *Richards v Gellatly* L R 7 C P at p 131 the relation between the parties must be such that a reply might be reasonably expected. *Norton v* 113, *Edwards v Toulls* 5 M

& G 674. The only fair way of stating the rule of law is that in every case you must look at all the circumstances under which the letter was written and you must determine for yourself whether the circumstances are such that the refusal to reply alone amounts to an admission. per Kay L J in *Wiedemann v Walpole* 2 Q B (1891) 541 and see per Jenkins C J in *R v Bal Gangadhar* 28 B at p 491 (1904).

(2) *Norton v* 113. See also *Roscoe v P* Ev 53.

(3) See *Farhe v Denton* 3 C & P 103. "what is said to a man's face he is in some degree collected on to contradict if he does not acquiesce in it but it is too much to say that a man by omitting to answer a letter admits the truth of the statements it contains." per Lord Tenterden or that every paper a man holds purporting to charge him with a debt or liability is evidence against him. *Doe v Francis* 11 A & E 792 per Lord Denman and see *Richards v Gellatly* L R 7 C P, 127. *Wiedemann v Walpole* supra.

(4) *Lucy v Moufflet* 5 H & N 229. *Edwards v Toulls* supra. *Richardson v Dunn* 2 Q B 218. *Gaskill v Skene* 14 Q B 664, *Fairlie v Denton* supra. *Freeman v Cox* supra, *Hampden v Wallis* supra.

(5) *Taylor v* § 910 and cases there cited.

them, and they are frequently received in Criminal prosecutions (1) So, also, the opportunity of constant access to documents may sometimes, by raising a presumption that their contents are known, and of non objection, afford ground of correctness of such society recorded account book kept

openly in a club room (4) are evidence against the members On similar grounds books of account which have been kept between master and servant, tradesman and shopman banker and customer or co partners (5), will occasionally be admitted as evidence even in favour of the party by whom they have been written, provided that the opposite party has had ample opportunities for testing from time to time the accuracy of the entries (6) In the case cited below the accused was convicted of theft on the evidence of an accomplice which was treated as corroborated in material particulars by the depositions of a Police officer and the complainant to the effect that the accused pointed out the house which he had entered on the night of the offence and the various places in the house connected with the offence

Held (1) that the evidence of the Police officer and the complainant as to the pointing out of the various places by the accused was really evidence of the confession of his guilt made while he was in the custody of the Police officer and was therefore inadmissible under ss. 25 and 26 of the Evidence Act of 1872, (2) that the evidence could not be treated as evidence of conduct apart from the accompanying statements under this section, and (3) that the statement made by the Police officer to the complainant in the presence of the accused that he (the accused) was going to show the various places connected with the theft was not admissible under explanation 2 to this section because the conduct apart from the accompanying statements was not shown to be relevant, and, secondly, because under the circumstances such a statement could not be said to affect the conduct of the accused (7)

9 Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity (8) of any thing or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact

Facts necessary to explain or introduce relevant facts

(1) *Lalit Chandra Choudhury v R* (1911) 39 C 119

(2) *Taylor Ev* § 812 See notes to s 14 *post*

(3) *Raggett v Musgrave* 2 C & P 556 *Alderson v Clay* 1 Starkie 405 *Aspelt v Sercombe* 5 Ex 147

(4) *Wile v Adamson* 1 Phillips Ev 339

(5) See *Lindley Partnership* 536 5th Ed and cases there cited and note to s 18 *post*

(6) *Taylor Ev* § 812 and cases there cited as to books of a Company see *Lindley Company Law* 312 *Phipson Ev* 5th Ed 243 244 344 and books of Corporations *Taylor Ev* §§ 1781—1783 *Phipson Ev* 5th Ed 243 244 352 *Roscoe & P Ev* 123 214—215 *Grant on Corporations* 317—319 and note to s 35 *post*

(7) *Es p v Hira Gobar* 21 Bom. L R 724 s c 52 I A 601 20 Cr L J. 681

(8) See as to identity Introduction to ss 45—51 *post* (opinion evidence) *Wigmore Ev* § 410 *et seq* Witnesses may state their belief as to the identity of persons present in Court or not and may also identify absent persons by photographs produced and proved to be theirs [*Phipson Ev* 5th Ed 376 *Frith v Frith* L R P D (1896) p 74 note to s 35 *post* Introduction to ss 45—50 *post* *Rogers Expert Testimony* § 140] The same rule applies to identification of things (ib) It is well settled that for certain purposes photographs may be received in evidence Thus whenever it is important that the *locus in quo* should be described to the jury it is competent to introduce in evidence a photographic view of it So also in an action to recover damages for assault committed with a raw hide a plaintiff was allowed to introduce a ferrotype of his back taken three days after the injury the person taking the same having testified that it was a

happened, or which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose

Illustrations

- (a) The question is, whether a given document is the Will of A

The state of A's property and of his family at the date of the alleged Will may be relevant facts (1)

- (b) A sues B for libel imputing disgraceful conduct to A B affirms that the matter alleged to be libellous is true

The position and relation of the parties at the time when the libel was published may be relevant facts as introductory to the facts in issue

The particulars of a dispute between A and B about a matter unconnected with the alleged libel are irrelevant, though the fact that there was a dispute may be relevant if it affected the relations between A and B (2)

- (c) A is accused of a crime

The fact that, soon after the commission of the crime, A absconded from his house is relevant, under section 8, as conduct subsequent to, and affected by, facts in issue

The fact that at the time when he left home, he had sudden and urgent business, at the place to which he went, is relevant, as tending to explain the fact that he left home suddenly

The details of the business on which he left are not relevant except in so far as they are necessary to show that the business was sudden and urgent (3)

- (d) A sues B for inducing C to break a contract of service made by him with A C, on leaving A's service, says to A 'I am leaving you because B has made me a better offer' This statement is a relevant fact as explanatory of C's conduct which is relevant as a fact in issue (4)

correct representation Rogers *op cit* Harris' Law of Identification, §§ 12, 157—178, 352, 590 642 As to photographic copies of writings for purpose of comparison, see s 73, *post*

(1) As explanatory or introductory Also when the question is Will or no Will such facts may contradict or support the terms of the alleged Will whence forgery might be presumed or negated Such facts would then 'rebut or support an inference suggested by a fact in issue' (Norton, Ev., 116) It is to be observed that the *factum* and not the construction of the Will is here the matter in issue As to evidence of surrounding circumstances in aid of construction, see Introduction to Chap VI *post*

(2) The object with which what would otherwise be collateral matter is receivable here is to show the *malice* or *animus* of the libeller, though to go into the full details of a quarrel would be too remote and would waste too much time It is

.. ..

arising from the act of absconding is thus 'rebutted' The fact of absconding is in itself equivocal It may be the result of guilty knowledge or conscience, or it may

be perfectly innocent Anything, therefore that the party says at the time of the act is receivable as *explanatory* of a relevant fact It would also be receivable as part of the *res gesta* and as a declaration accompanying an act The question frequently arises in bankruptcy, when it is necessary to decide whether leaving the house is an act of bankruptcy or not In order to prove the intent with which the bankrupt departed from his dwelling house evidence of what he said is admissible as forming part of the *res gesta* Norton Ev 118, Roscoe N P Ev 52, Bateman v Bailey, 5 T R 512, Ambrose v Clendon Ca t, Hardw, 267, Rouch v G W Ry Co, 1 Q B, 51, Smith v Cramer 1 N C 585 The details just as in illust (b) are not admissible generally except as corroborating the allegation of the suddenness and urgency of the emergency which caused the departure Declarations made or letters written during absence from home are admissible as original evidence since the departure and absence are regarded as one continuing act Taylor Ev, §§ 588 589

(4) v *post* Hadley v Carter, 8 New Hamp. P, 40, Bruckousky v Thacker, Spink and others 6 B L R, 107

(e) *A*, accused of theft, is seen to give the stolen property to *B*, who is seen to give it to *A*'s wife. *B* says as he delivers it, '*A* says you are to hide this'. *B*'s statement is relevant as explanatory of a fact which is part of the transaction (1)

(f) *A* is tried for a riot, and is proved to have marched at the head of a mob

The cries of the mob are relevant, as explanatory of the nature of the transaction. (2)

Principle.—As the 7th and 8th sections provide generally for the admission of facts, the present section may be said to say that any such fact (3) There are strictly constitute a fact in issue, may yet be regarded as forming a part of it, in the sense that they accompany and tend to explain the main fact, such as identity (4) names, dates, places, the description, circumstances and relations of the parties and other explanatory and introductory facts of a like nature (5) The particulars receivable will necessarily vary with each individual case, it is not all the incidents of a transaction that may be proved, for the narrative might be run down into purely irrelevant and unnecessary detail (6) By the answers to some of such questions, if sufficiently particular for the purpose the fact is individualised (7) See also Commentary, *post*

s. 3 (Fact)

s. 11 (Rebuttal of inference, etc.)

s. 3 (Fact in issue)

s. 3 (Relevant)

Steph Dig. Art. 9 Steph Introd. Phipson Ev. 5th Ed. 47 Cunningham Ev. 98 Norton, Ev. 115 Wills Ev. 2nd Ed. 63 Wigmore Ev., §§ 410—416

COMMENTARY.

The seventh section, *ante* provides for evidence of the state of things under which relevant facts or facts in issue happened, and the 11th and 15th sections *post* for evidence of similar facts, closely connected with the main fact, and explanatory of it. Evidence in support and particularly in rebuttal of inferences is of a similar explanatory character (8) The eleventh section is very like the present one as to rebutting an inference and forms an instance of sections overtopping one another (9) All the abovementioned facts qualify, explain or complete the main fact in some material particular. A statement which can be shown to be explanatory under this section may be admissible irrespective of whether the person against whom it is given heard it, or was present when it was made (10) But it is necessary to distinguish the *purpose* for which it is admissible. It is presumed that the statements made by *C* in the one case and *B* in the other [illustrates (d) (e) *ante*] are only to be receivable

(1) *v. post*

(2) This illustration is founded on the case of *R. v. Lord George Gordon* 21 How St Tr 514 529. In the case put the cries would be made in the presence of the leader though they were the cries of third parties not of himself; his silence would be equivalent to an admission that he accepted and acquiesced in those cries as explanatory of the common objects of himself as well as of those he led. Under the effect of the next section such cries would be evidence against the accused even if he was not present upon proof of a conspiracy between himself and the rioters joint and common for the preparation of a wrongful act. Norton Ev. 119 In *R. v. Hunt* 3 B & Ald 566 evidence given of bidders and

inscriptions was held to be properly admissible to show the general character and intention of an assembly

(3) Cunningham Ev. 98

(4) See Norton Ev. 119 *R. v. Rickman* 2 East P. C. 1035 *R. v. Rooney* 7 C & P 517 *R. v. Fursey* 6 C & P 81 Wills Ev. 47

(5) See *R. v. Amir Khan* 9 B. L. R. 36 50 51 (1871)

(6) Phipson Ev. 5th Ed. 47 the facts are relevant in so far as they are necessary for that purpose s. 9 *supra*

(7) Benthams cited in Norton Ev. 44

(8) Illust. (c)

(9) Norton Ev. 115 and Introduction, *ante*

(10) See illustrs. (d) (e)

as evidence that such statements were made, as declarations accompanying and explaining an act, *not of the truth of them* as affecting *B* or *A* respectively. Without some proof of authority given by the parties to be affected, to those making the statements, it is clear that a very dangerous innovation is introduced, whereby persons may suffer in life, person, or property by statements put into their mouths behind their backs, a principle which the law of evidence has hitherto entirely eschewed" (1). Identity may be thought of as a quality of a person or thing. The essential assumption is that two persons or things are thought of as existing and that the one is alleged because of common features to be the same as the other. The process of inference operates by comparing common marks found to exist in the two supposed separate objects of thought with reference to the possibility of their being the same. It follows, that its force depends on the necessariness of the association between the mark and a single object. Where a circumstance, feature or mark may commonly be found

possessing it may well be different. But where the objects possessing the mark are only one or a few, and the mark is found in two supposed instances, the chances of the two being different are *nil* or are comparatively small. For simplicity's sake the evidential circumstances may thus be spoken of as a mark

one *MS* belonging to a totally different family from that of *DS* an attested

sions of this section. Where one of the main questions for determination in a case was whether a document impugned was or was not presented before the Registrar by one *AS*, a comparison of the thumb impression of the person who presented the document with that of *NS* was held to be admissible under this section if the similarity of those impressions could establish the identity of that person with *AS* (4). *A* and *B* were charged with theft committed in

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various witnesses to mention the utterance as an identifying mark. This utterance, not being used as an assertion to prove any fact asserted therein,

(1) Norton Ev 118 119, *per contra* Cunningham Ev 98 99, it will be seen from the illustrations themselves that the statement in illust (d), is relevant as explanatory of *C's* conduct and in (e) of a fact which is part of the transaction.

(2) Wigmore's Evidence § 411. Circumstances identifying persons are corporeal marks, voice, mental peculiarities, clothing, weapons, name, residence, and

other circumstances of personal history, ib § 413.

(3) *Radhan Singh v Kanayi Dicit*, 18 A 98 (1895).

(4) *R v Fakir Mahomed* 1 C W N, 33 34 (1896) see as to identity and post, ss 11 and Introductions to ss 45-51.

(5) *Emp v Panchu Das* 47 C. 671, (F B) s c, 24 C W N 501, 31, C L J., 402.

is not obvious to the hearsay rule and may therefore be proved like any other identifying mark. The utterance cannot, however, be used as having any assertive value. From this use of identifying utterances the following superficially similar uses should be distinguished (a) mentioning a third person's utterance as a reason for observing a particular fact, (b) mentioning it as a reason for recollecting a particular fact, (c) using one's own prior utterances of a fact to corroborate one's present testimony and repel the suggestion of recent contrivance (1).

10 Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done, or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it

Things said or done by conspirator in reference to common design

Illustration

Reasonable ground exists for believing that A has joined in a conspiracy to wage war against the Queen

The facts that B procured arms in Europe for the purpose of the conspiracy C collected money in Calcutta for a like object D persuaded persons to join the conspiracy in Bombay, E published writings advocating the object in view at Agra and F transmitted from Delhi to G at Cabul, the money which C had collected at Calcutta and the contents of a letter written by H, giving an account of the conspiracy are each relevant both to prove the existence of the conspiracy and to prove A's complicity in it although he may have been ignorant of all of them, and although the persons by whom they were done were strangers to him and although they may have taken place before he joined the conspiracy or after he left it

Principle.—The rule which says that a man shall be chargeable with the acts and declarations of his agent or fellow conspirator is not a rule of evidence (2). A conspiracy makes each conspirator liable under the Criminal law for the acts of every other conspirator done in pursuance (3) of the conspiracy. Consequently the admissions of a co conspirator may be used to affect the same conditions as his acts when used to create a presumption of *tortfeasors* enacts the same rule in its application to torts (4). The tests therefore are the same whether the act or the admission of the co conspirator or joint *tortfeasor*, in other words the question is one of substantive law and its solution is not to be sought in any principle of evidence (5). The principle is substantially the same as that which regulates the relation of agent and principal. When various persons conspire to commit an offence or actionable wrong (e.g., co trespassers or other *tortfeasors*) each makes the rest his agents to carry the plan into execution. The acts done by any one in reference to the common intention (*vis post*) is considered to be the act of all. These acts are themselves evidence of the *corpus delicti*, the conspiracy to be established,

(1) Wigmore Ev. § 416

(3) See however as to this notes *post*

(2) Prof Thayer in American Law Review 80 As to procedure see *Abdel-Salam v. King Emp.*, 35 C L J., 279

(4) See *R v. Hardcastle* 11 East., 578

(5) Wigmore Ev. § 1079

as evidence that such statements were made, as declarations accompanying and explaining an act, *not of the truth of them* as affecting *B* or *A* respectively. Without some proof of authority given by the parties to be affected, to those making the statements, it is clear that a very dangerous innovation is introduced, whereby persons may suffer in life, person or property by statements put into their mouths behind their backs, a principle which the law of evidence has hitherto entirely eschewed" (1). Identity may be thought of as a quality of a person or thing. The essential assumption is that two persons or things are thought of as existing and that the one is alleged because of common features to be the same as the other. The process of inference operates by comparing common marks for objects of thought with reference to It follows, that its force depends on the mark and a single object. Where a circumstance feature or mark may commonly be found

the objects that possess that mark are numerous, and therefore two of them possessing it may well be different. But where the objects possessing the mark are only one or a few, and the mark is found in two supposed instances, the chances of the two being different are *nil* or are comparatively small. For simplicity's sake the evidential circumstances may thus be spoken of as a mark. But in practice it rarely occurs that the evidential mark is a single circumstance. It is by adding circumstance to circumstance that we obtain a composite feature or mark which, as a whole, cannot be supposed to be associated with more than a single object (2). In the undermentioned case (3) one of the questions in issue as to the pedigree of a certain family being whether one *GS* was son of *BS*, or of one *MS* belonging to a totally different family from that of *BS*, an attested copy of a *rubkar* (or Magistrate's judgment) in some proceedings long anterior to the suit, was tendered in evidence, in which *rubkar GS* was described as the son of *BS*. It was held that the *rubkar* was admissible in evidence under the provisions of this section. Where one of the main questions for determination in a case was whether a document impugned was or was not presented before the Registrar by one *NS*, a comparison of the thumb impression of the person who presented the document with that of *AS* was held to be admissible under this section if the similarity of those impressions could establish the identity of that person with *AS* (4). *A* and *B* were charged with theft committed in 1914 in the house of a prostitute, evidence was brought forward to shew that *C* and *D* committed a theft in the house of another prostitute in 1918 in some what similar circumstances. Held (Chaudhuri J, dissenting) that the evidence was not admissible either under this section or under s. 11 to prove that *A* and *B* were the same persons as *C* and *D* (5). It often happens that a place or a time is marked significantly by an utterance there or then occurring so that the identification of it may alone be made, or not be made by permitting the various witnesses to mention the utterance as an identifying mark. This utterance, not being used as an assertion to prove any fact asserted therein,

(1) Norton Ev 118 119, *per contra* Cunningham Ev 98 99. It will be seen from the illustrations themselves that the statement in *illust (d)*, is relevant as explanatory of *C's* conduct and in *(e)* of a fact which is part of the transaction.

(2) Wigmore's Evidence § 411. Circumstances identifying persons are corporeal marks, voice, mental peculiarities, clothing, weapons, name, residence and

other circumstances of personal history, *ib* § 413.

(3) *Radhan Singh v Kanay Ditchi*, 18 N 98 (1895).

(4) *R v Fakir Mahomed* 1 C W N, 33 34 (1896) see as to identity and *post*, s. 11 and Introductions to ss 45—51.

(5) *Emp v Pancku Das* 47 C 671, (F B) s c 24 C W N, 501, 31, C L J, 402.

is not obnoxious to the hearsay rule and may therefore be proved like any other identifying mark. The utterance cannot, however, be used as having any assertive value. From this use of identifying utterances the following superficially similar utterance as a reason for recollection of a fact to corroborate one's present testimony and repel the suggestion of recent contrivance. (1)

10 Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done, or written by any one of such persons in reference to their common intention after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it

Things said or done by conspirator in reference to common design

Illustration

Reasonable ground exists for believing that *A* has joined in a conspiracy to wage war against the Queen

The facts that *B* procured arms in Europe for the purpose of the conspiracy, *C* collected money in Calcutta for a like object, *D* persuaded persons to join the conspiracy in Bombay, *E* published writings advocating the object in view at Agra and *F* transmitted from Delhi to *G*, at Cabul the money which *C* had collected at Calcutta and the contents of a letter written by *H*, giving an account of the conspiracy are each relevant both to prove the existence of the conspiracy and to prove *A*'s complicity in it although he may have been ignorant of all of them, and although the persons by whom they were done were strangers to him, and although they may have taken place before he joined the conspiracy or after he left it

Principle—The rule with the acts and declarations of the conspirator in reference to the common intention of the conspiracy is evidence of the conspiracy. (2) A conspiracy is a crime against the public interest. Consequently the admissions of a co-conspirator done in pursuance of the conspiracy may be used to affect the proof against the others on the same conditions as his acts when used to create their legal liability. The inclusion of *tortfeasors* enacts the same rule in its application to Civil liability for torts (4). The tests therefore are the same whether that which is offered is the act or the admission of the co-conspirator or joint *tortfeasor*, in other words the question is one of substantive law and its solution is not to be sought in any principle of evidence (5). The principle is substantially the same as that which regulates the relation of agent and principal. When various persons conspire to commit an offence or actionable wrong (e.g., co trespassers or other *tortfeasors*) each makes the rest his agents to carry the plan into execution. The acts done by any one in reference to the common intention (*vide post*) is considered to be the act of all. These acts are themselves evidence of the *corpus delicti*, the conspiracy to be established,

(1) Wigmore Ev. § 416

(2) Prof. Thayer in American Law Review, 80. As to procedure see Abdul Sahib v. King Emp., 35 C. L. J. 279

(3) See however as to this notes *post*

(4) See *R. v. Hardwicke* 11 East., 578

(5) Wigmore Ev. § 1079

they are relevant "for the purpose of proving the conspiracy," as well as the part which each conspirator took in it (1)

§ 3 ('*Pelerant*')

§ 136 (*Fact proposed to be proved only admissible on proof of some other fact*)

§ 3 ('*Fact*')

Steph Dig, Art 4, and Note III, Taylor, Ev, §§ 590—597, Best, Ev, § 508 3 Russell's Crimes, 109—176, Norton, Ev, 120, Poscoe, Cr Ev, 13th Ed, 348—359; Mayne's Penal Code ss. 107, 121A, Wills Ev 2nd Ed, 167, 168, Wigmore, Ev, § 1079

COMMENTARY.

Conspiracy

The provisions of the section are wider than those of the English Law according to which the act or declaration must have been done or said in the execution or furtherance of the common purpose (2) Thus mere narratives and admissions of past events have been held to be inadmissible as such as against any conspirators except those by whom, or in whose presence such statements were made (3) Under the present section anything said or done in reference to the common intention is admissible, and thus the contents of a letter written by a co conspirator giving an account of the conspiracy is relevant against the others, even though *not written in support of it or in furtherance of it* (4) It is not necessary that the co conspirator, whose act or declaration it is sought to prove, should be tried or indicted (5) The act or declaration of the co conspirator may have been done or made by a stranger to, and in the absence of the party against whom it is offered, or without his knowledge or before he joined the combination (6), or even after he left it (7) This last-mentioned provision is contrary to the English rule, according to which acts and declarations of others are not admissible against a conspirator if done or made after his connection with the conspiracy has ceased (8)

the conspiracy and "reasonable conspiracy must be shown, who, but for such conspiracy, *no* or fact of conspiracy must acts of any person not in the peaking be done by evidence of the party's own acts (10) But owing to the difficulties in the way of such proof a deviation has, in many cases, been made from the general rule, and evidence of the acts and conduct of others has been admitted to prove the existence of a conspiracy previous to the proof of the defendants' privity (11) But

(1) Steph Dig Note III p 160, Norton Ev 121 Taylor Ev, § 590, 3 Russ. Cr 143 144, Best, Ev § 508, R v Amir Khan 9 B L R 36 (1871) s c, 17 W R Cr 15, R v Amiruddin 9 B L R 36 (1871), s c 15 W R, Cr, 25 and cases there and in the text books (*supra*) cited

(2) Steph Dig Art 4 and text books cited *ante*

(3) R v Hardy 24 How St. Tr, 718 where an account given by one of the conspirators in a letter to a friend of his own proceedings in the matter not intended to further the common object and not brought to A's notice was held not to be relevant as against A see also R v Blake 6 Q B, 876 Steph Dig, Art 4, Illustrs (a), (b), Taylor Ev §§ 593 594

(4) See Illustration to section, and

Fields Ev 6th Ed 72, Cunningham Ev 100 Whitley Stokes 527

(5) Roscoe Cr Ev 13th Ed 354 355

(6) See Illustr *ante* R v Brandreth, 32 How St. Tr., 857, 858 R v Murphy 8 C & P 311, Taylor Ev, § 592

(7) See Illustr *ante*

(8) R v Hardy 24 How St Tr 718, 731 Taylor Ev § 595

(9) *Aadambini Das v Kumudini Das* 30 C 983 (1903) s c, 7 C W N 808, *Shahebar Ma v Emperor* 18 C L J 590 (1913)

(10) 1 East P C, 96 cited in argument in R v Amir Khan *supra* 55, Roscoe, Cr Ev 13th Ed 352

(11) Roscoe Cr Ev, 13th Ed 352, 2 Starkie 2nd Ed 234

in respect of such conduct a distinction has been made between declarations accompanying acts(1) (which are admissible), and mere detached declarations and confessions of persons not defendants, not made in the prosecution of the object of the conspiracy, and which being mere "hearsay" are not evidence even to prove the existence of a conspiracy (2) The persons must have conspired together to commit an offence or actionable wrong There must have been some pre-concert A conspiracy within the terms of this section contemplates something more than the joint action of two or more persons to commit an offence If that were not so, the section would be applicable to any offence committed by two or more persons jointly with deliberation, and this would import into a trial a mass of hearsay evidence, which the accused persons would find it impossible to meet (3) The agreement to conspire may be inferred from circumstances which raise a presumption of a concerted plan to carry out an unlawful design (4) (b) After the existence of a conspiracy has been established, the particular defendants must be proved to have been parties to it (5) (c) After these two facts have been proved the acts and declarations of other conspirators in reference to their common intention may in all cases be given in evidence against the defendants, and under the present section, letters written and declarations made by any of the conspirators which are not part of the prosecution of the conspiracy and are in the nature of mere admissions

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by proof which actually brings the parties together, but may be shown, like any other fact, by circumstantial evidence (8) This section is strictly conditional on there being ground to believe that two or more have conspired (9) The statement of an accused made after arrest and not amounting to a confession

(1) *v s 8, ante*

(2) 2 Starkie, Ev, 235 cited in Roscoe Cr Ev, 13th Ed, 354, "the mere assertion of a stranger that a conspiracy existed amongst others to which he was not a party would clearly be inadmissible, and although the person making the assertion confessed that he was party to it this on principle fully established would not make the assertion evidence of the fact against strangers *ib*, see also 3 Russ, Cr, 144

(3) *Nogendrabala Dabee v R*, 4 C W N, 528, 530 (1900) As to evidence of conspiracy, see *Subrahmanya Ayyar v R*, 23 C, 797 (1901), *R v Tirumal Reddi*, 24 M, 547 (1901), *Templeton v Lawrence*, 25 B, 230 (1900), [conspiracy to obtain conviction of accused person, and as to what amounts to evidence of abetment of conspiracy], *Abdul Salim v King Emp*, 35, C. L. J. 279 (1921), see *Kohli Munda v. R*, 28 C 797 (1901)

(4) *Barindra Kumar Ghose v R* (1909), 37 C., 91

(5) Roscoe, Cr Ev, 13th Ed, 354.

Amrita Lal Hazra v Emperor 42 C 957 (1915)

(6) *v supra* and Roscoe Cr Ev 13th Ed 350 351 and as to proof generally *ib* 13th Ed 352—356 *The Queen's Case* 2 B & B 310, Norton, Ev, 120, 3 Russ Cr 144 and cases there cited but see also s 136 *post*

(7) *Per Pennfather C J* in *R v McKenna* Ir Circ Rep 461 cited in Taylor Ev p 525

(8) Taylor Ev s 591 3 Russ Cr 148, the evidence may be entirely circumstantial and the existence of the conspiracy collected from collateral circumstances *R v Parsons* 1 W R 392, Roscoe, Cr Ev 13th Ed, 354—355 "It is perfectly true that the dark covertness of crime cannot often be laid open, that conspiracies like other crimes must be generally supported by circumstantial proof *per Sir Lawrence Peel C J*, in *R v Hedger* p 129 (1852)

(9) *Barindra Kumar Ghose v R* (1909), 37 C 91

is not admissible in evidence against a co accused either under this section or s 30 of the Evidence Act, but only against himself. The admission does not however affect the conviction when no stress was laid on such statement by the Trial and Appellate Courts (1)

Evidence that some of the accused ran cocaine and gambling dens long before existence of the conspiracy which was the subject of the charge, was held admissible, the accused were first thrown together by that they continued to meet at such place piracy charged. The evidence of an excise inspector of raids on the dens was admissible as leading up to the admissions made to him (2)

When facts not otherwise relevant become relevant

11. Facts not otherwise relevant are relevant—

(1) If they are inconsistent with any fact in issue or relevant fact.

(2) If by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable

Illustrations

(a) The question is whether A committed a crime at Calcutta on a certain day. The fact that, on that day A was at Lahore, is relevant (3)

The fact that near the time when the crime was committed A was at a distance from place where it was committed, which would render it highly improbable, though not impossible, that he committed it is relevant (4)

(b) The question is, whether A committed a crime

The circumstances are such that the crime must have been committed either by A, B, C or D. Every fact which shows that the crime could have been committed by no one else, and that it was not committed by either B, C or D, is relevant. (5)

Principle.—The object of a trial being the establishment or disproof by evidence of a particular claim or charge, it is obvious that any fact which either disproves or tends to disprove or tends to prove that claim or charge is relevant

s 3 ("Fact")

s 3 ("Relevant")

s. 13 (Transaction inconsistent with existence of right or custom.)

s 3 ("Fact in issue.")

Cun.
N 1

(1) *Sital Singh v Emp*, 46 Cal 700
s c 30 C. L. J., 255 54 I C 53

(2) *Ib*

(3) An alibi the relevancy of which is its entire inconsistency with the hypothesis that the accused committed the crime. Norton Ev, 124, see *R v Sakharan Mukundji* 11 Bom. H C R., 166 (1874) and s 103, illust (c), *post*, see observations on an alibi as a defence in *R v Parbhudas* 11 Bom H C R., 97 (1897), Wills Circ. Ev. 6th Ed., 279

(4) This example is of a fact rendering

the hypothetical fact on the other side not positively impossible, but highly improbable as often happens when the question is whether there was time for the accused to have gone from the place where he says he was to the scene of the crime and returned again

(5) This is a disjunctive hypothetical syllogism—X is either A or B or C but it is not B or C therefore it is A see Whitley Stokes 861 note (3) Cunningham Ev, 103, Norton Ev 124

COMMENTARY.

While the seventh section defines the meaning of the term 'relevancy' in Inconsistent-ency. Probabilit
quasi scientific language, the present section contains a statement in popular language of what in the former section is attempted to be stated in scientific language. The practical effect of these two sections is to make every relevant fact admissible as evidence (1) It has been said that the terms of this section, which are very extensive (2), must be read subject to the restrictive operation of other sections in the Act (3) that it may possibly be argued that the effect of the second paragraph of this section would be to admit proof of facts of the irrelevant character mentioned in the Introduction (*ante*) but that this was not the intention of the section, is shown by the special provisions in the following part of this Chapter as to the particular exceptions which exist to the general rules which exclude as irrelevant the four classes of evidence already mentioned in the Introduction, and is also shown by indications in other portions of the Act (4) The sort of facts which the section was intended to include, are facts which either exclude or imply, more or less distinctly, the existence of the facts sought to be proved (5) In the word of West, J, this section "is, no doubt, expressed in terms so extensive that any fact which can, by a claim of ratiocination, be brought into connexion with another, so as to have a bearing upon a point in issue, may possibly be held to be relevant within its meaning. But the connections of human affairs are so infinitely various, and so far reaching, that thus to take the section in its widest admissible sense would be to complicate every trial with a mass of collateral inquiries limited only by the patience and the means of the parties. One of the objects of a law of evidence, is to define the bounds prescribed by Courts within the bounds prescribed. It would be completely frustrated by the circumstance on either side, having some remote and conjectural probative force, the precise amount of which might itself be ascertainable only by a long trial and a determination of fresh collateral issues, growing up in endless succession, as the enquiry proceeded. That such an extensive meaning was not in the mind of the Legislature, seems to be shown by several indications in the Act itself. The illustrations to the eleventh section do not go beyond familiar cases in the English

(1) Markby Ev, 17, 18

(2) Some degree of latitude was designedly left in the wording of the section (in compliance with a suggestion from the Madras Government, on account of the variety of matters to which it might apply Steph Introd 160 161

(3) The meaning of the section would have been more fully expressed if words to the following effect had been added to it — No statement shall be regarded as rendering the matter stated *highly probable* within the meaning of this section unless it is declared to be a relevant fact under some other section of this Act. *Ib* 161 see observations on this section in Whitley Stokes 819 It is to be observed however, that the section says "Facts not otherwise relevant (i.e., under ss 6-10, 12 and subsequent sections) are relevant etc

(4) Steph Introd, 160 It may for instance, be said *A* (not called as a witness) was heard to declare that he had seen *B* commit a crime. This makes

it highly probable that *B* did commit that crime. Therefore *A*'s declaration is a relevant fact under s 11 cl (2) This was not the intention of the section as is shown by the elaborate provisions contained in the following part of the Chapter II (ss 12—39) as to particular classes of statements, which are regarded as relevant facts either because the circumstances under which they are made invest them with importance or because no better evidence can be got. *Ib*

(5) *Ib* the words '*highly probable*' point out that the connection between the facts in issue and the collateral facts sought to be proved must be so mediate as to render the co-existence of the two highly probable. *per Mitter J A v M J P'spoors, Moodlar & C 645 662 (1881)*

If an improperly wide scope be given to the section the latter might seem to contain in itself and to supersede all the other provisions of the Act as to relevancy. Cunningham, Ev., 103

law of evidence' (1) All evidence which would be held to be admissible by English Law would be properly admitted under this section (2) There must always be room for the exercise of discretion when the relevancy of testimony rests upon its effect towards making the affirmative or negative of a proposition 'highly probable' and with any reasonable use of the discretion, the Court ought not to interfere (3) In order that a collateral fact may be admissible as relevant under the eleventh section the requirements of the law are (a) that the collateral fact must itself be established by normally conclusive evidence and (b) that it must when established, afford a reasonable presumption or inference as to the matter in dispute (4)

Any fact material to the issue which has been proved by the one side may be disproved by the other, whether the contradiction is complete i.e. inconsistent with a relevant fact under the first clause of this section or such as only to render the existence of the alleged fact highly improbable under the second clause (5) There are five common cases of the argument of inconsistency, absence of a any alleged self infliction of the harm alleged Thus the theory of an *alibi* is that the fact of presence elsewhere is essentially inconsistent with presence at the place and time alleged and therefore with personal participation in the act (6) So to disprove a rape, evidence is admissible that the prisoner had for many years been afflicted with a rupture which rendered sexual intercourse impossible (7) When the question is whether a person is sane, it is admissible to prove that the Sovereign were not in fact being whether A is a lunatic or a sane man (8) The fact of the alleged loan is admissible as tending to disprove it (9) Again under this latter clause of the section, facts may be put in evidence in corroboration of other relevant facts, if they render them highly probable (10) So where two or more persons have perished by a common calamity such as shipwreck, and the question is whether A survived B, the law of England raises no presumption either of survivorship or contemporaneous death but if any circumstances connected with the death of either party can be proved the whole question of survivorship may be decided (11) The fact of the alleged resemblance, or want of resemblance, of A to B is admissible (12) So also circumstances may be proved which render the fact of payment of a debt probable, as for instance, the settlement of accounts subsequent to the accruing of the debt, in which no mention is made of it (13) Where defendants Nos 2 and 4

(1) *R v Parbludas* 11 B H C R 90 91 (1874) *R v Vajram* 16 R 414 475 (1892) see note to s 14 post

(2) *R v Vajram* supra 430 per Telang J

(3) *R v Parbludas* supra 94 per West J

(4) *Bibi Khatun v Bibi Rukla* 6 B L R 983 (1904)

(5) S 9 is very similar to the present section as to rebutting an inference, Norton Ev 115 v ante

(6) *Wigmore* Ev §§ 135 et seq

(7) 1 Hale P C 835, Best Ev § 450

(8) *Lady Ivy's case*, 10 St Tr 615,

Steph Dig Art 9 illust (d), see also *Field* Ev 6th Ed p 39 note

(9) *Douling v Douling* 13 Ir C L 241 cited in *Phipson* Ev 5th Ed 103

(10) *Norton* Ev 124

(11) *Taylor* Ev § 203 Best Ev § 410, *Underwood v Wing* 4 D M & G 633 *Wing v Angrove* 8 H L C. 183

(12) *Burnaby v Bailhe* 42 Ch D 282 290

(13) *Colell v Budd* 1 Camp 27 as also that the party claiming to have paid the debt was afterwards in possession of the document creating it *Brembridge v Osborne* 1 Starke 374 see for similar cases *Taylor* L. §§ 178 138,

sold a *jote* to defendant No 1, which they obtained under a partition and subsequently colluded with the plaintiff and denied the said partition as well as the sale, the statements previously made by them which went to show that there had been a partition and they had changed their attitude were held to be admissible as against them under the third clause of twenty first section and the second clause of the eleventh section of the Evidence Act (1) In a case in which

indicative of an intention that any one of these leases was perpetual should

indicated by the acts and conduct of the parties was to make these leases perpetual would make it highly probable that the same was the intention with there
it then
so far

as they were proved had been explained as being either insufficient or as being the result of peculiarities in the circumstances of the leases to which they belonged (2) When the question was whether a deceased person had married a lady, and a draft of a Will, not written by the testator himself and containing
it was held
made by the
ant plaintiff
leased it to

lease (4) It has been held that when the question is whether the accused is an habitual cheat the fact that he was a member of an organization formed for the purpose of habitual cheating is relevant under this section, and that the facts of such membership and such cheating may be proved against each of the members of the organization (5) And it has been held that an intercepted letter written by the accused referring to a telegram signed with a different name but sent from his address was relevant against him under this section
A and B were charged
evidence was brought
the house of another
prostitute in 1918 in somewhat similar circumstances Held (Chaudhuri, J, dissenting) that the evidence was not admissible either under s 9 or under this section to prove that A and B were the same persons as C and D (7) As to the question of admissibility of judgments under this section see notes to the thirteenth section *post* (8) As to the admissibility of depositions made by a

Best E. § 406 and other cases dealt with by these authors under the head of presumptive evidence

(1) *B b Gyanessa v Mussaniasat Mobarakunnessa* 7 C W N 91 (1897)

(2) *Nars gh Dyal v Ravi Narayan* 30 C. 883 896 897 (1903)

(3) *Haji Saboo v Ayeslaba* 7 C W N 665 (1905) s c 27 B 485

(4) *Ka g Hla Pru v San Pau* 3 L. B R 90

(5) *Kalu V r a v R* (1909) 37 C. 91

(6) *Booth v Emperor* 41 C. 545 (1914)

(7) *Emperor v Panchu Das* 47 C. 672,

F B s c 74 C W N 501

(8) *And Tepu Khan v Rojoni Mohun* 2

C W N 501 (1898) *Lakshman v Anrit*

74 B 598 599 (1900)

person since deceased, it has been held that unless they are admissible under sections 32 and 33, the present section will not avail to make them evidence (1) An entry made in a register of indoor patients in a hospital is admissible in evidence to prove that the person mentioned in the entry was in the hospital on a certain date (2) The accused was charged with having caused grievous hurt to one of his wives and killed another The wounded woman, on the day of occurrence on her arrival in hospital made a statement to a Magistrate to the effect that it was accused who had attacked herself and co wife This statement was admitted and placed before the jury Held that the mere fact that the woman made a statement had no bearing on the main fact in issue and this section does not justify the admission of the contents of the statements (3)

On questions of title, repeated acts of ownership with respect to the same property are, under the thirteenth section, *post*, receivable, and even acts done with respect to other places connected with the *locus in quo* by "such a common character of locality as to give rise to the inference that the owner of one is likely to be the owner of the other" (4) are sometimes under the present section receivable In *Jones v Williams*, (5) Parke B, said that "evidence of acts in another part of one continuous hedge adjoining the plaintiff's land was admissible in evidence on the ground that they are such acts as might reasonably lead to the inference that the entire hedge belonged to the plaintiff." "In other words, they are facts which, by the eleventh section of the Evidence Act, are relevant, because they make the existence of a fact in issue highly probable" (6) When a question as to the ownership of land depends on the application to it of a particular presumption capable of being rebutted, the fact that it does not apply to other neighbouring pieces of land similarly situated is deemed to be relevant (7) So when the question is, whether A the owner of one side of a river, owns the entire bed of it or only half the bed at a particular spot, the fact that he owns the entire bed a little lower down than the spot in question is deemed to be relevant (8) In like manner it has been held that when the question is, whether a piece of land by the roadside belongs to the lord of the manor, or to the owner of the adjacent land the fact that the lord of the manor owned other parts of the slip of land by the side of the same road is relevant (9) And in a suit brought by the plaintiff against several defendants to prevent encroachments by the defendants it was held that the admission of one of the defendants in a previous suit to which the other defendants were not parties, as to the common character of the portion of the land between his house and the plaintiffs and also a similar statement in a deed put in by another of the defendants to prove his title to his own house were admissible in evidence to establish the common character of the entire lane as alleged by the plaintiff The fact of common ownership of other parts of

(1) *Bela Ram v Melabir Singh* (1912) A C, 34 A 341

(2) *Amolak Rai v Emperor*, 19 Cr L J 141

(3) *Emperor v Abdul Sheikh* 23 C W N., 933

(4) *Jones v Williams* 2 M & W 326, *Bristow v Cormican* 3 App Cas 641 670, *Neill v Devonshire* 8 App Cas 135, *Lord Advocate v Lord Blantyre* 4 App Cas 791, *Sabram Sheikh v Oday Mahto* 1 Pat 375 (1922) Taylor Fv §§ 322-325, Roscoe N P Ev 85 86 931 934, Steph Dig Art. 3, see note to s 13 *post* The rule in *Jones v Williams* 2 M & W, 326 and *Lord Advocate v Lord Blantyre* 4 App Cas,

791 was observed upon in *Mohini Molan v Promoda Nath* 24 C 259 (1896) See *Sabram Sheikh v Oday Mahto* 1 Pat 375 (1922)

(5) *Jones v Williams* at p 331

(6) *Naro Vinayak v Narhari* 16 B 125 128 (1891) *per* Sargent C J referred to in *Bibi Gyanessa v Mussamat Mobarakunnessa* 2 C W N, 91 94 (1897)

(7) Steph Dig Art 3

(8) *Ib Jones v Williams* 2 M & W 326 (see note to s 13 *post*), followed in *Naro Vinayak v Narhari* ante

(9) *Ib Doe v Kemp* 7 Bing, 332, 2 Bing N C 102, Taylor, Ev §§ 320-325

the lane should be treated as relevant to the issue as to the common character of the entire line on the principle laid down in this section (1) It has been recently held that documents not *inter partes* containing recitals of boundaries of other lands are not admissible in evidence under this section (2) Where one of the main questions for determination in a case was whether a document then impugned was or was not presented before the Registrar by one NS, a comparison of the thumb impression of the person who presented the document with that of NS was held to be admissible under the second clause of this section if dissimilarity of the impressions made the identity of that person with NS improbable (3) Where the parties to a suit are at issue on a vital question and the evidence is conflicting, the safest principle for the Court is to consider which story fits best with the admitted circumstances and the resulting probabilities (4)

12 In suits in which damages are claimed, any fact which will enable the Court to determine the amount of damages which ought to be awarded is relevant

In suits for damages, facts tending to enable Court to determine amount are relevant

Principle—In suits in which damages are claimed, the amount of the damages is a fact in issue See Note, *post*

s 3 ('Fact')

s 3 ('Relevant')

s 55 ('Character as affecting damages')

Roscoe, N P Ev, *passim*, *sub toc* "damages" Norton, Ev, 124, Mayne on Damages 4th Ed. (1884), Alexander s 'Indian Case Law on Torts,' 3rd Ed., 1891, Pollock on Torts, 2nd Ed., 1890, Act IX of 1872 (Contract Act) ss. 73—75, 117, 118, 125 150—152, 154, 160, 181, 205, 206, 211, 212, 225, 235, 259 Cunningham and Shephard's Indian Contract Act 11th Ed., 1915

COMMENTARY.

Damages, which are the pecuniary satisfaction which a plaintiff may obtain by success in an action are unless expressly admitted, deemed to be a fact in issue (5), damages may be claimed either in actions or contracts (6) or tort (7) The question as to when damages may be recovered, and the amount of damages recoverable in particular suits, as well the defences pleadable in such suits, is a portion of the particular branch of the substantive law under the provisions of which these suits are brought (8), and therefore the present section does not specify how the facts made relevant by it are to be related with the injured property, person or reputation, but lays down generally, that evidence tending to 'determine' i.e., to increase or diminish the damages is admissible (9) Thus in an action for libel, other libellous expressions by the defendant whether used before or after the commencement of the suit, are sometimes admissible for the plaintiff to show the malevolence of the defendant and so to enhance damages On the other hand evidence of circumstances, which, according to the law of libel, have the effect of mitigating

(1) *Naro I najak v. Narhari* supra.

(2) *Soroy Kumar Achary v. Umed Ali Howlador* 25 C W N 1022 (1921) nor (it was there held) under s 13 *post*

(3) *R v. Fakir Mahomed* 1 C W N 33 34 (1896) *ante* s 119 n 1

(4) *Dattis v. Maung Shwe Go* (1911) 38 I A 155

(5) See Roscoe N P Ev 86 878

(6) See Contract Act (IX of 1872) ss. 73—75 117 118 125 150—152 154 180 181 205 206 211 217 225 235 259

(7) See Alexander's Indian Case Law on Torts Pollock on Torts Draft Indian Civil Wrongs Bill *ibid* p 517

(8) See Mayne on Damages Roscoe N P Ev *sub toc* "Damages"

(9) Norton Ev 124 Roscoe N P. Ev 86

damages are admissible in evidence for the defendant (1) In an action for breach of promise of marriage, the plaintiff may give evidence of the defendant's fortune, for it obviously tends to prove the loss sustained by the plaintiff, but not in an action for adultery (2), nor for seduction (3), nor for malicious prosecution, for it is nothing to the purpose in an action on tort "whether the damages come out of a deep pocket or not" (4) Injury to the feelings is irrelevant in an action on contract as an element of damage, but in actions on tort heavy damages may be given on this score In *Hamlin v Great Northern Railway Company* (5) it was said The case of a contract to marry has always been considered as a sort of exception, in which not merely the loss of an establishment in life, but, to a certain extent, the injury to a person's feelings in respect to that particular species of contract, may be taken into account, but, generally speaking, the rule is this in the case of a wrong, the damages are entirely with the jury, and they are at liberty to take into consideration the injury to the party's feelings and the pain he has experienced, as, for instance, the extent of violence in an action of assault, and many topics, and many elements of damage, find place in an action for tort, or wrong of any kind, which certainly have no place whatever in an ordinary action of contract' (6) The leading case on the subject of damages in the case of breach of contract—*Hadley v Baxendale* (7)—is the foundation of the rule contained in section 73 of the Indian Contract Act, according to which rule the damages which the plaintiff ought to receive should be such as naturally arose in the usual course of things from the breach, or such as the parties knew, when they made the contract, to be likely to result from the breach of it All facts showing the amount of such damage are relevant under this section, but no damages can be ordinarily recovered by an action of contract that are not capable of being specifically stated and appreciated (8) Neither in actions on contract nor on tort must the damage be too remote (9), and evidence of damage of such a character will not be admissible, nor, in general, will

(1) *Roscoe N P Ev* 864 878 evidence in mitigation and aggravation of damages may be further illustrated by the decided cases on action for seduction assault false imprisonment trespass trover etc Thus where the defendant had given the plaintiff in charge of a constable for felony he was allowed to show reasonable ground of suspicion in mitigation of damages *Chinn v Morris*, Ry & M 424 *v Roscoe N P Ev passim sub loc 'damages'*, *Norton Ev*, 126 So also in actions for assault, the provocation offered by the plaintiff would be relevant under this section in the case of action against Railway Companies for injuries received the position and circumstances and earnings of the plaintiff the precautions taken by the Company, and the contributory negligence if any of the plaintiff See *Cunningham Ev* 105

(2) *James v Biddington* 6 C & P 589 *Roscoe N P Ev* 86 *Hodgson v Taylor* post 81

(3) *Hodgson v Taylor*, L R 9 Q B, 79 *Roscoe N P Ev* 86 and p 911 as to evidence in aggravation.

(4) *Per Blackburn J* in *Hodgson v Taylor* supra quoting Lord Mansfield

(5) 36 L J, Ex, 20, 1 H & N 408, per Pollock C B (this was an action for damages for breach of contract) See *Williams v Curtis*, 1 C B, 841

(6) See *Williams v Curtis* 1 C B, 841, *Sears v Lyons*, 2 Starkie 317, this principle is well illustrated in actions for libel where the injury to the feelings is always an element of consideration *Norton Ev* 126 the circumstances of time and place when and where the insult was given require different damages, thus it is a greater insult to be beaten upon the Royal Exchange than in a private room per Bathurst J, *Tullidge v Wade* 3 Wills 19 *Roscoe N P Ev* 913, and in trespass the jury may consider not only the pecuniary damage sustained but also the intention with which the act has been done whether for insult or injury, per Abbott J, *Sears v Lyons*, 2 Starkie 318, *Roscoe N P Ev*, 937

(7) 23 L J Ex, 179, 182, 9 Ex, 341, see Act IX of 1872 (Contract), s 73. *Cunningham* and *Shepherd's Indian Contract Act* 11th Ed (1915).

(8) *Per Pollock C B*, in *Hamlin v G v Ry Co* supra at p 23

(9) Act IX of 1872 s 73, *Alexander*, op cit, 9

evidence of facts tending to show damage, or of facts in aggravation or mitigation of damages, be relevant under this section, unless the damage or aggravating or mitigating facts are of the kind and character which the substantive law recognises. The question when, and under what circumstances, evidence of character may be given in Civil actions with a view to damages, is dealt with by section 55, *post*, and in the notes thereto

13 Where the question is as to the existence of any right or custom, the following facts are relevant —

Facts relevant when right or custom is in question

(a) any transaction by which the right or custom in question was created, claimed, modified, recognised, asserted or denied, or which was inconsistent with its existence

(b) particular instances in which the right or custom was claimed, recognised or exercised, or in which its exercise was disputed, asserted or departed from

Illustration

The question is whether A has a right to a fishery. A deed conferring the fishery on A's ancestors, a mortgage of the fishery by A's father, a subsequent grant of the fishery by A's father irreconcilable with the mortgage, particular instances in which A's father exercised the right or in which the exercise of the right was stopped by A's neighbours are relevant facts.

Principle.—In such cases every act of enjoyment or possession is a relevant fact since the right claimed is constituted by an indefinite number of acts of user exercised *animo domini* (1). Ownership may be proved by proof of possession, and that can be shown by particular acts of enjoyment (2), these acts being fractions of that sum total of enjoyment which characterises *dominium* (3). This also is the best evidence, with the exception of that afforded by judicial recognition, which is only admissible in proof of matters of a public nature that

Opinion also is admissible in proof of rights and as to their existence but by the examination of actual instances and transactions in which the alleged custom or right has been acted upon or not acted upon or of acts done or not done involving a recognition or denial of their existence (6). 'In the absence of direct title deeds, acts of ownership are the best proofs of title' (7). Acts of ownership, when submitted to are analogous to admissions or declarations by the party submitting to them that the party exercising them has a right to do so and that he is therefore the owner of the property upon which they are exercised. But such acts are also

(1) Wills Ev 2nd Ed 60

(2) *Jones v Williams* 2 M & W 326
folli Sabran Sheikh v Odov Mahto 1 Pat 375 (1922)

(3) Wills Ev 2nd Ed 61

(4) *v s 42 post* see remarks of Edge C J and Tyrrell J in *Gurdial Mal v Jhandi Mal* 10 A 586 (1888)

(5) *v s 32 cl (4) 48*

(6) See remarks of Turner J in *Lachman Rai v Akbar Khan* 1 A 440 (1877) and *Gopalujan v Ragupathisajan* 7 Mad 11 C Pep 250 354 *post* and remarks of

Westrop C J in *Bhagandas Tejmal v Rajmal* 10 Bom. H C R 261 (1873)

Steph Dig Arts 5 and 6 and case there cited *Taylor Ev* § 1683 *v Ranchhodas Krishnadas v Bapu Narhar* 10 B. 439, *post v Commentari post* and note to *ss 32 cls (4) (7) and 42 48* as to long usage being the best exponent of right see *Nalakandhen Vambudrapad v Padmanabha Rami Iarma* 18 M. 1 (1895)

(7) *Per Jackson J in Collector of Rayshahy v Doorga Soonduree* 2 W. R. 212 (1865)

admissible of themselves *proprio vigore*, for they tend to prove that he who does them is the owner of the soil (1)

- s. 3 ("Relevant")
 s. 32, CL (4), (Public right or custom; opinion of person not called as witness)
 s. 32, ILLUSTR (i) (Illustration of "public right")
 s. 32, CL (7) (Statements in Document relating to "transaction")
 s. 42 and ILLUSTR (Judgments relating to matters of a public nature.)
- s. 48 and ILLUSTR (General Custom or rights; opinion of witnesses on.)
 s. 48, EXPLANATION (Meaning of "general custom or right")
 s. 48, ILLUSTR (Illustration of "general custom or right")
 s. 49 (Opinions as to usage, etc.)
 s. 51 (Grounds of opinion)
 s. 92 PROV 5 (Usage and Custom imported into contract)

The following Acts refer to custom — Acts XXI of 1850, s. 1 (Non forfeiture of right by loss of caste), XV of 1856 (Re marriage of Hindu widows), IV of 1872, ss 5 (a), 7 (Punjab

1872), IV of 1872, s. 16 (b) (Civil Courts, Madras), III of 1876 (Central Provinces Laws), XVIII of 1876 (Madras Laws), as amended by Acts XXVI of 1920 and X of 1922), II of 1901 (V B P Rent), XVIII of 1881, s. 67 (Land Revenue, Central Provinces), II of 1882, s. 1 (Indian Trusts as amended by Acts XXI of 1917 and XXXI of 1920) See also Act XIV of 1920 (Religious Trusts) V of 1882, ss 18 20 (Easements), VIII of 1884, s. 40 (Punjab Courts as amended by Acts VI of 1918 and IX of 1919), VIII of 1885, s. 183 (Bengal Tenancy) See B and O Acts II of 1913, III of 1916, XXII of 1887, s. 125 (Punjab Land Revenue as amended by Acts XVIII of 1919 and XVIII of 1920), Steph Dig., Art. 5, Taylor, Ev. §§ 1683 609, 320, Starkie, Ev., §§ 123 139, Roscoe, N P Ev., 24, 25, 53, 54, 934, Phipson Ev., 5th Ed., 96 Best, Ev., §§ 366 399, 499, Wills' Ev., 2nd Ed., 60

COMMENTARY.

Right

The right mentioned in this section is not a public right only the Illustration shows this is not so, the right there mentioned being a private one (2) Three kinds of rights are thus included in the Act — (a) private *e.g.*, a private right of way, (b) general, which is defined to include rights common to any considerable class of persons *e.g.*, the right of villagers of a particular village to use the water of a particular well (3), and (c) public (4) The latter class of right is nowhere defined in the Act Every public right in the sense of the though (if the distinction made in English and "public" be accepted) every general

There was at one time a conflict of decisions as to whether the term is to be understood as comprehending all legal rights (including a right of ownership) or only incorporeal rights In the leading case *Gujju Lall v. Fatteh Lall*, Jackson, J., and Garth, C. J., were of opinion that the rights referred to, in the section, were incorporeal rights "What is referred to in the section cited is evidently a right which attaches either to some property or to status, in short, incorporeal rights, which though transmissible, are not tangible or objects of the bodily senses." (5) "It may be difficult perhaps to define precisely the scope of the word 'right,' but I think it was here intended to include those properties only of an incorporeal nature, which in legal phraseology are generally called 'rights,' more especially as it is used in conjunction with the

(1) Starkie, Ev., 470, note F *Jones v. Williams* 2 M & W., 326 v. post

(2) *Surya Narain v. Bissambhar*, 23 W. R. 311 (1875) see *Gujju Lall v. Fatteh Lall* (F. B.) 6 C. 187 (1890), per Garth, C. J.

(3) S. 48 and illust.

(4) S. 32 cl. (4), illust. (i) and illust. to s. 42 which last section also deals with the subject of public rights

(5) Per Jackson J., in *Gujju Lall v. Fatteh Lall* 6 C. supra 184, Mitter, J., dissenting

word 'custom' It is certainly used in that sense in subsequent parts of the Act (v. the forty eighth section, and the fourth sub section of the thirty-third section) which deal with matters of public or general 'right or custom' (1) On the contrary it has been held by Mitter, J., that the contention that the section in question refers only to incorporeal rights whether of a public or private nature, is not warranted by any general principle, it being difficult to suggest a reason which would justify the existence of a distinction between the rules applicable to the proof of corporeal and incorporeal rights respectively, whether of a public or private nature (2) Quite recently also Banerjee, J., observed as follows (3) — "It has been said that the right spoken of in this section is an incorporeal right I do not think that there is any sufficient reason for putting this limitation on the meaning of the term as used by the section" So also in Bombay, it has been held that the words "rights and customs" should be understood as comprehending all rights and customs recognised by law, and therefore as including a right of ownership (4) and in Allahabad that the word 'right' in both clauses (a) and (b) includes a right of ownership, and is not confined, as held by the majority (*sed qu* majority) in *Gujju Lall v Fatch Lall*, to incorporeal rights (5) It would seem now to be generally held that the term 'right' includes all rights and is not limited to incorporeal rights As to antiquity in the case of a right no less than of a custom usage for a number of years certainly raises a presumption that such right or custom has existed beyond the time of legal memory (6)

Custom" as used in the sense of a rule which in a particular district, Custom or class or family has from long usage, obtained the force of law (7) must be (a) usage ancient (8) (b) continued, unaltered uninterrupted uniform constant (9),

(1) *Per Garth C J* 186 *id* Mitter J dissenting and see *Kalidhun v Shiba Nath* 8 C 503 (1882) The undermentioned cases decided prior to *Gujju Lall v Fatch Lall* (1880) may be consulted on this point *Koonda Nath v Dheer Clander* 20 W R 345 (1873) (right of succession to office) *Neamat Ali v Goo roo Dass* 22 W R 365 (1874) (utamee right to lands) *Guttee Koiburto v Bhu kut Koiburto* 22 W R 457 *Dattaras Mohanti v Jugo Bundhoo* 23 W R 293 (1875) followed in *Sabran Sheikh v Odo Malto* 1 Pat 375 (1922) *Hansa Koor v Sheo Gobind* 24 W R 431 (suit for lands) *Mohesh Chunder v Dmo Bandhu* 24 W R 265 *Lachmeedhur v Rughoobur* 24 W R 284 *Omer Dutt v Burn* 24 W R 470 (suits for rent) *Nerangi Bhika bhai v Difa Umed* 3 B 3 (1878) (suit for chirda allowance)

(2) *Gujju Lall v Fatch Lall* 6 C 180 v. *Stra Pontifex J* expressed no opinion upon this particular point and Morris J merely agreed with Garth C J in holding that the former judgment was inadmissible

(3) In *Tepu Khan v Rajoni Molan* 2 C W N 501 504 (1898)

(4) *Ranchhoddas Krishnadas v Bapu Narhar* 10 B 439 (1886) *per* Sargent C J

(5) *Collector of Gorakhpur v Palakdhari Singh* 13 A 13 24 (F B) and see *Ramasami v Appatu* 12 M 9 (1887) (suit for money claimed under alleged right) *Penkatasa v Venkatreddi* 15 M 12

(1891) suit for declaration of title to land, *Vythilinga v Venkatacha* 16 M 194 (1892) suit for possession of land Followed in *Sabran Sheikh v Odo Malto*, 1 Pat 375 (1922)

(6) *Ramasami v Appatu* 12 M 14 (1887)

(7) *Hurpurshad v Sheo Dyal* 3 I A 259 (1876) s c 26 W R 55 *Sivananjanja Perumal v Meenakshi* 22 Ammal 3 Mad H C R 77 (1866)

(8) *Hurpurshad v Sheo Dyal* 3 I A 259 (1876) *Lala v Hira Singh* 2 A 51 (1878) *Doe d Jogomohon v Nimu Dasi* Montrious Cases of Hindu Law 596 (length of time necessary) *Joy Kishan v Doorga Naram* 11 W R 348 (1860) (id) *Jaggomohun Ghose v Manickchand* 7 M I A 282 (1859) s c 4 W R (P C) 8 *Amrit Nath v Gouri Nath* 6 B L R 238 (1870) *Rajah Nagendur v Ruhoonath Nara* W R (1864) 20 *Ramalakshmi Ammal v Stananjanja Perumal* 17 W R 553 (1872) *Perumal Sethurayar v M Ramalinga Sethurayar* 3 Mad H C R 77 (1866) *Gopalujan v Raghupattayan* Mad H C R 254 (1873) (usage must also be public) See *Ramasami v Appatu* 12 M 14 ante and *Bhaw Nanjys v Sundraba* 11 Bom H C R 271 post *Durga Charan Mahito v Raghunath Mahito*, 18 C L I 559 (1913)

(9) *Lala v Hira Singh* 2 A., 49, supra *Jameela Khaton v Pagul Ram*, 1 W R 250 (1864) *Beni Madhub v Jos*

and definite(3); or not(4) The have been performed with the consciousness that they spring from a legal necessity(5), and (g) must not be immoral (6) In a recent case it was said that a custom must be proved to be immemorial, recoverable, uninterrupted and also certain as regards its nature in the locality and persons affected by it(7), in this case it was said that a custom is void at law if there is proof that it originated within the time of memory but proof of its existence for a longer period will put the onus on those who assail it And in another recent case it was said that a custom must be reasonable, must apply to matters which the law has left undetermined, must be considered binding by at least a majority of a given class and must be established by a series of well known and continuous instances(8) The Privy Council has held that it is permissible to adduce evidence of a family custom which varies the strict Mahommedan Law (9)

The right mentioned in the section being a public or private right (a), the 'custom' must also on proper principles of construction, include a private custom (10) The word 'custom' as used in this section is not, however, limited to ancient custom, but includes all customs and usages So it has been held under section 48, which deals with general customs and rights, that evidence of usage was admissible (11) The word 'usage' would include what the people are, now or recently, in the habit of doing in a particular place It may be that this particular habit is only of a very recent origin, or it may be one which has existed for a very long time If it be one which is regularly and ordinarily

Krishna, 7 B L R, 154, 155 (1869), Juggomohun Ghose v Manikchund, 7 M I A, 282, s c, 4 W R (P C), 8, supra Amrit Nath v Gauri Nath, 6 B L R 238, supra, Rajah Nugendur v Rugehonath Narain W R (1864), 20 supra Rama lakshmi Ammal v Sivanananja Perumal, 17 W R, 553, supra, Patel Vandraton v Patel Manimal, 16 B 470 (1891), Perumal Sethurayar v M Ramalinga Sethurayar, 3 Mad H C R, 77, supra, Sooren dronath Roy v Mussamat Heeramonee, 12 M I A 81 (1868) s c 10 W R (P C), 35, Tara Chand v Reeb Ram, 3 Mad H C R, 57 (1866), (acts must also be plural) Rajkisen Singh v Ramjoy Surma 1 C, 195 (1872) (discontinuance), Juggomohandas Mangaldas v Sir Mangaldas 10 B, 543 (1886), (the consensus utrum, which is the basis of all legal custom must be uniform and constant)

(1) Lala v Hira Singh 2 A, 49 supra

(2) Hurlpurshad v Sheo Dyal 3 I A, 285, supra, Lala v Hira Singh, 2 A, 49, supra, Luchmeeput Singh v Sadaulla Nushyo, 9 C, 699 (1882), Ransordas Bhogilall v Kesrising Mohun, 1 Bom H C R, 229 (1863), Arlafa Nayah v Narsi Keshavji, 8 Bom H C R (A C), 19 (1871), C R DeSouza v Festanjis Dhanji bhai 8 B., 408 (1884), Rajah Furma v Ravi Furmah 1 M, 235 (1877), Njunt mutullah Ostagar v Gobind Churn, 6 W R Act X, 40 (1866), Awar Sen v Mamman (1895) 17 A, 87, Shadi Lal v Muhammad Ishaq Khan (1910), 33 A, 257

(3) Hurlpurshad v Sheo Dyal 3 I A, 285 supra Rajkisen Singh v Ramjoy Surma 1 C 195 196 supra, Lala v Hira Singh 2 A 48, supra Lachman Rai v Akbar Khan 1 A 440 (1877), Bhagavan Das v Balgobind Singh 1 B L R, S N, x (1868) Tekaet Doorga v Tekaet Doorga 20 W R 157 (1873), Rama lakshmi Ammal v Sivanananja Perumal, 17 W R, 553 ante

(4) Eshan Chandra Samanta v Nilmoni Singh (1908) 35 C 851 (riparian owner's right to irrigate) Mussamat Parbati Kunwar v Rani Chandrapal Kunwar, 8 O C, 94 and v P C (1909) 36 I A, 125

(5) Tara Chand v Reeb Ram, 3 Mad. H C R 57 supra Gopalayyan v Raghupathayyan 7 Mad H C R 254 (1873)

(6) Chinna Ummayy v Tegarai Chetti 1 M, 168 (1876) See also Sankaralingam Chetti v Subban Chetti 17 M, 479 (1894), Ghasity v Umrao Jan, 20 I A 193 (1893), 21 C 149

(7) Mahamaya Debs v Haridas Holdar, 42 C 455 (1915)

(8) Kunhambi v Kalanthor, 38 M. 1052 (1915), see Mauli v Halliday, 1 Q B 125 (1898)

(9) Muhammad Ismail Khan v Lala Sheomukh Rai, P C, 17 C W N, 97 (1902)

(10) Collector of Gorakhpur v Palakdhari, 12 A 16 (1889)

(11) Dalglish v Yusuffer Hossain 23 C, 427 (1896), Saratulla Sarkar v Pran Nath, 26 C, 184 (1898)

practised there is usage (1) So a common Law custom need not be long an agricultural custom have existed in this and other sections of the Act in its widest sense, including all customs ancient or otherwise and all usages Three classes of custom or usage are thus dealt with in the Act, (a) private, (b) general(4), (c) public (5)

Instances of the first class are family customs and usages termed *kulachar*, or in Upper India, *Rasm u a riuaq-i khandan* (v post) (6)

The expression "general custom" is defined to include customs common to any considerable class of persons (7) These are (a) local, termed *desachar*, e.g., in the Broach and other Gujarat districts *uakf* property, which is alienable by Mahommedan Law, may be by custom of the district alienated (8) In the same district, and more especially in parts of Eastern Bengal, the right of pre-emption which is based on Mahommedan Law, is allowed and enforced by customs as between Hindus also(9), (b) caste or class, of which the *Khojah* and *Memon* Cases(10), and the right of divorce marital by usage of particular castes, the customs of religious brotherhoods attached to Hindu temples and the like(11), afford examples English Municipal Law, owing to historical development, limits custom to a particular locality only Sir Erskine Perry in the *Khojah's* Case has remarked that this peculiar Municipal rule of English Law can have no application to India, where customs are seldom local and are mostly personal or caste customs, (c) Trade customs or usages (v post)

Public custom is nowhere defined in the Act It is not clear, if any, and if so what, meaning is to be attached to the word "public" as distinguished from the word "general" in the Act In speaking of matters of public and general interest the terms "public" and "general" are sometimes used as synonyms, meaning merely what concerns a multitude of persons (12) But

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interested in it, hearsay from persons wholly unconnected with the place or business would be not only valueless, but probably altogether inadmissible (13) But as the Indian Evidence Act(14) makes no such distinction as to admissibility, merely declarant, the expression 'g
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(1) *Dalglis v Yusuffer Hossain* 23 C 427 (1896) *Sariatulla Sarkar v Pran Nath* 26 C 184 (1898)

(2) *Juggomohun Glose v Manickchand* 7 M 11 A 263 282

(3) *Tucker v Linger* 8 App Cas 508 in which case the local custom had grown up within the last 30 or 40 years

(4) v s 48 post

(5) t s 32 cl (4) post

(6) v Norton Ex 190

(7) t s 43 and illust post

(8) *Abas Ali v Ghulam Muhanisad* 1 Bom H C R 36 (1861)

(9) *Shah Kh Koodru v Molince Mohun*, 13 W R (F B), (1870) *Under Narain v*

Mahomed Naziruddeen 1 W R 235 (1864) and the cases cited in Field's Ex 115

(10) *Perry's Or Ca* 110 *Karim Khatav v Pardhan Manji* 2 Bom H C R 6 (1886)

(11) See Field Ex 6th Ed 500 501 where a large number of cases of family local caste and class custom are collected

(12) Taylor Ex § 609 Gresley Ex 305 see notes to s. 32 cl (4) post

(13) Taylor Ex § 609

(14) t s 32 cl (4)

(15) See Norton Ex, p 186

and include") (1) customs or rights common to any considerable class of persons in fact such matters as would according to the English rule fall within the expression "matter of general interest" (2) The expression therefore would appear to have a more extended meaning and to be applicable also to those which are cases spoken of in English law as "matters of public interest"

Custom or usage occupies a prominent place in Hindu Law (of which it forms a branch), and wherever it obtains, supersedes its general maxims "Immemorial custom," says Manu, "is transcendent law" (3) Clear proof of usage will outweigh the written text of the law (4) The Digest subordinates in more than one place the language of text to custom and approved usage (5) Where a custom is proved to exist it supersedes the general law, which however still regulates all beyond the custom (6) A custom is some established practice at variance with the general law There cannot therefore be a custom to do that which the general law permits any one to do or abstain from at his own will (7)

"Facts"

The third section contains the general definition of the term "fact" as used in this Act The particular facts which are relevant under this section are 'transactions' and "instances" as to the meaning of which (*vide post*) See also note on the admissibility of judgments (*post*) (8)

'Transactions' 'Instances'

The facts made relevant are (a) transaction (b) instances Neither of these terms is defined by the Act (a) A transaction is the doing or performing of a thing, or the performance, that which is done, A transaction is something which is now going on or, if ended is still contemplated with reference to its progress or successive stages (9) "We use the word proceeding in application to an affair in the street and the word transaction" to some commercial negotiations that have been carried out in the street. The 'proceeding', means the manner of proceedings in a Court of law. The 'transaction' as the transactions on the exchange denoted is something which has been concluded between persons by a cross or reciprocal action as it were (11) 'A transaction in the ordinary sense of the word is some business or dealing which is carried on or transacted between two or more persons' (12) The qualifying characters of the transaction spoken of in the

(1) It does not therefore (accepting the distinction between public and general) exclude public custom. When a definition is intended to be exclusive it would seem the form of words is 'means and includes' *per* Jackson J *R v Ashutosh Chuckerbutty* 4 C 493 (1878)

(2) *Field Ex* 6th Ed 195

(3) See the authorities set out in judgment of West J in *Bhanu Narayan v Son draba* 11 Bom H C R 262 (1874) and *Tara Chand v Rb Ram* 3 Mad H C R 50 (1866)

(4) *Collector of Madura v Muttu Rama inga* 1 B L R 12 (1868) cited and applied in *Diagran Singh v Bhagran Singh* 17 A 339 (1895) but held to have been misapplied by the Privy Council s c 21 v 412 (1899)

(5) *Bhyah Ram v Bhyah Ugur* 11 M I A 390 (1890) s c 14 W R (P C) 1

(6) *Veelkisto Dev v Beer Clunder* 12

M I A 542 (1869) s c 12 W R (P C) 21

(7) *Sri Braja Kisora v Kundana Devi* 3 C W R 378 380 (1899) P C

(8) s also ss 3 11 ante

(9) Webster's Dictionary sub non Transaction

(10) *Craib's Synonyms*

(11) *Gujju Lal v Fattch Lal* 6 C 185 (1880) *per* Jackson J transaction in its largest sense means that which is done ib 175 *per* Mitter J

(12) *Ib* at p 186 *per* Garth C. J who added If the parties to a suit were to adjust the differences *inter se* the adjustment would be a transaction and by a somewhat strained use of the word the proceedings in a suit might also be called transactions but to say that the decision of a Court of Justice is a transaction appears to me a misapplication of the term See also *Ranchi oddas v Bapu Narhar* 10 B 442 (1886) but see as to judgments *post*

section are (a) creation, (b) claim, (c) modification, (d) recognition, (e) assertion, (f) denial, (g) inconsistency. Of these (b) and (d) are also qualifying characters of "instances" (b) An "instance" is that which offers itself, or is offered, as an illustrative case, something cited in proof or exemplification a case occurring, an example (1) The qualifying characters of the "instances" spoken of by the section are (a) claim, (b) recognition (common both to "instances" and "transactions"), and (c) exercise (which is peculiar to "instances" only), and instances in which the exercise of the right or custom was disputed, asserted or departed from. It will have been observed that the section distinguishes between a claim and an assertion. Under the second clause, however, instances are admissible in which the exercise of a right or custom was asserted. The word "assertion" includes both a statement and enforcement by act. Ordinarily the evidence tendered under this section will be evidence of acts done, but a verbal statement not amounting to and not accompanied by, any act would also be admissible if it amounted to a "claim."

Road cess papers and deeds of sale were held to be evidence *quantum valent* as transactions and instances in which rights were asserted and recognised (2) Documents showing recognition of alleged right by Government *hile in charge mehal* merely *ado* under the

a map of Government within the meaning of section 80, the accuracy of which is to be presumed, but such a map may be evidence of possession or of assertion of right under the thirteenth section (4) In a suit for possession of land, the plaintiffs claimed title under a lease from the *shrotriendars* of the village where the land was situated. The defendants, who had obstructed the plaintiffs from taking possession of part of the land, claimed to have permanent title not to the land plaintiffs tendered the village showing

—Held, that these documents were admissible, course concluded by them, but that the documents were relevant evidence under the thirteenth section as showing the tenure on which the village was held (5) Decisions are conflicting as to whether previous judgments and decrees *inter partes* are (6), or are not (7), included

(1) Webster's Dictionary *sub nom* in stance

(2) *Dattari Mohanti v Jugo Bundho* 23 W R 293 (1875), followed in *Sabran Stekh v Oday Mahto* 1 Pat 375 (1922)

(3) *Surjo Narain v Bissa ibhur Singh* 23 W R 311 (1875) And see *Sremutti Nijja Kali v Sarat Chandra Bose* 51 I C 866

(4) *Junmajoy Mullick v D arkanath Mjee* 5 C 287 (1879) And see *Slashi Bhusat Dhur v Natab of Murshidabad* 49 I C 957

(5) *Lythlinga v I nikatachala* 16 M 194 (1892)

(6) *Nanant Ali v Gooro Dass* 22 W R 362 (1874) *Gujju Lal v Fatteh Lal* 6 C 175 (1880) *per Mitter J* *cur dissent Collector of Gorakhpur v Palakdlari Singh* 12 A 43 (1889) *per Mahmood J* *cur dissent*

(7) *Gujju Lal v Fatteh Lal* (F B) 6 C 183 185 187 *per curiam Mitter J* *dissent Collector of Gorakhpur v Palakdlari Singh* 12 A 14 27 28 *per curiam* see remarks of Sargent C J in *Ranchhod das Krishnadas v Bapu Narhar* 10 B 442 (1886) former judgments are not themselves transactions but the suit in which they were made is a transaction *per Straight J* 12 A 25 *supra* It was said by Ranade J that the interpretation placed upon the words right and transaction in *Gujju Lal v Fatteh Lal* seems not to have been accepted by the Privy Council and its correctness is questioned in the Full Bench judgment of the Allahabad High Court in the *Collector of Gorakhpur v Palakdlari* in so far as the exclusion of such judgments from being received as evidence under any section is concerned *Lakshman v Amrit* 24 B 599 (1900)

in the term "transaction" or are(1), or are not(2), included in the words "particular instances" (v *post*) In some cases it has been held that judgments and decrees are not themselves "transactions" or "instances," but the suit in which they were passed and made is a "transaction" or "instance" So in the undermentioned case Banerji J, observed as follows "If the existence of the judgment is not a transaction within the meaning of clause (a) of the thirteenth section it proves that a litigation terminating in the judgment took place, and the litigation comes well within the meaning of the clause as being a transaction by which the right now claimed by the defendants was asserted So again litigation which is evidenced by the existence of the judgment was a particular instance within the meaning of clause (b) of the thirteenth section in which the right of possession now claimed by the defendants was claimed" (3) In a case where a dispute existed between the proprietors of two estates, A and B as to the right to water flowing through an artificial watercourse on estate B belonging to the defendants proceedings were taken in the Criminal Courts by the owners of estate A against some ryots of estate B in consequence of their having closed the watercourse These proceedings led to a *raznamah*, or deed of compromise which was relied on as evidence before the Privy Council Their Lordships said 'This agreement is a clear *acknowledgment of right* to this overflow It was objected that this *raznamah* does not bind the proprietors of B but although it was apparently made between tenants it seems to have been subsequently acted upon, and may be properly used to explain the character of the enjoyment of the water' (4) Their Lordships also referred to certain proceedings under section 320 of the Code of Criminal Procedure of 1861 (corresponding to the section 147 of the Codes of 1882 and 1898) in which a claim was made as to the right to use the water collected in the *tal* observing that the proprietors of B do not seem to have challenged the decision of the Magistrate,

nothing contrary to it The deed was executed before action brought by the present plaintiffs and also by a plaintiff who had died since the institution of the suit and, as the plaint alleged, by a 'considerable majority' of the family, but the defendant was not a party to it The deed was held to be admissible as evidence on behalf of the plaintiffs (6) In an English case the Crown claimed against A, who in proof of occasionally fishing there, of binding his tenants,

(1) *Koondo Nath v Dheer Chunder* 20 W R 345 (1873) *Jianatulla Sirdar v Ranani Kant* 15 C 233 (1887), *Ramasami v Apparu* 12 M 9 (1887), and see *Bajathanna v Atulla* 15 M, 19 (1891)

(2) Record and not the judgment alone admissible as an instance *Collector of Gorakhpur v Palakdhari Singh* 12 A 14 28 *supra per* Edge C J and Tyrrell J former judgment not itself an instance but the suit in which it was made is an instance *ib* 25 *per* Straught J and see *Cusju Lal v Fattah Lal* 6 C 171 *supra*

(3) *Tepu Khan v Rajoni Mohun* 2 C W N 501 504 (1898) *Srimati Aijun v Hara Chandra S A* 106 of 1907 Cal H C 1st July 1904 and see *Mahomed Amin v Hasan* (1907) 31 B, 143

(4) *Ramesur Pershad v Koonj Behari*

4 C 640 (1878)

(5) As to this case Edge C J observed 'apparently this *raznamah* was admissible under s 9 the record of the proceedings in the Criminal Court which the Judicial Committee admitted in evidence might be admissible under s 9 or under s 13 (b) 12 A 16 In *Raja Run v Mussamat Lucio* (11 C 310) the Judicial Committee would possibly have held that the record in the rent suit of which the judgment referred to former part was admissible under s 13 (b) and see *Hira Lal v A Hills* 11 C L R 530 (1882) See also *Venkataram v Venkatreddi* 15 M 12 (1891) *post* and note on Admissibility of judgments *post*

(6) *Hurronath Mullck v Nittanund*, 10 B L R, 263 (18 3), see s 37 cl. (7)

in their leases, to protect the fishing and prevent all others from fishing (1) In a case decided prior to the Act, measurement *chittas* were admitted as *prima facie* evidence that long before the case originated and the suit was thought of, the plaintiff put forward his rights to certain lands as *mal* lands (2) The question is whether A has a right of fishery in a river licenses to fish granted by his ancestors and the fact that the licensees fished under them are relevant (3) The question is whether A owns land the fact that A's ancestors granted leases of it is relevant (4) The question is whether there is a public right of way over A's land The facts that persons were in the habit of using the way, that they were turned back, that the road was stopped up that the road was repaired at the public expense, and A's title deeds showing that for a length of time reaching beyond the time when the road was said to have been used no one had power to dedicate it to the public, are all relevant (5) A petition to the court to be allowed to be entered in the register of title to the land from which the right of way is claimed, by which the land is shown as a transference of title to infer

right in question was claimed and disputed and disallowed (8) And generally speaking, title to property, corporeal or incorporeal, may be proved under this section, or (if the section be held to be applicable to incorporeal rights only, which it is submitted is not the case) under this and the preceding sections by evidence of acts of ownership and enjoyment, such as the receipt of rents and profits, the discharge of the burdens or repairs of the property, the granting of licenses and leases and the like, while in rebuttal, proof is admissible that these acts were disputed, or done in the absence of persons interested in disputing them (9) It has been recently held that documents not *inter partes* containing recitals of boundaries of other lands are not admissible in evidence under this section (10) As to *Wajib-ul-arazi*, see note to section 35

Judgments *qua* judgments or *adjudications* upon questions in issue and proofs of the particular points they decide are only admissible either as (a) *res judicata* (11), or (b) as being 'in rem' (12) or (c) as relating to matters

admissible
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(1) *Lord Advocate v Lord Lovat* L. R. 5 App. Cas. 273 in this case an ancient document was tendered to prove ancient possession and held to be admissible the rule being that such documents coming out of the proper custody and purporting on the face of them to exercise ownership such as a lease or license may be given in evidence as being in themselves acts of ownership and evidence of possession see notes to s. 90 post See also *Molcolmson v O'Dea* 10 H. L. Cas. 593 and note to s. 90 post

(2) *Debee Pershad v Ram Coomarr* 10 W. R. 443 (1868) see note to s. 32 cl. (7), post

(3) *Rogers v Allen* 1 Camp. 309 See also *Neill v Duke of Devonshire* L. R. 8 App. Cas. 135

(4) *Doe v Pulman* 3 Q. B. 622 623

626

(5) Steph. Dig. Art. 5 illust. (c) as to proof of custom by instances see *Vishnu v Krishnan* 7 M. 3 (1883)

(6) *Shan anand Das v Rama Kant* 37 C. 6 17 (1904)

(7) *Lakhi Chandra v Kali Kumar* 10 C. W. N. xxiv (1905)

(8) *Bhaya Dirgaj Deo v Pande Fateh Bahadoor Ram* 3 C. L. J. 521

(9) Wills Ev. 2nd Ed. 60 Phipson Ev. 5th Ed. 96 *Jones v Williams* 2 M. & W. 326 As to repairs constituting an act of ownership see 4 C. W. N. cccii

(10) *Soro Kumar Chakraborty v Umed Ali Houladar* 25 C. W. N. 1022 (1921) nor (it was held) under s. 11 ante

(11) Under s. 40 post

(12) Under s. 41 post

of public nature (1) In (a) they are between the same parties in (b) they are declared by law to be conclusive proof against all persons of certain (2) matters only in (c) though not conclusive, they are relevant as adjudications against persons not parties to them, the reason being that in matters of public right the new party to the second proceeding as one of the public has been virtually a party to the former proceeding (3) But judgments, orders and decrees, other than those admissible by sections 40, 41, 42 may be relevant under section 43, if their existence is a fact in issue or is relevant under some other provision of the Act (4) In the sections relating to judgments the judgment is admissible as the *opinion of the Court* on the questions which came before it for adjudication Ordinarily judgments are not admissible as between persons who were not parties and do not claim under the parties to the previous litigation But there are exceptions to this general rule (5) The cases

section 13 are such as the section itself illustrates, viz, when the fact of any particular judgment having been given is a matter to be proved in the case (6) Section 43 is one of the group of sections relating to judgments and contains the provision applicable to cases relating to the relevancy of judgments as evidence against strangers (7) Under that section a judgment may be admissible as relevant under some other provision of the Act So a previous judgment has been admitted not in order to prove an adjudication, but in order to prove an admission made by a predecessor in title of the party against whom the document was sought to be used (8) This being so, the question

under clause (b), as 'particular instances' This question has been the subject

Calcutta
decisions

h judgments were up to 1880 frequently being, it was said (11), large enough to be admitted, not as conclusive, but of they ought to have Upon this principle previous judgments and proceedings in suits were admitted as relevant in the undermentioned cases (12) In 1880, the Full Bench of the Calcutta High Court

(1) Under s 42, post
(2) See *Kanhaya Lall v Radha Churn* 7 W R 344 (1867)

(3) Per Pontifex J in *Gujju Lall v Fatteh Lall* 6 C, 183 (1880)

(4) S 43 post
(5) *Hira Lall v A Hills* (11 C L R, 530), per Field J (1882)

(6) Per Garth, C. J., in *Gujju Lall v Fatteh Lall*, 6 C, 192

(7) *Tepu Khan v Rojoni Mohun* 2 C W N, 501, 505 (1898)

(8) *Krishnasami Ayyangar v Rajagopala*, 18 M, 73, 78 (1895)

(9) Other than public or general rights and customs in regard to which (being matter of a public nature) adjudications *inter alia* have always been admissible and are now so under s 42 of the Act
(10) *Taylor v § 1683, Madhub Chunder v Tomce Beraiah* 7 W R, 210 (1867),

Vaitathambi Batta v Nellakumara Pillai, 7 Mad H C, R 306 (1873), *Ramasami v Appatu* 12 M, 9 and s 42, post

(11) See *Lala Ranglal v Desmarayan Tewary*, 6 B L R 69 (1870), *Doorga Das v Nurendro Coomarr* 6 W R, 232 (1866), *Koondoo Nath v Dheer Chander*, 20 W R, 345 (1873), and remarks of Couch C. J. in *Neamut Ali v Gooroo Doss* 2 W R, 365 (1874), and of Mitter, J., in *Gujju Lall v Fatteh Lall* 6 C, 179 (1880), (and see *R v Keshub Mohajan* 8 C, 953 (1882), remarks of Garth C. J.)

(12) Per Couch C. J. in *Neamut Ali v Gooroo Doss*, 22 W R 366

(12) *Guttee Koiburto v Bhukat Koiburto* 22 W R, 457 (1874), [the judgments appear to be *inter partes*] *Roopchand v Hur Kishen* 23 W R 162 (1875), *Daitari Mohan v Jugo Bundhoo*, 23 W R, 293 (1875) followed *Sabran Sheikh v*

in the case of *Gujju Lall v. Fattch Lall*(1) considered the question. This was a suit to recover possession of certain property. The Lower Court allowed the plaintiff to put in evidence against the defendant a judgment in a former suit between the defendant and others and to which the plaintiff was no party. It was contended by the defendant that the judgment in this former suit could not be used as evidence in this suit because the plaintiff was no party to the former proceedings, while the plaintiff, on the other hand, contended that the former judgment was admissible in evidence under this section as being a transaction by which a right claimed in this suit by the plaintiff was asserted and denied. Both the Lower Courts considered the judgment admissible in evidence, and, apparently upon the strength of it, decided in the plaintiff's favour. The question referred to the Full Bench was whether under the thirteenth section or any other section of the Evidence Act, the judgment in the former suit, which was admitted and acted upon as evidence in this suit, was admissible. It was held (Mitter, J., dissenting)—that the former judgment was not admissible as evidence in the subsequent suit, either as a "transaction" under the thirteenth section or as a fact under the eleventh section or under any other section of the Evidence Act. The case was accordingly sent back to the Lower Court to be decided upon the other evidence. It was further held by the Full Bench (Mitter, J., dissenting) that a former judgment which is not a judgment "*in rem*" under section 41 nor one relating to matters of a public nature under section 42, is not admissible in evidence in a subsequent suit either as a *res judicata*, or as *proof of the particular point which it decides*, unless between the same parties or those claiming under them (2). It has been said that this judgment practically decided that except in the case of judgments *in rem*, and judgments relating to matters of a public nature, a judgment, in order to be evidence, must be such as would operate by way of estoppel or *res judicata* (3). This interpretation, however, of the judgment is, it is submitted, incorrect. What the Full Bench held was that a judgment or decree was not admissible under this section, but it might be evidence under others by virtue of the operation of section 43, and that in any case a judgment not *inter partes* was not admissible in proof of the particular point it decided, that is, it was not admissible in its character of a *judicial opinion* and as having the effect more or less of *res judicata*.

In a subsequent suit however, which was one for rent, the amount of the land held by the defendant was questioned, and it was contended that the land must be measured with a *hath* of 21½ inches and not one of 18 inches, as claimed

Odoy Mahto 1 Pat 375 (1922) *Mohesh Chunder v. Dno Bundhoo* 24 W R, 265 (1875) *Luchmeedhur Pattack v. Rughobur Singh* ib 284 *Hunsa Koor v. Sheo Gobind* ib 431 *Omer Dutt v. Burn* ib 470 (1875) [*ex parte* decree]

(1) 6 C 171

(2) See the following cases in which the principle laid down in *Gujju Lall v. Fattch Lall* was concurred in and followed: *Hira Lal v. A Hills* 11 C L R, 530 (1882) *Ram Narain v. Ramcoomar Chunder* 11 C 562 (1885) *Mohendra Lal v. Rosomoy Dass* 12 C, 207 (1885), and affirmed in *Surendra Nath v. Brojo*

Nath 13 C. (F B) 352 (1886). [see *Gobind Chunder v. Sri Gobind*, 24 C, 330 (1896)] "In the conclusion of that judgment we fully concur" *per* Tyrrell, J. *Duthoit J., Shadal Khan v. Amin ul lah Khan* 4 A 96 (1881) *post* A v. *Keshab Mahajan, R v. Udit Pershad*, 8 C, 993 (1882) see remarks of Edge C. J., *Collector of Gorakhpur v. Palakdhari*, 12 A 13 (*post*), 1886, and see as to the effect of this decision the remarks of Parker J. and Handley J. in *Bysthamma v. Atulla* 15 M 23 (1891) *post*

(3) *Surendra Nath v. Brojo Nath* 13 C, 352-353 (1886)

Fatteh Lall but it was held that they afforded some evidence in corroboration of the plaintiff's case and that they furnished evidence of particular instances in which a custom was claimed (1) It may, however be said that the judgment was not of a nature, whether admitted to or not which

was alleged to be *lakhray* a claim for rent was successfully made on a former occasion (2) It was said We do not use them as evidence in the way in which judgments and decrees are often used between the same parties that is to show that there has been a previous adjudication on a question of title We take it that these decrees are not evidence of any decision of a Court of Justice that the land is *mal* or *lakhray* We do not consider that in so deciding we are in any way violating the principle laid down in the Full Bench decision in *Gujju Lall v Fatteh Lall* On the contrary and in order to prevent there being any misapprehension we desire to say that we entirely concur in the principle of that decision so far as it was concerned with the facts which were then before the Court (3) Though this case recognised the principle laid down in *Gujju Lall v Fatteh Lall* it would seem to be excluded by it in that the previous litigations were used not merely to show that claims for rent had been made but that such claims were successful The claims could only take on this character by reference to the judgments as adjudications so asserting it In a suit for possession of land the defendant offered in evidence a judgment obtained by him in a suit to which the plaintiff or his predecessors in title were not parties Objection was raised to this judgment that it was not *inter partes* and was therefore inadmissible It was held on the authority of *Davies v Lowndes*(4) and *Ramesur Persad Narain Sing v Koo j Behari Pattuk*(5) that this judgment was admissible in evidence to show the character of the defendant's possession and the nature of the enjoyment had in the lands (6) The case of *Davies v Lowndes* referred to in this judgment was an action to recover lands of the defendant's father and other persons unconnected with the defendant It was held that the father should be let into possession of the property was held admissible on behalf of the defendant not as proof of any of the facts therein stated but for the purpose of showing that the claimant claimed of this kind

Bench decision
Chowdhry (8)
Gujju Lall v
Full Bench

Council held that a previous judgment in the case) and by the decision of the Full Bench in *Mukerji v Drobo Moyi Daba*(11) already mentioned The Court further observed that it did not understand why, if the judgments which were dealt with in the two last mentioned cases could be properly used as evidence for one purpose or another the judgments

(1) *Jamstulla v Roman Kant* 15 C 233 (1887)

(2) *Hira Lall v Hills* 11 C L R 528 (1882)

(3) *Per Field J* ib 530 *Ramesur Persad v Kooj Behari* 4 C 633 (1878) referred to

(4) 1 Bng N C 607

(5) 4 C 633 v ante

(6) *Peari Molun v Drobo moy* 11 C

45 (1885) in this case the judgment was properly admissible under s 43

(7) 1 Bng N C 607 s c 6 M & Gr 471 520 Taylor Ev § 1668 see note to s. 43 post

(8) 13 C 352 (1886)

(9) 6 C 171 (1880)

(10) 11 C 301 (1884)

(11) 11 C 745 (1885)

(12) 11 C L R 528 (1882)

adduced in this case could not be used as evidence. The Full Bench, however, upon the authority of *Gujju Lall v Fatteh Lall*(1), considered the judgment to be inadmissible. In a subsequent case(2), these two Full Bench decisions were distinguished, it being held that a decree for possession made by a Court under the ninth section of the Specific Relief Act in a suit beyond the pecuniary limits of that Court's jurisdiction, although not *res judicata*, was some evidence of *dispossession* by the defendants in a subsequent suit against the same defendants to recover mesne profits. In this case the fact of the judgment having been given was admissible. A Full Bench of the Calcutta High Court(3) subsequently expressed the opinion that the decisions in the case of *Gujju Lall v Fatteh Lall*(4), and *Surendra Nath Pal Chowdhry v Brojo Nath Pal Chowdhry*(5), must be regarded as materially qualified owing to the decisions of the Privy Council they referred to(6), because these decisions establish that under *certain circumstances* and in *certain cases* the judgment in a previous suit to which one of the parties in the subsequent suit was not a party may be admissible in evidence for *certain purposes* and with *certain objects* in the subsequent suit. This expression of opinion, which was *obiter*, has been dissented from by Geidt, J, in a subsequent case(7) to which reference will be made (8). In the last mentioned case the question was whether one A was a partner with J. An award made by an arbitrator in a previous suit brought by A against J was tendered to show the alleged partnership. Geidt, J, held that the award was not admissible. Ghose, J, that it was agreeing in the view that the Privy Council decisions referred to had qualified the rule laid down by the Full Bench and stating that he was disposed to think that the Privy Council had in these cases adopted the dissentient opinion of Mitter, J, in the Full Bench. A decree obtained by a co sharer landlord for rent has been held to be evidence as to the rate of rent in a suit by another co sharer for rent (9).

The Bombay High Court has concurred(10) in the judgment given in *Bombay Gujju Lall v Fatteh Lall*. In the case cited the plaintiff sued to recover arrears of rent for a certain shop alleging the annual rent to be Rs 250. The defendant contended it was only Rs 60. In support of his allegation, the plaintiff relied upon the evidence of his brother and two entries in his hand writing in the book of the firm of which the plaintiff's brother and the defendant were partners. To prove the *bona fides* of these entries the plaintiff offered in evidence a judgment given in favour of the plaintiff's brother in a suit brought by the defendant, charging him (the plaintiff's brother) with improperly debiting their firm with Rs 250 as the rent of the shop. It was held that the judgment was not admissible. Sargent, C J, remarking "As to the term 'transaction' it is doubtless one of large import and might, although by a strained use of it, be held to be applicable to proceedings in a suit but as the result of holding it to be so applicable in the thirteenth section would be to effect a most important departure from the English rule of evidence which would make judgments, decrees and verdicts of juries only admissible in matters of public interest, it may well be doubted if such was the intention of the framer of the Code (11). Later it was said. It is not easy to reconcile this conflict of views in particular instances but apparently the cases, which decide that judgments not inter

(1) 6 C 171 (1880)

(2) *Janullah Sleikh v Inu Khan* 23 C 69 (1896)(3) *Tepu Khan v Rojans Molun* 25 C 522 s c 2 C W N, 501 (1898)

(4) 6 C 171 (1880)

(5) 13 C 352 (1886)

(6) *Rani Ranjan v Ram Narayan* 22 C 53 (1895), *Bhillo Kanwar v Aesho Pershad* 24 I A, 10 (1897)(7) *Abnash Chunder v Poresh Nath* 9 C W N 402 (1904)

(8) v post p 183

(9) *Bjonesh Chakravarty v Jaga dishar Rai* 22 C W N 304(10) In *Ranehoddas v Bapu Narhar*, 10 B 439 (1886)(11) *Id* 422 *Narayan Bhikhabhai v Dipa Umed* 3 B 3 referred to and distinguished

partes, are not admissible in evidence, proceed chiefly on the ground that those or less, of *res judicata* admitted in evidence, be used to show the conduct of the parties, or show particular instances of the exercise of a right or admissions made by ancestors, or how the property was dealt with previously, they may be used under the eleventh or thirteenth section as exceptions recognised under section 43 as relevant evidence." (1) This decision was followed in the undermentioned case. The judgments rejected by the lower Appellate Court were *not enter partes* but were in suits brought by other creditors against the same defendants in which the existence of the partnership denied in the suit was asserted with success. It was held that the judgments were admissible in evidence and must be treated as relevant but not as conclusive as to the existence of the partnership (2). *Sed quære*. And in the case now cited a house had been passed to the plaintiff by a registered sale deed by his deceased father, and subsequent to the sale certain mortgagees of the father had brought a suit on the mortgage against the plaintiff and his father and mother, on which suit the sale had been held to be a sham transaction. On the plaintiff bringing ceased brother, the defendants sell (*actg C J*) in the two last

mentioned cases, and that the proceedings in the suit on the mortgage were admissible as relevant evidence because the plaintiff and the defendants, either by themselves or their predecessors, were parties to that suit, and that the said proceedings came within the words "particular instances in which the right was claimed," and it was held by Beaman, J., that the judgment in the suit on the mortgage was admissible to prove that the genuineness of the sale-deed was then questioned but could not be used for any ulterior purpose (3).

The Madras High Court has also concurred (4) in the judgment given in *Guggu Lall v Fatteh Lall*. In a suit brought by the trustees of a temple to recover from the owners of certain lands in certain villages money claimed under an alleged right as due to the temple, judgments in other suits against other persons in which claims under the same right had been decreed in favour of the trustees of the temple were admitted (5). It was said. We concur with the majority of the learned Judges who decided, in *Guggu Lall v Fatteh Lall*, that a judgment of the character there under consideration, viz, as to whether a certain person was or was not the heir to another, is neither a transaction nor a fact in the sense in which the words are used in the thirteenth section

not be racter vious in the ere so to us ts are right ed or departed from,' and was further adjudicated upon, and that the right was a right

(1) *Per Ranade J in Lakshman v Amrit* 24 B., 598 599 (1900)

(2) *Govindji Jhaver v Chhotalal Velsi* 2 Bom L R 651 (1900)

(3) *Makamad Amin v Hasan* (1906), 31 B 143 and see *Dharmdar v Dhundi-*

raj (1903) 5 B L R 230

(4) In *Subramanya v Paramaswaran*, 11 M 123 (1887), *Ramasani v Appavu*

12 M 13 (1887)

(5) *Ramasani v Appavu* 12 M, 9 (1887)

of the character dealt with under the thirteenth section of the Evidence Act. The case for the appellants is—and there is evidence in support of it in the case before us as to at least six of such villages—that, from those who hold lands in large number of villages in the vicinity of the temple, the payment claimed

nature' within the meaning of section 42 of the same Act. The question for determination before us is not dissimilar in principle from that reported in *Naranji Bhikhabhai v Dipa Umed* (1). The right now claimed appears to us to be as much a right of the character indicated in the thirteenth section of the Evidence Act as the right to a fishery, and the judgments go far to support the finding of the District Judge as to the payments claimed having been customarily made (2). In this case the remarks as to this section were *obiter* as it was held that the case came within s. 42. But apart from this the judgment may have been admissible to explain the nature of the payments made, viz., that they had been made after suits brought and that the payments were thus claimable as of right and were not voluntary. In a suit to establish the plaintiff's title to certain lands he put in evidence (a) a conveyance in favour of his father, (b) a sale certificate issued to his father's vendor, (c) an order made in certain execution proceedings in which was recited a petition by his father asserting his title, (d) a judgment obtained by his father in which his title was recognized. Neither the defendants nor their predecessors were parties to any of these instruments or proceedings. It was held that none of these documents were conclusive, since the defendants were not parties to them, but that they were relevant evidence as tending to show that the plaintiff's ancestors had dealt with the site as their own for a long term of years (3). In this case documents A and B were clearly admissible as documents of title. D was an assertion of right, C the judgment set out to pleas of the parties and from these it appeared that the defendant's predecessors had parted with the property to the plaintiff's father, though the admission was attempted to be avoided by an allegation of an agreement to return the property. But as to this it may doubtless be held that the purpose as the plaintiff had in view was the same as that in *Gujju Lal* former judgment. In that case the plaintiff had lost his title, and it was held

that the opinion expressed in the former judgment was not a relevant fact within the meaning of the Evidence Act. In the case before us it is not the case that the plaintiff had lost his title, but that he had a particular instance of a *marumakata jam*

tarwad, wholly irrespective of the particular decision arrived at in the suit. This, we think, is a relevant fact (4). In this case the document referred to as a judgment was an entry in the Court diary of the District Munsif and was held to be admissible under section 35, *post*.

The question was considered by a Full Bench of the Allahabad High Court in the case of *The Collector of Gorakhpur v Palakdhar Singh* (5). In *decisions*

(1) 3 B 3 *supra*

(2) *Ramasami v Apparu* 12 M 13 (1887) referred to in *Bathamma v Arulla* 15 M 24 (1891) (*in post*), and *Vythalinga v Venkatachala* 16 M 196 (1892)

(3) *Venkatasami v Venkatreddi* 15 M 12 (1890).

(4) 15 M at pp 25-24 (1891). *Arissasami v Rajagopala Ayyangar* 18 M, 73, 77 (1895)

(5) 12 A 1 (F B) (1889) [as to the effect of this decision see *Lakshman v Amrit* 24 B 599 (1900), a case prior to this will be found in 4 A. *Shadul Khan v Amin ul lah Khan* where at p. 96, Tyrrell,

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Court of first instance and by the High Court on appeal. After the widow's death the plaintiff brought a suit against one Dalip Naram Singh, whom the Collector as Manager of the Court of Wards, had accepted as the minor son, the defendant in the first suit, and against the Collector, as such Manager, for possession of the same villages upon the same grounds as those put forward in the former suit — *Held* by the Full Bench that the judgments of the Court of first instance and the High Court in the former suit did not operate as *res judicata* in the present suit, but (Brodhurst, J., dissenting on this point) (1) that they were admissible in evidence in the present suit. *Held per* Edge, C J, and Tyrrell, J, that the judgments were not admissible under the eighth section or the ninth section, nor was either of them a 'transaction' or a "fact," within the meaning of the thirteenth section. But the *record* and not the judgments alone in the former suit was admissible under the clause (b) of the thirteenth section independently of section 43 as evidence of a particular instance in which the alleged right of the plaintiff to the property now in suit was at the time *claimed and disputed*, the word 'right,' in both clauses (a) and (b) being *ill*, to incorporeal suit for the decree. *traight, J*

that under section 43 of the Evidence Act the question was whether the *existence* of the former judgments was a fact in issue or relevant under some other provisions of the Act. Here the question was not as to the *existence* of the judgments, but as to their *relevance* as a fact in issue or relevant fact, but though other than those mentioned in the former judgments and decrees it did not make them absolutely inadmissible when they were the best evidence of something that might be proved *aliunde*. The former judgments and decrees

judgments
l, J. That
Gujju Lall

v. Fatteh Lall, the former judgment of the High Court was admissible in evidence

J and Duthoit J say. In the conclusions of that judgment (*Gujju Lall v. Fatteh Lall*) we fully concur.]

(1) *Per* Brodhurst J. My opinions on the points that have been referred are in accordance with the judgment of the Court in *Gujju Lall v. Fatteh Lall* at p. 27.

(2) *Sed quare* whether the judgment could be used as a recognition of right. The defendant's right was only recognised in the sense that in the opinion of the Court it was found to exist that is adjudicated upon. By "recognition in

the section was meant it is submitted admitted not adjudicated upon *post* but see also *Abinash Chandra v. Poresh Nath* 9 C W N 402 at p. 415 *per* Ghose J. or it is a transaction *recognising* the right of Abinash in that property within the meaning of s. 13 of the Evidence Act and *Gujju Lall v. Fatteh Lall* at p. 181 *per* Mitter J. where he held that the judgment was relevant because it *recognised* the right of the plaintiff and made therefore the existence of the fact in issue in the subsequent suit highly probable.

A recent decision of the Lahore High Court holds that a previous judgment could only be used for the purpose of showing that the right had been called in question but that the finding of the Court was not relevant (1) Lahore decision

The Privy Council have in the following reported instances admitted in evidence judgments and orders not between the same parties (2) Privy Council decisions

Where to actions of ejectment by a zemindar, the defendants pleaded a *ghatauli* tenure of the mouzahs in dispute under permanent *mokurruri* and *dur mokurruri* rights at fixed rents from before the decennial settlement, it was held that certain decrees in 1817 and 1845 relating thereto, to which the zemindar's predecessors in title were not parties, but which sustained the defendants' claim to hold at fixed rents, were admissible in evidence as showing *ancient possession and assertion of title* many years ago, and that taken with other evidence, they established the defendants' possession at a uniform rent for so

relate, and that in former suits the parties asserted the same rights which they were then asserting, and that to this extent the judgments were admissible even though the plaintiff was no party to them. The Privy Council made no reference to this section. It is true that it cited the findings of the Lower

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The Privy Council by reference to the findings show that they did not. But the ground on which the Privy Council itself admitted the evidence was that

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of the judgment, and the existence of the judgment was admissible as a fact in issue under section 43, *post* (4). The result of this decision appears to be that the judgments were admitted under section 43 as facts in issue and also (if the Privy Council be taken to have affirmed the decision of the High Court on this section) But neither Court the effect of a kind of qualified

(1) *Inder Singh v. Fatch Singh* 1 Lahore 540.

(2) See *Tepu Khan v. Rojoni Molun* 25 C 522, s c 2 C W N 501 503 (1898).

(3) *Ram Ranjan v. Ravi Narain* 22 Ind App 60 (1894), s c 22 C, 533.

(4) *Per Geidt J. in Dinash Chandra v. Porosh Nath*, 9 C W N 402 408

(1904). The judgment however was not treated as proof that the amount decreed was the correct amount payable but that that particular amount was by the decree made payable b at p 410.

(5) Which appear to have been the view entertained by Ghose J., in the last mentioned suit.

In *Bhatto Kunuar v Kesho Pershad Misser*(1) their Lordships of the Privy Council, speaking of a judgment in a former suit against one of the defendants, Bacha Tewari, observed "this decision is not conclusive against Bacha Tewari, as the suit was not between the same parties as the present suit, but their Lordships agree with the Subordinate Judge that it was admissible as evidence against him" In this case a decree obtained against the defendant that a Will was revoked was held not to be *res judicata* in a suit against him brought by other plaintiffs, but admissible as evidence against him There is no mention of this section in the judgment, and the grounds upon which the previous decisions were admitted are not stated in the report An opinion, however, has been expressed that as the matters in controversy in the suit in which the decree was passed related to public charitable purposes the prior decision was brought within the terms of section 42 which treats of judgments relating to matters of a public nature(2) Whether the judgment might or might not have been admissible on this ground, the Authors have ascertained from the records of the Allahabad High Court(3) that this was not the ground on which the Subordinate Judge (whose decision was approved by the Privy Council) admitted it in evidence The plaintiff claimed the property in suit as the heir of Ramkishan If the property were subject to a trust and Ramkishan had been in possession as trustee, then plaintiff had no title to it, otherwise if there were no trust and both Ramkishan and Bacha Tewari had beneficial possession The fifth issue therefore was whether there was a trust, and this involved the question whether Bhawani had revoked the Will creating the trust. The second and fourth issues were as to the time since when possession had been held and what was the nature of the possession of Ramkishan, the plaintiff's alleged predecessor, and of the defendant Bacha Tewari These were all facts

well as his mortgagee a party to that suit), as a trustee under the Will It was, however, held in that suit that the Will was revoked and therefore the property was not subject to a trust At the date of that suit Bacha Tewari was in possession of his moiety He continued to hold after the suit and held under a title which negated the trust namely, the title declared by the judgment in question "and, as the Privy Council held, admissible as evidence against Bacha Tewari it—as showing the character of the title—over the estate in respect of which the agreement of 1850 was made" He could not after this decree have held as trustee when the trust was negated by it The judgment was therefore relevant and admitted not under this section, but its existence was either a fact in issue under the forty third and fifth sections or relevant as explaining a fact in issue under the forty third and ninth sections

Neither of these decisions appear to affect the Full Bench decision in *Guggu Lall v Fatteh Lall*.

(1) 24 I A 10 (1897) 1 C W N, 265

(2) *Ab nash Chandra v Poresk Nath* 9 C W N 402 (1904) at p 409, per

Ge dt J this was doubted by Ghose J, in the same case see p 352

(3) See Appendix

In the later case of *Dinomoni Choudhrani v Brojomohini Choudhrani*(1) in which however, this section was expressly referred to the facts were as follows—The suit was instituted by *D M C* as the widow and executrix of *H N C*, against *J C* to partly a reformat of her villages I

of *H N C* whereupon proceedings took place in the Criminal Court under section 318 of the Criminal Procedure Code, XXV of 1861, in the course of which *H N C* was found to be in possession of the land, and an order was passed by the Magistrate confirming his possession. Some time after, a third party, a neighbouring proprietor, commenced a dispute which also terminated by an order of the Criminal Court under section 530 of the Criminal Procedure Code (Act X of 1872), dated 19th June, 1876 in favour of *H N C*. In 1888, further possessory proceedings took place in the Criminal Court under section 145 of the Criminal Procedure Code of 1882, as the result of which the defendant *J C* was found to be in possession and by an order of 31st December 1888, she was confirmed in possession of the land in dispute. The Subordinate Judge dismissed the suit and rejected the Criminal proceedings of 1876 as being inadmissible as a party to them relevant for the purpose with that which was in force at that time. On orders (made in

1867, 1876 and 1888), are merely police orders made to prevent breaches of the peace. They decide no question of title, but under section 145 of the Criminal Procedure Code of 1882 (relating to disputes as to immovable property) the Magistrate is, if possible, to decide which of the parties is in possession of the land in dispute, and if he decides that one of the disputants is in possession, the Magistrate is to make an order declaring such party to be entitled to retain possession until evicted in due course of law, and forbidding all disturbance of such possession until such eviction. The Criminal Procedure Acts in force in 1866 and 1876 were to the same effect. These police orders are in their Lordships' opinion admissible in evidence on general principles as well as under the thirteenth section of the Indian Evidence Act to show the facts that such orders were made. This necessarily makes them evidence of the following facts all of which appear from the orders themselves, viz who the parties to the dispute were, what the land in dispute was, and who was declared entitled to retain possession. For this purpose and to this extent such orders are admissible in evidence for and against every one when the fact of possession at the date of the order has to be ascertained. If the lands referred to in such an order are described by metes and bounds, or by reference to objects or marks physically existing these must necessarily be ascertained by extrinsic evidence, i.e., the testimony of persons who know the locality. If the orders refer to a map that map is admissible in evidence to render the order intelligible and the actual situation of the objects drawn or otherwise indicated on the map must as in all cases of this sort be ascertained by extrinsic evidence. So far there appears to be no difficulty. Reports accompanying the orders or maps and not referred to in the orders may be admissible as hearsay evidence of reputed possession (Taylor on Evidence § 517). But they are not otherwise admissible, unless they are made so by the thirteenth section of the Indian Evidence Act. To bring a report within that section the report must be of a transaction in which the right or custom in question was created, claimed, modified, recognised, asserted or denied or which was inconsistent with its existence. The words are very wide and are wide enough to let in the reports forming part of the proceedings in 1867, 1876 and 1888. Their Lordships are of opinion that the

(1) *Dinomoni Choudhrani v Brojomohini Choudhrani* 21 C. 187 (1891) ac, 29 L.A. 24.

High Court did not err in receiving the report made in the proceedings of 1876, to the reception of which Mr Cohen objected'

Summary

It is true that the Privy Council refer to this section but their judgment shows that the 'police-orders' as they are called but which were apparently the judgments or orders of Magistrates in proceedings under section 145 of the Criminal Procedure Code were also admissible on general principles. What these are is not stated. But as the Judicial Committee has also held that before a document can be admitted it must be shown to be admissible under the Evidence Act it must have here referred to some other section than the present one. This being so, the expression of opinion as regards this section was *obiter*. In fact the judgments or orders were admissible as facts in issue under the fifth section. The suit was to recover possession and it was obviously admissible to show on the question whether a party had possession at a particular time that an order had been passed retaining him in possession. It might of course have been shown that notwithstanding such order he had not or did not get possession but in the absence of such evidence the presumption would be that what was ordered to be done was carried out. It is however clear that neither as facts in issue nor as transactions nor instances under this section were these orders treated as a kind of inconclusive *res adjudicata* that is it was not the correctness but the fact of the decision which was relevant. Were it not that the judgment of the Privy Council refers to this section it would create no difficulty at all. With all respect however it may be questioned how the order of the Magistrate could be a transaction or instance of the character mentioned in this section except on the ground that it recognised the right to possession of a particular party or was inconsistent with the possession of the opposite party as to which see *post*. What the reports were which were admitted is not stated in the decision but this matter does not immediately touch that under discussion. It does not appear that the section was originally intended to refer to judgments but to the acts and statements of persons which may be submitted for the consideration and determination of the Court itself. The order ended to refer to the difficulties of the section to some of the judgments in the cases referred to were in fact admissible under other sections of the Act. There is no question that for some purposes and apart from this section judgments may be relevant. The point is whether this section can be quoted as a ground for their admission.

In the first place the evidence tendered must be that of a transaction or instance. Then assuming it is a transaction it must be one of the kind mentioned in the section. If it is an instance it must be an instance

of the kind mentioned in the section. It is obvious that a Court does not *claim* or *assert* or *deny* or *exercise* a right or custom. Nor does it

of the litigants before it or of those persons whose acts and statements the law treats as their own. Then even assuming a judgment is a transaction it cannot be said to *create* or *modify* a right or custom. The right or custom either exists or it does not before the cause comes to trial. The Court merely finds that before and at the date the suit was instituted the right or custom did or did not exist. If the parties litigating had no right the Court cannot give

it to them. And if a right or custom exists the Court has no jurisdiction to modify either. The only words in the section which may with any show of reason be made applicable to judgments is the word "recognized" in clauses (a) and (b), and the phrase "which was inconsistent with its existence" in clause (a). But it seems that neither were in fact intended to apply. The recognition referred to in the section appears to be, like the other acts mentioned, an act of a person and not of a tribunal. It is an act of admission. A Court, however, does not admit a right, but adjudicates upon it. Lastly, apart from the question whether a judgment is a "transaction," the "inconsistency" mentioned would appear to refer to the same class of facts as the others stated in the section.

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in the first part of illustration (a) to the eleventh section and not the "inconsistency" (if indeed it can be correctly so described), which exists between facts

sistency of fact, however, is shown when two opposed facts are proved and no explanation is offered of their apparent inconsistency

If this view of the section be correct, then as held by the Full Bench in

of the first two Privy Council decisions cited(2) (and they do not in the Authors'

missible under this section were not stated. Possibly it was admitted as a recognition of right, or as being inconsistent with the right claimed by the defendant, or as evidence of an assertion of right on the part of the plaintiff. It is on the last mentioned ground that the argument for the admissibility of judgments has commonly been founded. Acts of ownership in respect of the subject matter of a litigation may be shown by proof of particular transactions or instances of the character mentioned in the section. These may be transfers of property such as gifts, sales, leases, mortgages or acts of enjoyment such as the actual exercise of a right and the like. A claim, however, may be asserted or denied in a litigation as well as in or by any other of the modes

(1) *Gujju Lall v. Fateh Lall* 6 C. 1, 1 (1880)

(2) *Ram Kanjan v. Ram Narain* 22 C. 533 (1894). *Bhutto Kunwar v. Kesho Pershad* 19 A. 277 (1897)

(3) *Dinomoni Choudhrani v. Brojomo uni Choudhrani* 29 C. 187 (1901)

(4) *Collector of Gorakhpur v. Palak dhari* 12 A. 14, 25, 28 (1889). *Tepu Khan v. Rajoni Mohun* 2 C. W. 501 (1893), s. c. 25 C. 522

(5) *Ib v. art*. It seems however a somewhat forced use of language to call a litigation a transaction.

(6) *Ib v. ante Ja nullah v. Ramari Kant* 1 C. 233 (1887). *Ramasa v. Iffra* 12 M. 9 (1887)

(7) *Tepu Khan v. Rajoni Mohun* 2 C. W. 501 (1894) s. c. 25 C. 522, 5 M. 41 Jan. v. *Hara Chandra* S. A. 106 191 Cal. H. C. 1 July 1904

case the relevant fact is the litigation, and the judgment is only the proof of it. There may be cases in which a judgment is the only proof of the assertions of the parties. But it may be objected that a claim is asserted or denied in the pleadings, in the issues, or in the evidence given in support or denial of those issues. If these are available, are not they the proper evidence of the claim made? The judgment is the judicial opinion rendered on the claims of the parties. It is not their claim, though it may in common with other parts of the proceedings record it. Whether judgments can be said to recognise or be inconsistent with rights has already been dealt with. In short, great difficulties ensue in the application of this section to judgments. But whether admissible under this section or not, it is clear that the reasons⁽¹⁾ given for a former judgment or decree cannot be relied on to show that in subsequent litigation either of the parties were right or wrong in their assertion or denial of the claim litigated and adjudicated upon. If in a suit by *A* against *B*, the former asserts a claim which is declared to be well founded by the judgment in that suit, such assertion may be evidence in a subsequent litigation between *A* and *C*, tending to show that in the last mentioned litigation *A* is also entitled to a decree. But the opinion given in favour of *A* in the first suit is not relevant to prove that the judgment should also be in his favour in the subsequent suit. So to use a judgment is to use it in respect of the *judicial opinion* which it contains. Such an opinion may have been given on a different state of facts and was moreover rendered in the absence of the parties sought to be affected by it. Judgments considered as judicial opinions are only relevant under ss 40-42. In this respect and to this extent the law appears to be the same now as it was before the Privy Council decisions which have been said to materially qualify it. The decision of the Full Bench holds that a judgment not *in rem* or of a public nature and not *inter partes* is not relevant under this section "as proof of the particular point it decides" in the sense indicated. The sole object for which it was sought in this case to prove the former judgment was to show that in another suit against another defendant the plaintiff had obtained an adjudication in his favour on the same right claimed. The plaintiff in short said "another Court has decided the same point in my favour, so the decision should be in my favour again." The dissentient Judge thought that because the plaintiff produced this prior favourable decision it therefore rendered the case of the plaintiff in the subsequent suit more probable. No decision of the Privy Council has ever sanctioned such a use of a judgment. But the existence of a judgment

thus, if *A* has obtained a son, murders *A* in consequence showing motive for a son on the judgment in the fact of acquittal, the fact, namely, that the Criminal proceedings terminated in favour of the plaintiff in the Civil action⁽⁵⁾. Again a reference to the finding of a judgment may explain the character of party's possession and the nature of the enjoyment had in the

(1) *The Collector of Gorakhpur v Palakdhari* 12 A 1 (1889), *Ahjan v Hara Chandra* supra.

(2) *Ram Ranjan v Ram Narain* 22 C, 533 (1894). *Dinomoni Chowdhram v Brojomohini Chowdhram* 29 C 187 (1901).

(3) Apparently (amongst others) under this section *Dinomoni v Brojomohini Chowdhram* supra though it should be noted as already stated that in one sense the opinion was *obiter* as the judgment in question was held also to be admissible on

general principles *v ante Ram Ranjan v Ram Narain* supra if that decision admitted the decrees also on the ground stated by High Court. In so far as it may be held that these decisions admit judgments under this section they appear to have altered the law laid down in *Gujju Lal v Fatteh Lal* according to which the section did not apply to judgments at all.

(4) S 43 illust (d).

(5) *v s 43 post*.

property in suit (1) And so the finding of a judgment may be referred to in all other cases where the record is matter of inducement or merely introductory to other evidence (2) And judgments are admissible where sought to be used to show the conduct of the parties, or to show particular instances of the exercise of a right, or admission made by ancestors or how the property was dealt with previously (3) Other instances are afforded by the Privy Council decisions cited

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The existence of any custom or right may be proved under this section by evidence of "transactions" or "instances" (5) A statement contained in any deed, will or other document which relates to any such "transaction" as is mentioned in clause (a) is relevant, if the person by whom such statement is made is dead or cannot be found, or if he is incapable of giving evidence, or his attendance cannot be procured without an unreasonable amount of delay or expense (6) The statement, written or verbal, giving the opinion of a person not called as a witness for similar reasons, as to the existence of any public right or custom, or matter of public or general interest as to the existence of which he would have been likely to have been aware, is relevant, provided it were made before any controversy as to such right, custom or matter had arisen (7) But such evidence of the controversy is inadmissible (8) When the Court has to form an opinion as to the existence of any general custom or right (this includes customs or rights common to any considerable class of persons), the opinion as to the existence of such custom or right of persons who would be likely to know of its existence, if it existed, are relevant (9), and the grounds upon which such opinions are based are also relevant (10) they relate to matters that is, y are not conclusive proof of that y evidence," it has been said, "of an enforcement of a custom is a final decree based on the custom" (12) Custom being in derogation of the general rules of law, must be construed and proved strictly (13) In *Ramalakshmi Ammal v Shivanantha Perumal Setthurayer* the Privy Council said — "Their Lordships are fully sensible of the importance and justice of giving effect to long established usage existing in particular districts and families in India, but it is of the essence of special usages, modifying the ordinary law of succession, that they should be ancient and invariable, and it is further essential that they should be established to be so by clear and unambiguous evidence" (14) Thus evidence which may suffice to raise a

Proof of
custom and
right

(1) *Peary Mohun v Drobomoy Dabia*
11 C 49 (1885) v ante

(10) S 51 post

(11) S 42 post and notes

(2) See Commentary to s 43 post

(12) *Gurdayal Mal v Jhandu Mal* 10 A 563 s 47 post

(3) *Lukhlisan v Arif* 24 B 598 599 (1900)

(13) *Hurpurad v Sheo Dyal* 3 I A 255 *Benu Madhub v Jai Krishna* 7 B L R 154 *Janki Prasad Singh v Dwarika Prasad Singh* 35 A 391 (1913) (evidence of insufficient proof)

(4) v s 42 post and note
(5) See in *Jugmohandas Mangaldas v Mangaldas Nathubhoy* 10 B 543 observations on proof by instances and *Anant Singh v Durga Singh* (1910) 37 I A 191

(14) *Ramalakshmi Ammal v Shivanantha Perumal* 17 W R 553 ante *Musamat Farbat Kunwar v Rami Chandrapal Kunwar* S O C 94 and v P C (1909) 30 I A 125 see *Janki Misra v Ranno Singh*, 15 A 472 (1913) (strict proof of each sale to a stranger where custom of pre-emption disputed)

(6) S 32 cl (7) post and *Hurronath Mulla v Nattanund* 10 B L R 263 ante

(7) S 32 cl (4) post

(8) *Ekrateshwar Singh v Janashree Prasad* P C 4 C 582 (1915)

(9) S 48 post

presumption may be insufficient to prove a customary right (1) The course of practice upon which the custom rests must not be left in doubt but be proved with certainty (2) "The most cogent evidence of custom is not that which is afforded by the expression of opinion as to its existence, but the examination of instances in which the alleged custom has been acted upon, and by the proof afforded by judicial or revenue records or private records or receipts, that the custom has been enforced." (3) "The acts required for the establishment of customary law ought to be plural, uniform and constant. They may be

inferred from the evidence Evidence of acts of the kind, acquiescence in those acts, their publicity, decisions of Courts, or even of *panchayats*, upholding such acts, the statements of experienced and competent persons of their belief that such acts were legal and valid, will all be admissible, but it is obvious that, although admissible, evidence of this latter kind will be of little weight if unsupported by actual examples of the usage asserted (5) A customary right to

tom is the test extending back were made on

(6) A custom shown to have been well established in a family cannot be defeated by proof that in one case it was not enforced (7) The existence of a custom may be

inferred from long enjoyment not exercised by permission stealth or force (8) What the law requires before an alleged custom can receive the recognition of usage so long common consent, particular family,

prevalent over a from its universality or usage To prove a local custom the evidence must be precise and conclusive (10) See in the undermentioned case observations on the usage of books of history to prove a local custom (11)

A caste-custom prohibiting widows from adopting, is one which before the Court can give judicial effect to it, ought to be established by very clear proof

(1) *Ramakanta Das Molapatra v Shamanand Das Molapatra* P C (1908) 36 C 590

(2) *Sivananjan Perumal v Mutu Ramalinga* 3 Mad H C R 77 ante

(3) *Lachman Rai v Akbar Khan* I A 440 per Turner J as to proof of instances see *Rahimathbai v Hirbai* 3 B 34 (1877)

(4) *Tara Chand v Reeb Ram* 3 M H C R 57 ante As to the plurality of acts and the onus probandi in the case of an allegation of custom see *Desai Ranchod das v Rasool Nathubai* 21 B 116 117 (1895) and see further as to onus the case of *Rahimathbai v Hirbai* 3 B 34 (1877)

(5) *Gopalayyan v Raghupatayyan* 7 Mad H C R 254 (1873) but see *Eranyoli Illath v Eranyoli Illath* 7 M 3

(1883)

(6) *Kumari Reddi v Nagayasani Thambicki Na cher* (1907), 31 M 17, and see *Peary Mohan Mukerjee v Jote Kumar Mukerjee* (1906) 11 C W N 83

(7) *Ekradeshwar Singh v Jalmeswar* Balmeun P C 42 C 582 (1915)

(8) *Shadi Lal v Muhammad Ishaq Khan* (1910) 33 A 277 *Malamaya Debi v Haridas Haldar* 42 C 455 (1915)

(9) *Sivananjan Perumal v Mutu Ramalinga* 3 Mad H C R 77, ante and v *Muhammad Usar Khan v Muhammad Ma'ud d n Khan* P C (1911) 39 C 418

(10) *Tekaet Doorga v Teketaetee Doorga* 20 W R 157 ante

(11) *Vallabai v Mudusudanam* 12 M, 495 (1889)

that the conscience of the members of the caste had come to regard it as for bidden. It must be shown that a uniform and persistent usage has moulded the life of the caste (1)

In order to establish a family custom at variance with the ordinary law of inheritance it is necessary that it should be established by clear and positive proof (2) (v ante). And the more unusual the custom the stricter must be the proof (3). To establish a *kulachar* or family custom of descent, one at least of two things must be shown—either a clear, distinct and positive tradition in the family that the *kulachar* exists, or a long series of instances of anomalous inheritance from which the *kulachar* may be inferred (4). It is said in the case of *Sumrun Singh v Khedun Singh* (5) that “to legalise any deviation from the strict letter of the law, it is necessary that the usage should have been prevalent during a long succession of ancestors, when it becomes known by the name of *kulachar*.” But a distinct tradition in the family supplies the place of ancient examples of the application of the usage (6). It has been doubted whether

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8) Where the plaintiff sued the defendants for possession of an estate on the assertion that she was the daughter of the last undisputed owner, and the defendants resisted the claim on the ground that she was excluded by a custom prevailing in the family and tribe to which the parties belonged, it was held that there was no objection to a party pleading that a custom exists both in a family and in the tribe to which the family belongs, but he must prove that it is binding on the family, and on appeal it was held by the Privy Council that evidence of a

“Usage of Trade,” v post

(1) *Patel Vandrayan v Patel Man Lal* 16 B 470 (1891) see *Jugmohandas Mangaldas v Mangaldas Nathubhai* 10 B 578 ante

(2) *Rajah Nugender v Rughoonath Narain W R* (1864) 20 ante. For recent Privy Council decision on family custom see *Nitra Pal v Jai Pal* 19 A 1 (1896) *Mohesh Chunder v Satrugan Dhal* 29 C 343 (1902) in which decrees not *inter partes* were admitted as evidence of custom *Chandika Baksh v Numa Kun* 24 A 273 (1901) see also *Mailathi Amin v Subbaraya Mudalar* 24 M 650 (1901) [Migration of Hindu subject of French India—custom]

(3) *Ganga Singh v Chedi Lal* 33 A 605

(4) *Malarani Hiranath v Rani Narayan* 9 B L R 274 294 (1872)

(5) 2 Sel Rep 116 New Ed 14

(6) *Maharani Hiranath v Baboo Ram* supra 295 as to *kulachar* determining succession to an impartible estate see *Subramanya Pandya v Siva Subramanya*

17 M 316 (1894) *Mohesh Chunder v Satrugan Dhal* 29 C 343 (1902)

(7) *Ta a Chand v Recb Ram* 3 Mad H C R 57 58 (1886) *Madhavray Raghuendra v Balkrishna* 4 B H C R (A C) 113 (1886) distinguished in *Bhanu Narayan v Sundrabai* 11 Bom H C R 271 (1874) *Musarat Parbati Kuar v Rani Chandrapal Kuar* 8 O C 94 See also *Maynes Hindu Law* § 51 5th Ed (1892)

(8) *Bhanu Narayan v Sundrabai* 11 Bom H C R 271 ante following *Shepherd v Payne* 31 L J C P 297 and *Lord Waterpark v Fennel* 7 H L 650 see also *Rai asam v Apparu* 12 M 14 ant and *Joy Kishen v Doorga Narain* 11 W R 38 ante

(9) *Musati Parbati Kuar v Rani Chandrapal Kuar* 8 O C 94 and P C (1909) 36 I A 125 and v *Shiragunga's* case (1863) 3 M I A 539

(10) *Soorendranath v Mussamat Heeramonnee* 10 W R (P C), 35 (1868), 1 C 198 ante

It must be proved that the right or custom shown to have been exercised on some particular occasion is the same with the right or custom which has to be proved. In England the custom of one manor is not admissible to prove the instance of another unless some connection can be shown between them, as, for instance, that the custom in question is a particular incident of the general tenure which is proved to be common to the two manors (1). So also where evidence of a right exercised in a particular locality was given, it was said: "Ownership may be proved by proof of possession, and that can be shown by acts of en

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pute belonged to the plaintiff if the other parts did. It has been said in the course of argument that the defendant had no interest to dispute the acts of ownership not opposite his own land, but the ground on which such acts are admissible is not the acquiescence of any party, they are admissible of themselves *proprio vigore*, for they tend to prove that he who does them is owner of the soil, though if they are done in the absence of all persons interested to dispute them, they are of less weight,—that observation applies only to the effect of the evidence" (2). See notes to s 42 *post*. The fact that a custom was not pleaded in litigations between members of the community where it might have been pleaded is relevant evidence, and the question of its relevancy is not affected by the circumstance that some of those suits were still pending in Courts at the time of the trial (3).

Usage of
trade

It has been said "that these words are to be understood as referring to a particular usage to be established by evidence and perfectly distinct from that general custom of merchants, which is the universal established law of the land, which is to be collected from

evidence *in pais*" (4). Thus

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judicial decisions, ratifying the usage of merchants in the different departments of trade, where a general usage has been judicially ascertained and established, it becomes part of the law merchant which Courts of Justice are bound to know and receive, but it is not easy to define the period at which a usage so becomes

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necessary to support an alleged usage, the Privy Council said that "there needs not either the antiquity, the uniformity or the notoriety of custom, which in respect of all these, becomes a local law. The usage may be still in course of growth, it may require evidence for its support in each case, but in the result it is enough, if it appears to be so well known and acquiesced in, that it may reasonably be presumed to have been an ingredient tacitly imported by

(1) *Marquis of Anglesey v Lord Hather* 10 M & W, 235, and Taylor, Ev. § 320. *Roscoe N P Ev*, 85, as to manorial rights see note to s 42 *post*.

(2) *Jones v Williams* 2 M & W, 326 per Parker B, Taylor, Ev. 309, 310, see s 11 *ante*.

(3) *Mariam Bibi v Shaik Mahomed Ibrahim* 28 C. L. J., 306, S. C. 48 I. A., 561.

(4) 1 Smith L. Cas. 9th Ed. 581, 582.

(5) *Mezer v Desser* 16 C. B. N. S., 660. *Indian Contract Act* s 1.

(6) *Roscoe N P Ev.*, 24, 25 and cases there cited.

(7) *Wackenzie v Dunlop* 3 Macq. H. L. Cas. 22. *Cunningham v Faublanque* 6 L. & P. 44, but see s 49 *post*.

(8) *Volkart Bros v Vetterlein Naden* 11 M. 465 (1887).

the parties into their contract.”(1) The usage must be shown to be certain(2), and reasonable(3), and so universally acquiesced in(4) that everybody in the particular trade knows it, or might know it, if he took the pains to enquire(5) If effect is to be given it, it must not be inconsistent with the provisions of the Contract Act(6) or repugnant to, or inconsistent with, the express terms of the contract made between the parties (7)

14. Facts showing the existence of any state of mind—such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person, or showing the existence of any state of body or bodily feeling—are relevant, when the existence of any such state of mind, or body, or bodily feeling, is in issue or relevant.

Facts showing existence of state of mind or of body, or bodily feeling

Explanation 1.—A fact relevant as showing the existence of a relevant state of mind must show that the state of mind exists not generally, but in reference to the particular matter in question.

Explanation 2.—But where, upon the trial of a person accused of an offence, the previous commission by the accused of an offence is relevant within the meaning of this section, the previous conviction of such person shall also be a relevant fact (8)

Illustrations

(a) A is accused of receiving stolen goods, knowing them to be stolen. It is proved that he was in possession of a particular stolen article

The fact that, at the same time(9), he was in possession of many other stolen articles is relevant, as tending to show that he knew each and all of the articles, of which he was in possession, to be stolen (10)

(1) *Juggomohun Ghose v Manickchand*, 7 Moo Ind App, 232 (1859), s c, 4 W R (P C) 8, per Sir J Coleridge cited and applied in *Palakdhari Rai v Manners* 23 C 179, 183 (1895) [usage in landholders estate]

(2) *Volkart Bros v Vetterlein Nadan*, 11 M 462 466 ante

(3) *Arafa Nayak v Narsi Keshaji & Co*, 8 Bom H C R (A C) 19 (1871), *Ramsardas Bhogilal v Keerising Mohanlal* 1 Bom H C R 231 (1863), *Volkart Bros v Vetterlein Nadan* 11 M 462 466, ante

(4) See *Mackenzie Lyall v Chamroo Singh* 16 C 702 (1889), *Volkart Bros v Vetterlein Nadan* 11 M 462 466, ante

(5) *Volkart Bros v Vetterlein Nadan* 11 M 461 462 *Plaice v Allcock*, 4 F & F (1074) per Willes J *Foxal v International Land Credit Co*, 16 L J S, 637

(6) Act IX of 1872, s 1 see *Madhab Chander v Rajcoomar Das*, 14 B L R 76 (1874)

(7) *Volkart Bros v Vetterlein Nadan*

11 M 461 *J G Smith v Ludha Ghella* 17 B 129 (1892) see note to s 29 proviso 5 post

(8) These *Explanations* were substituted for the original explanation to s 14 by Act III of 1891 s 1 (1) see also Cr Pr Code s 310 (Act V of 1893), and R v Naba Kumar 1 C W N 146 (1897), in which the alterations effected in this section and in s 54 are discussed

(9) See 34 & 35 Vic c 112 s 19 *R v Drage* 14 Cox 85 *R v Carter* 12 Q B D 522

(10) According to English law such evidence of intention in the case of indictments for receiving stolen goods is admissible only subject to certain limitations see Steph Dig Art 11 34 & 35 Vic c 112 s 19 *Roscoe Cr L v 12th Ed* 84 778 788 and cases there cited This illustration makes no reservation as to ownership or time so that though the stolen property belonged to other person than the prosecutor and without reference to the lapse of time since it was stolen evidence of its possession may under the Act be given against the accused, its weight

It must be proved that the right or custom shown to have been exercised on some particular occasion is the same with the right or custom which has to be proved. In England the custom of one manor is not admissible to prove the instance of another unless some connection can be shown between them, as, for instance, that the custom in question is a particular incident of the general tenure which is proved to be common to the two manors (1). So also where evidence of a right exercised in a particular locality was given, it was said "Ownership may be proved by proof of possession, and that can be shown by acts of enjoyment of the land itself, but it is impossible in the nature of things to confine the evidence to the very precise spot on which the alleged trespass may have been committed: evidence may be given of acts done on other parts, provided there is such a common character of locality between those parts and the spot in question as would raise a reasonable inference that the place in dispute belonged to the plaintiff if the other parts did. It has been said in the course of argument that the defendant had no interest to dispute the acts of ownership not opposite his own land: but the ground on which such acts are admissible is not the acquiescence of any party, they are admissible of themselves *proprio vigore*, for they tend to prove that he who does them is owner of the soil, though if they are done in the absence of all persons interested to dispute them, they are of less weight,—that observation applies only to the effect of the evidence" (2). See notes to s 42, *post*. The fact that a custom was not pleaded in litigations between members of the community where it might have been pleaded is relevant evidence, and the question of its relevancy is not affected by the circumstance that some of those suits were still pending in Courts at the time of the trial (3).

Usage of
trade

It has been said "that these words are to be understood as referring to a particular usage to be established by evidence and perfectly distinct from that general custom of merchants, which is the universal established law of the land, which is to be collected from decisions, legal principles and analogies not from evidence *in pais*" (4). Thus evidence of general custom is not admitted to contradict the law merchant. A custom or usage of trade must in all cases be consistent with law (5). That law has however been gradually developed by judicial decisions, ratifying the usage of merchants in the different departments of trade, where a general usage has been judicially ascertained and es-

been acted upon, and not by evidence of opinion only (7). Usage of trade may be proved by multiplying instances of usage of different merchants if it appears to be the same as that of other merchants (8). With reference to the evidence necessary to support an alleged usage the Privy Council said that "there needs not either of custom which in respect of all be still in course of growth, it is result it is enough, if it appears to be so well known and acquiesced in, that it may reasonably be presumed to have been an ingredient tacitly imported by

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(4) 1 Smith L Cas 9th Ed 581 582 (5) *Mezer v Desser* 16 C B N S, 660 *Indian Contract Act* s 1.

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(8) *Volkart Bros v Vetterlein Nadan* 11 M 465 (1887).

the parties into their contract"(1) The usage must be shown to be certain(2), and reasonable(3), and so universally acquiesced in(4) that everybody in the particular trade knows it, or might know it, if he took the pains to enquire(5) If effect is to be given it, it must not be inconsistent with the provisions of the Contract Act(6) or repugnant to, or inconsistent with, the express terms of the contract made between the parties (7)

14 Facts showing the existence of any state of mind—such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person, or showing the existence of any state of body or bodily feeling—are relevant, when the existence of any such state of mind, or body, or bodily feeling, is in issue or relevant

Facts showing existence of state of mind or of body, or bodily feeling

Explanation 1.—A fact relevant as showing the existence of a relevant state of mind must show that the state of mind exists not generally, but in reference to the particular matter in question.

Explanation 2—But where, upon the trial of a person accused of an offence, the previous commission by the accused of an offence is relevant within the meaning of this section, the previous conviction of such person shall also be a relevant fact (8)

Illustrations

(a) A is accused of receiving stolen goods, knowing them to be stolen. It is proved that he was in possession of a particular stolen article

The fact that, at the same time(9), he was in possession of many other stolen articles is relevant, as tending to show that he knew each and all of the articles, of which he was in possession, to be stolen.(10)

(1) *Juggomohun Ghose v Manickchand* 7 Moo Ind App 232 (1839) s c 4 W R (P C) 8 per Sir J Coleridge cited and applied in *Palakdhari Rai v Manners* 23 C 179 183 (1895) [usage in landholder's estate]

(2) *Volkart Bros v Vetterlein Nadan* 11 M 462 466 ante

(3) *Arapa Nayak v Narsi Keshavji & Co* 8 Bom H C R (A C) 19 (1871), *Ransordas Bhoglal v Keerising Mohanlal* 1 Bom H C R 231 (1863) *Volkart Bros v Vetterlein Nadan* 11 M 462 466, ante

(4) See *Mackenzie Lyall v Chamroo Singh* 16 C 702 (1889) *Volkart Bros v Vetterlein Nadan* 11 M 462 466 ante

(5) *Volkart Bros v Vetterlein Nadan* 11 M 461 462 *Plaice v Allcock* 4 F & F (1074) per Willes J *Foral v International Land Credit Co* 16 L J N S 637

(6) Act IV of 1872 s 1 see *Madhab Chander v Rajcoomar Das* 14 B L R 76 (1874)

(7) *Volkart Bros v Vetterlein Nadan*

11 M 461 *J G Smith v Ludha Gtella* 17 B 129 (1892) see note to s 29 proviso 5 post

(8) These *Explanations* were substituted for the original explanation to s 14 by Act III of 1891 s 1 (1) see also Cr Pr Code s 310 (Act V of 1898) and *R v Aaba Kuriar* 1 C W N 146 (1897) in which the alterations effected in this section and in s 54 are discussed

(9) See 34 & 35 Vic c 112 s 19 *R v Drage* 14 Cox 85 *R v Carter* 12 Q B D 522

(10) According to English law such evidence of intention in the case of indictments for receiving stolen goods is admissible only subject to certain limitations see *Steph Dig Art 11 34 & 35 Vic. c 112 s 19 Roscoe Cr Ev 12th Ed 84 778 788* and cases there cited This illustration makes no reservation as to ownership or time so that though the stolen property belonged to other person than the prosecutor and without reference to the lapse of time since it was stolen, evidence of its possession may under the Act be given against the accused, its weight

(b) *A* is accused of fraudulently delivering to another person a counterfeit coin which at the time when he delivered it he knew to be counterfeit.

The fact that at the time of its delivery *A* was possessed of a number of other pieces of counterfeit coin is relevant (1)

The fact that *A* had been previously convicted of delivering to another person as genuine a counterfeit coin knowing it to be counterfeit is relevant (2)

(c) *A* sues *B* for damage done by a dog of *B*'s which *B* knew to be ferocious.

The facts that the dog had previously bitten *X*, *Y* and *Z* and that they had made complaints to *B* are relevant (3)

(d) The question is whether *A*, the acceptor of a bill of exchange, knew that the name of the payee was fictitious

The fact that *A* had accepted other bills drawn in the same manner before they could have been transmitted to him by the payee, if the payee had been a real person, is relevant as showing that *A* knew that the payee was a fictitious person. (4)

(e) *A* is accused of defaming *B* by publishing an imputation intended to harm the reputation of *B*

The fact of previous publications by *A* respecting *B* showing ill will on the part of *A* towards *B* is relevant as proving *A*'s intention to harm *B*'s reputation by the particular publication in question

in each case being left to the discretion of the Court. Norton Ev, 132. *see* Penal Code s 411 and s 21 *illustr* (d) and s 114 *illustr* (a) *post* *R v Cassy Mul* 3 W R Cr 10 (1865) *R v Narain Bagdee* 5 W R Cr 3 (1866) *R v Motee Jolaha* 5 W R Cr 66 (1866), the test of a correct presumption of guilt in a prisoner not being able to account for the property on his premises is dependent on the fact whether the surrounding circumstances of the case really and properly raise such a presumption. *Re Meer Yar Ali* 13 W R Cr 70 71 (1870) *R v Samruddin* 19 W R Cr 25 (1872) *see* Wigmore Ev § 324

(1) *See R v Nur Mahomed* 8 B 223 (1883) *R v Vajram* 16 B 414 (1897). This illustration speaks only of *possession* but it is only a single illustration of the knowledge spoken of in the section. Evidence of other utterings would be equally receivable under the section to establish guilty knowledge. Norton Ev 134 *R v Whitley* 2 Leach 986 cited in *R v Vajram Blake v Alb on Life Assurance Society* 4 C P D 102 *R v Green* 3 C. & K 204. In England it is now well settled that evidence of uttering counterfeit coin on other occasions than that charged is evidence to show guilty knowledge. Roscoe Cr Ev, 13th Ed 83 84 and that utterings after that for which the indictment is laid may be given in evidence for this purpose as well as those which take place before. *R v Foster* 24 L J M C 134, *see* s 15 *illustr* (c) proof of the prisoner's conduct (as for example that he passed by different names) is clearly admissible. *R v Tattersall* 2

Leach 984 *R v Phillips* 1 Jew C C 105 Roscoe Cr Ev 12th Ed 87 83 v s 8 *ante*. In the case of forged instruments similar evidence of possession and uttering has been constantly admitted in England (*v post*). But whether evidence is admissible of uttering other forged instruments where these are uttered *subsequently* to that with which the prisoner is charged seems to some extent doubtful. Roscoe Cr Ev 12th Ed 82 84 (*v post*). *See* Penal Code ss 239 241 471 463 477 *passim* and *see* s 21 *illustr* (e) *post* *R v Kisto Soonder* 2 W R Cr 5 (1865) [counterfeit seals and forged documents] Wigmore Ev § 309

(2) This illustration was substituted for the original illustration (b) to s 14 by Act III of 1891 s 1 (2)

(3) *See Thomas v Morgan* 2 C M & R 496 *Judge v Cox* 1 Starkie 285, *Hudson v Robert* 6 Ex 697 *Cox v Birbridge* 13 C B N S 430 Roscoe N P Ev 748. In the case of wild and naturally ferocious animals such as lions tigers monkeys etc it is not necessary to prove *scienter* i.e. that the defendant knew and was well aware that the animals were ferocious dangerous or mischievous as the case may be knowledge will be presumed (*May v Burdett* 9 Q B 112). But in the case of dogs horses and other domestic animals '*scienter*' must be proved in order to entitle the plaintiff to damages. The law relating to Dogs by F Lupton 1888 pp 4 7 *cf* also Penal Code s 289 Norton Ev 134

(4) This is the case of *Gibson v Hunter*, 2 H Bl 288 Roscoe N P Ev 85, Taylor Ev § 338

The facts that there was no previous quarrel between *A* and *B*, and that *A* repeated the matter complained of as he heard it, are relevant, as showing that *A* did not intend to harm the reputation of *B* (1)

(f) *A* is sued by *B* for fraudulently representing to *B* that *C* was solvent, whereby *B* being induced to trust *C*, who was insolvent, suffered loss

The fact that, at the time when *A* represented *C* to be solvent, *C* was supposed to be solvent by his neighbours and by persons dealing with him is relevant as showing that *A* made the representation in good faith. (2)

(g) *A* is sued by *B* for the price of work done by *B*, upon a house of which *A* is owner by the order of *C*, a contractor. *A*'s defence is that *B*'s contract was with *C*

The fact that *A* paid *C* for the work in question is relevant, as proving that *A* did, in good faith, make over to *C* the management of the work in question, so that *C* was in a position to contract with *B* on *C*'s own account and not as agent for *A* (3)

(1) Not only is the publication of other libels evidence but the mode of their publication to show *quo animo* they were published (see *Bond v Douglas* 7 C & P 626, where libellous handbills were carried backwards and forwards before the plaintiff's door) As the existence of previous ill feeling throws light upon the *animus* with which the libel was published so does the absence of previous quarrel or the fact that the accused merely repeated what he had heard, afford evidence of the absence of malicious intention But in civil suits this will only be receivable in mitigation of damages (v ante) Norton Ev 135, see *Pearson v Le Maître* 5 M & Gr 700 and cases collected in Roscoe N P Ev 864, and Cr Ev 13th Ed 579 Taylor Ev, § 340, See *Kailhusru Noroji v Jehangir Byramji* 14 B, 532 (1890)

(2) Here the gist of the action is fraud (see *Pasley v Freeman* 2 Smith L C 74) *Bona fides* may necessarily always be given in evidence for where there is *bona fides* there can be no fraudulent intent *Shreusbury v Blount* 2 M & G 475 Roscoe N P Ev 853 the illustration is an example Norton Ev 136 In a case for a false representation of the solvency of *A B* whereby the plaintiffs trusted him with goods their declarations at the time that they trusted him in consequence of the representation are admissible in evidence for them *Fellows v Williamson* 1 M & M 306 and see *Vaclar v Cocks* ib, 353 The case on which the illustration is based is *Sheen v Bumpstead* 2 H & C 193 in which Cockburn C J, said 'With regard to the question put to the other witnesses respecting the general reputation of *W* for trustworthiness as a tradesman, I think it also admissible It was important to ascertain the state of mind of the defendant at the time he made the representation complained of and that could only be shown by inference A plaintiff may not be able to bring home to the defendants by direct and positive evidence a knowledge

of the falsehood of his representation, the plaintiff may, however prove certain facts which necessarily lead to that inference Now suppose the plaintiff had called every tradesman in the town to say not only that *W* was insolvent, but that his insolvency was notorious would it not have been a fair and obvious remark to the jury that the defendant must have known what was the common knowledge of every other tradesman? On the other hand if after the plaintiff has established a *prima facie* case against the defendant the latter calls a number of tradesmen who have had dealings with *W* and they say that at the time the defendant made the representation they believed that *W* was perfectly solvent is not that strong evidence—morally at least—from which the jury may infer that what was the common opinion of tradesmen in the neighbourhood was shared by the defendant and that in making the representation he acted in good faith?' And see *Barrow v Hem Chunder Lahiri* (1903) 35 C 495

(3) This is the case of *Gerish v Charter* 1 C B 13 'The evidence was material and was properly admitted It intended to show that the defendant was not seeking to evade payment for goods ordered for his benefit but that he had actually paid the person with whom alone he had contracted It showed that the defendant conducted himself like a party who was dealing with 'C' as a principal and not as an agent' per Maule J ib 'A considerable body of evidence had been given by the plaintiff to show that 'C' interfered in the matter as the defendant's agent which this evidence went directly to negative' per Cresswell J ib 'In an action for goods sold and delivered a general form of defence is 'I am liable to pay another person and in such cases the jury usually comes to the conclusion that the defendant wants to keep the goods without paying for them' Here therefore it was material for the

(h) *A* is accused of the dishonest misappropriation of property which he had found, and the question is whether, when he appropriated it, he believed in good faith that the real owner could not be found

The fact that public notice of the loss of the property had been given in the place where *A* was (1) is relevant, as showing that *A* did not in good faith believe that the real owner of the property could not be found

The fact that *A* knew, or had reason to believe that the notice was given fraudulently by *C* who heard of the loss of the property, and wished to set up a false claim to it, is relevant, as showing that the fact that *A* knew of the notice did not disprove *A*'s good faith (2)

(i) *A* is charged with shooting at *B* with intent to kill him In order to show *A*'s intent, the fact of *A*'s having previously shot at *B* may be proved (3)

(j) *A* is charged with sending threatening letters to *B* Threatening letters previously sent by *A* to *B* may be proved, as showing the intention of the letters (4)

(k) The question is whether *A* has been guilty of cruelty towards *B* his wife

Expressions of their feeling towards each other shortly before or after the alleged cruelty, are relevant facts (5)

(l) The question is, whether *A*'s death was caused by poison

Statements made by *A* during his illness as to his symptoms are relevant facts (6)

(m) The question is, what was the state of *A*'s health at the time when an assurance on his life was effected

Statements made by *A* as to the state of his health at or near the time in question are relevant facts (7)

(n) *A* sues *B* for negligence in providing him with a carriage for hire not reasonably fit for use, whereby *A* was injured.

The fact that *B*'s attention was drawn on other occasions to the defect of that particular carriage, is relevant.

defendant to show the *bona fides* of his defence by proving payment to such third person and that was the effect of the evidence in question *per* Erie J *ib*

(1) 'And in such a manner that *A* knew or probably might have known of it Steph Dig Art 11 illust (j) See also Norton Ev 137, some evidence should be given that the notice was within his knowledge

(2) In the instances given in the illustration the first is to negative good faith the second to rebut the presumption of *mala fides* raised by the first see Penal Code s 403, Expt (2) Norton Ev 136 137 Roscoe Cr Ev 13th Ed 549 *R v Thurburn* 1 Den C C R 387 18 I J M C 140 in which and in the judgment of Parke B the whole law with reference to larceny of goods found is considered

(3) This illustration which is taken from the case of *R v Pake* R & R 531 is in principle like illust (o) *post* the difference between the two illustrations is that this illustration is a case of shooting with intent to kill while illust (o) is of murder outright In *R v Pake* the prisoner was indicted for maliciously shooting at the prosecutor Evidence was given that the prisoner fired at the

prosecutor twice during the day In the course of the trial it was objected that the prosecutor ought not to give evidence of two distinct felonies, but Burrough J held that it was admissible on the ground that the counsel for the prisoner by his cross examination of the prosecutor had endeavoured to show that the gun might have gone off by accident that the second firing was evidence to show that the first was wilful and to remove the doubt if any existed in the minds of the jury see Roscoe Cr Ev 13th Ed 83 Norton Ev, 137

(4) See *R v Robinson* East P C 1110 in which previous letters sent by the prisoner were read in evidence as they served to explain the letter on which he was indicted

(5) See Taylor Ev s 582 This and the two following illustrations relate to feelings the first to mental feelings of ill will "or good will" the two last to bodily feelings (*v text post*)

(6) See *R v Gloster* 16 Cox 471, *R v Johnson* 2 C & K 354

(7) See *Aveson v Kinna* rd 6 East 188 *R v Nicholas* 2 C & K 246, 2 Cox C C, 136 *R v Guttridge* 9 C & P 471

The fact that *B* was habitually negligent about the carriages which he let to hire, is irrelevant (1)

(o) *A* is tried for the murder of *B* by intentionally shooting him dead.

The fact that *A* on other occasions, shot at *B* is relevant, as showing his intention to shoot *B*.

The fact that *A* was in the habit of shooting at people with intent to murder them is irrelevant

(p) *A* is tried for a crime

The fact that he said something indicating an intention to commit that particular crime, is relevant

The fact that he said something indicating a general disposition to commit crimes of that class, is irrelevant

Principle.—If the existence of a mental or bodily state or bodily feeling is, as is assumed by the section, in issue or relevant, it is clear that facts from which the existence of such mental or bodily state or bodily feeling may be inferred are also relevant. The *second Explanation* is merely a particular application of the body of the section. The rejection rests on the ground that the collateral is any connection with the *factum probandum*

s 3 ("Fact")

s 21, cl (2) ("Admission consisting of statements of existence of state of mind or body")

s 3 ("Relevant")

ss 102, 106, 111 (Burden of proof)

Steph Dig, Art II and Note VI, Taylor, Ev, §§ 580—586, 150, 160, 812, 1665, 1666 340—347, 188, Phipson, Ev, 5th Ed, 50, 69, 130—142; Lindley, Partnership, 536, Chitty's Equity Index, 4th Ed, "Notice", Brett's Leading Cases in Equity, 2nd Ed, 260, Roscoe N P Ev, 633—635, 847—855, 736 *et seq*, Norton, Ev, 131—140, Swift, Ev, 111, Cunningham, Ev, 117, 119 Pollock's Law of Fraud in India (1894) 44, 45, 61, 65, 66, 76, 77, First Report of the Select Committee, 31st March 1871, Roscoe, Cr Ev, 13th Ed, 79—85, Lindley & Company Law, 6th Ed, 432, 433, Bevan's Principles of the Law of Negligence (1889), Cr Pr Code, s 310, Contract Act, s 17, Best, Ev, p 86, §§ 255, 433, Walls, Ev, 2nd Ed, 73—75, Wigmore, Ev, §§ 309—370, 581, 658—661, 1962, 1963

COMMENTARY.

Facts, it has been seen, are either physical or psychological, the former being the subject of perception by the senses, and the latter the subject of consciousness (2). A person may testify to his own intent. But if his acts and conduct are shown to be at variance and inconsistent with the intent he swears to, his own testimony in his own favour would ordinarily obtain very little credit (3). Of facts which cannot be perceived by the senses, intention, fraud, good faith and knowledge are examples (4). But a man's intention is a matter of fact capable of proof. The state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else (5). The latter class of facts however are in capable of direct proof by the testimony of witnesses, their existence can only be ascertained either by the confession of the party whose mind is their seat

states of mind or of body or bodily feeling

(1) This and the two following illustrations refer to the 1st Explanation. Illustr (a) illustrates 'negligence' as well as illust (c) should be read in conjunction with illust (i) *ante* & text *post*

(2) & *ante* s 3 illust (d)

(3) Wigmore, Ev, § 581

(4) S. 1st Report of the Select Committee 31st March 1871. *Evil v. Paine*, 4 C. 671 (1 B. s. c. 24 C. W. N. 501)

(5) *Firgion v. Firgion*, 29 Ch. D. 419 (1881) per B. & C. L. J. See Lindley's Law of Fraud in India, p. 61

or by presumptive inference from physical facts (1) It has been debated whether the "opinion rule" excludes testimony to another person's state of mind (2) But it may be safely and in general said that a witness must speak to facts and let the inference from those facts be drawn by the Court or jury (3) This section is in accordance with the principle laid down in numerous cases (4) that, to explain states of mind, evidence is admissible, though it does not otherwise bear upon the issue to be tried As regards this principle there is no difference between Civil and Criminal cases (5) The present section makes general provision for the subject, and the next section is a special application of the rule contained in the present one The subject of the existence of states of mind is one of the most important topics with which judicial enquiries are concerned, in Criminal cases they are the main consideration, and in Civil

instance, where there is a question The present section is framed to es or the time within which the fact addition, must have occurred The only point for the Court to consider, in deciding upon the admissibility of evidence under this section, is whether the fact can be said to *show the existence* of the state of mind or body under investigation (6) The same considerations will, it is apprehended, determine the question of the admissibility of facts *subsequent* to the fact in issue to prove intent and other like questions (7) So also, though the collateral facts sought to be proved should not be so remote in

(1) See *Balmakand Ram v Ghansam Ram* 22 C 391, 406 (1894) [proof of intention need not be direct it will be enough if it is proved like any other fact (and the existence of intention is a fact) by the evidence of conduct and surrounding circumstances] *The Deputy Remembrancer v Karuna Bastob*, 22 C 164 1/4 (1894), *R v Rhuttin Ram* 2 W R Cr 63 (1865), *R v Beharee* 3 W R Cr 23 24 27 (1865) [exclamations as evidence of guilty intention conduct of prisoner] *Re Meer Yar Ali* 13 W R Cr 71 (1870) [ib] *R v Rookni Kant* 3 W R Cr 58 (1865) [province of jury to judge of intention] *R v Gookool Bowree* 5 W R Cr 33 38 (1866) [to some degree of course the intentions of parties to a wrongful act must be judged of by the event] *R v Gora Cland* 5 W R Cr, 45 46 (1866) [presumption of intention must depend upon the facts of each particular case], *R v Shuruffooddeen* 13 W R Cr 26 (1870) [a guilty knowledge is no necessarily a thing on which direct evidence can be afforded It is a matter of conscience and connected with the

7 Cox C C 79 As to burden of proof see ss 102 105 106 *post*

(2) Wigmore Ev §§ 1962 1963 The answer to the objection in § 661 seems to be that in such case the witness is submitting his inference to the jury Because the jury have themselves to draw the inference that is no reason why the witness should be allowed to do so As to the different meanings of 'belief' or 'impression' as signifying the degree of positiveness of original observation or recollection (in which case there is no legal objection) or lack of actual personal observation (in which case the evidence is excluded) see *ib* 658

(3) Swift Ev 111 A witness must swear to facts within his knowledge and recollection and cannot swear to mere matters of belief

(4) See judgment of Williams J., in *R v Richardson* 2 F & F 346

(5) *Blake v Albion Life Assurance Society* 4 C P D 102

(6) Cunningham Ev 117

(7) Thus according to English law on charges for uttering counterfeit coin utterings after that for which the indictment is laid may be given in evidence, but the point is doubtful in the case of forged instruments and in the case of false pretences it is still doubtful whether pretences made subsequently to the one charged are admissible but it seems both on authority and on principle that they are not as it is possible the guilty intention may not have arisen until after the acts upon which the charge is founded Roscoe Cr Ev 94

7 C & P 318 (lustful intent), *R v Bholi* 23 A. 124 (1900), cited in notes to § 106 [Assembling for the purpose of committing dacoity evidence of intention] *R v Papa Sanu* 23 M., 159 (1899), *Deputy Legal Remembrancer v Karuna Bastob* supra [obtaining girls for prostitution, evidence of intent] and as to declarations as proof of intention see *R v Petcherini*

yet such remoteness only (1) But necessary, as in an action for an injunction to restrain the use of a trade mark where the defendant's goods were (on the face of them and having regard to the surrounding circumstances) plainly calculated to deceive. Here the defendant was taken to have intended the reasonable and natural consequences of his own acts (2) In the next case cited the appellant was convicted under s 209, Indian Penal Code of having made false claims in three suits brought against certain persons. Two of them were executed and convicted for bigamy. *Held*, that evidence relating to the suits was admissible in the charges were properly admitted under this and the next section for the purpose of showing the ill will or enmity of the appellant towards defendants, in those suits as a body, but the evidence relating to suits brought by other persons, when no case of a conspiracy between them and the appellant was alleged or established, was inadmissible (3)

The mental and physical conditions of a person may be proved either by that person speaking directly to his own feelings, motives intentions, and the like, or by the evidence of another person detailing facts from which the given condition may be inferred but such other person may not in general testify

Proof of mental and conditions

defendant himself was called and was asked in chief, "Had you any other object in view, in taking proceedings, than to further the ends of justice?" The question was admitted (5) And in cases of obtaining goods on false pretences, the prosecutor is constantly asked, not only in cross examination but in chief with what motive, or for what reasons, or on what impression he parted with the goods (6) So on a question of domicile, A may state what his intention was in residing in a particular place (7) In a suit by a house agent against the former owner of a house in which the question was whether the former was entitled to receive from the latter the sale of the house through his interference, the plaintiff sought to ascertain whether any acts of the defendant, put the following question to the purchaser—"Would you, if you had not gone to the plaintiff's office and got the card (a card to view the premises with terms of sale written by the plaintiff's clerk on the back), have purchased the house?" and overruling an objection, received his answer which was, "I should think not" (8) But it is obvious that in many cases such evidence may

(1) *R v Whitley* 2 Leach, C C 983, cited in *R v Vajiram* 16 B 431 (1892).

True it is that the more detached the previous utterings are in point of time the less relation they will bear to the particular uttering stated in the indictment, and when they are so distant the only question that can be made is whether they are sufficient to warrant the jury in making any inference from them as to the guilty knowledge of the prisoners but it would not render the evidence inadmissible *per* Lord Ellenborough. See also *per* Lord Blackburn in *R v Francis* 12 Cox C C, 612 614

(2) *Anna Lal Serajee v Jaxala Prasai* (1908) 35 C 311 *Saxichmer v Apollinaris Co* (1897) 1 Ch, 893

(3) *Raghunath Lal v Emp* 22 C W N 494 s c 19 Cr L J 776

(4) See *Phipson Ev* 5th Ed 50 51, *Cunningham Ev* 117, but as to the opinion of experts see s 45 *post* v *ante*, *Wigmore Ev* §§ 581 1962-1963

(5) *Hardwick v Coleman* 1 F & F 531

(6) *Hardwick v Coleman* 1 F & F 531 *note* and see *R v Hoagill* 1 Dear C 315 *R v Dale* 7 C & P 352

(7) *Bilson v Wilson* L R 2 P & D 435 444

(8) *Mansell v Clements* L R 9 C P, 119 In a suit by A against B for goods sold and delivered in which B pleaded that the debt became due from him jointly with one C who was still alive, and the

not be reliable, and in other cases may not be had. The mental and physical conditions of a person must then be proved by the evidence of other persons who speak to the outward manifestations known to them of states of mind and body. Such manifestations may be either by conduct, conversation or correspondence (1). To prove mental and physical conditions "all contemporaneous manifestations of the given condition, whether by conduct, conversation, or correspondence, may be given in evidence as part of the *res gestæ*, it being for the Court or jury to consider whether they are real or feigned. Thus, the answers of patients to enquiries by medical men and others are evidence of their state of health, provided they are confined to contemporaneous symptoms, and are not in the nature of a narrative as to how, by whom, such symptoms were caused (2). And if the condition of the patient before or after the time in issue be material, his declarations at such times as to his then present condition are equally receivable (3). Not only may a party's own statements, but those made to him by *third persons* (4) be proved for the purpose of showing his state of mind at a given time (5). Thus where the question was whether a person knew that he was insolvent at a certain time, his own statements implying consciousness of the fact as well as letters from third persons refusing to advance him money, were *held* to be admissible after the fact of his insolvency had been proved independently (6). In addition to evidence of contemporaneous manifestations of the given condition, collateral facts are admitted to show the existence of a particular state of mind. Acts unconnected with the act in question are frequently receivable to prove psychological facts such as intent (7). In order to show this, similar acts done by the party are relevant, but similar acts are not relevant to prove the *existence* of the particular fact in issue, being inadmissible for this purpose under the rule by which similar but unconnected acts are excluded (8). Thus when a man is on his trial for a specific crime, such as uttering a forged note or coin, or receiving an article of stolen property, the issue is whether he is guilty of *that* specific act. To admit therefore as evidence against him other instances of a *similar* nature clearly is to introduce collateral matter. This cannot be with the object of inducing the Court to infer that because the accused has committed a crime of a similar description on other occasions, he is guilty on the present, but to establish the criminal intent and to anticipate the defence that he acted innocently and without any *guilty knowledge*, or that he had no *intention* or motive to commit the act, and generally to interpret acts which, without the admission of such collateral evidence, are ambiguous (9). In other words, the existence

replication traversed the joint liability — *Held*, that with a view to prove *B's* sole liability the witness who proved the giving of the order could not be asked the question with whom did you deal? but that the proper enquiry was as to the acts done. *Bonfield v Smith*, 12 M & W, 405.

(1) See *Hright v Tatham* 7 A. & E. 324.

(2) *Aeson v Annand* 6 East. 188. *R v Nicholas* 2 C. & K. 246, *R v Gloster* 16 Cox 471, illustrates (D), (M).

(3) *R v Johnson* 2 C. & K. 354.

(4) *Lacher v Cocks* 1 M. & M. 353, *Lewis v Rogers*, 1 C. M. & R. 48, *Whart*, § 254.

(5) *Phipson* Ev. 5th Ed., 50 see *Taylor* Ev. §§ 580—586.

(6) *Id.* 39. *Thomas v Connell* 4 M. & W. 267. *Vacher v Cocks* 1 M. & M., 353. *Cotton v James*, *ib.*, 273.

(7) *Best* Ev. 255.

(8) See notes to s. 8 ante. "When there is a question whether a person said or did something the fact that he said or did something of the same sort on a different occasion may be proved if it shows the existence on the occasion in question of any intention knowledge good or bad faith malice or other state of mind, or any state of body or bodily feeling the existence of which is in issue or is deemed to be relevant to the issue, but such acts or words may not be proved merely in order to show that the person so acting or speaking was likely on the occasion in question to act in a similar manner." *Steph Dig. Art. 11* and see note VI *ib.*

(9) *Roscoe* Cr. Ev. 13th Ed. 79. *Norton* Ev., 131. *R v Cole*, 1 Phillips Ev. 508, *R v Richardson* 2 F. & F., 343. *Blake v Albion Life Assurance Society*,

of the fact in issue must be always independently established, and for this purpose evidence of similar and unconnected acts is inadmissible but when once the fact in issue is so established, such similar acts may be given in evidence to prove the state of mind of the party by whom it was done (1) Thus in a trial for forgery, proof of similar transactions which are not the subject of the charge, he forgery (2), that a certain person was in the state of mind connected that proof of one can be arrived at through evidence going to prove the others, the evidence is not on that account excluded (4)

In *R v M J Vyapoory Moodelkar* (5), Garth, C J, said "Section 14 seems to me to apply to that class of cases which is discussed in Taylor on Evidence 6th Edition, sections 318—322—that is to say cases where a particular act is more or less criminal or culpable according to the state of mind or feeling of the person who does it, as, for instance in actions of slander or false imprisonment, or malicious prosecution where malice is one of the main ingredients in the wrong which is charged evidence is admissible to show that the defendant was actuated by spite or enmity against the plaintiff, or, again on a charge of uttering coin evidence is admissible to show that the prisoner knew the coin to be counterfeit, because he had other similar coins in his possession, or had passed such coin before or after the particular occasion which formed the subject of the charge The Illustrations to section 14 as well as the authorities cited in Taylor, show with sufficient clearness the sort of cases in which this evidence is receivable But I think we must be very careful not to extend the operation of the section to other cases where the question of guilt or innocence depends upon actual facts, and not upon the state of a man's mind or feeling We have no right to prove that a man committed theft or any other crime on one occasion, by showing that he committed similar crimes on other occasions Thus the possession, by an accused person, of a number of documents suspected to be forged was held to be no evidence to prove that he had forged the particular documents with the forgery of which he was charged" (6) In *R v Parbhudas* (7) West, J, said 'The possession by an accused of several other articles deposed to have been stolen, would, no doubt, have some probative force on the issue of whether he had received the particular articles which he was charged with having dishonestly received and the receipt or possession of which he denied altogether, yet in the first illustration to section 14, it is set forth as) a preliminary to the admission of testimony as to the other articles that it is proved that he was in possession of (the) particular stolen article

Scope of the Section

4 C P D 106 (fraud), *R v Balls*, L R 1 C C 328 and cases cited post 'There is no principle of law which prevents that being put in evidence which might otherwise be so merely because it discloses other undictable offences per Williams J in *R v Richardson* supra 346, Roscoe Cr Ev 85, *Makin v Attorney General for New South Wales* L R 1894 App Cas 65

(1) *R v Parbhudas* post *R v Jayaram* post *R v M J Vyapoory Moodelkar* post

(2) *Krishna Cotinda Pal v Emperor* 43 C 788 (1915)

(3) *Emperor v Yakub Ali* 39 A 178 (1917) and see *Amrita Lal Haura v Emperor* 42 C 957 (1915) *Baharuddin v Emperor* 18 C L J, 578 (1913) *Girdhari Lal v Emperor*, 11 Cr L J 428 (1909)

(4) *R v Parbhudas* 11 Bom H C R 90 93 (1894) and *R v Ellis* 6 B & C 145 cited in *R v Parbhudas* supra and *R v Jayaram* 16 B 304 (1892)

(5) 6 C 645 659 (1881)

(6) *R v Parbhudas* supra *R v Nur Mahomed* 8 B 223 225 (1883) in which the former case was distinguished and in which it was held that evidence of the possession and attempted disposal of coins of an unusual kind is relevant on a charge of uttering such coins soon afterwards when the factum of uttering is denied

(7) 11 Bom H C R 90 91 (1894)

A fully argued case where Mr Justice West gives a full and lucid exposition of s 14 of the Indian Evidence Act per Jardine J in *R v Fakirappa* 15 B, 502 (1890)

The receipt and possession are not allowed to be proved by other apparently similar instances, only the guilty person makes (o) to the same section makes person murdered, evidence of caused the death; B or not, the fact bative force, so, evidence that 'A' w them,' yet this evidence is excluded, even as proof of A's intention, either as too remotely connected with the particular intention in issue, or as raising collateral questions, which could not properly be resolved in the case' (1) In the same case Melville, J., said(2) 'It appears to me that the Indian Evidence Act does not go beyond the English Law' As to the latter Lord Herschell said(3) "The mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental or to rebut a defence which would otherwise be open to the accused" In *R v Bond* it was held that where the defence to a criminal charge is that the acts alleged to constitute the crime were done by the accused for an innocent purpose, evidence that the accused did the same acts for an improper purpose on another occasion is admissible as evidence negating the defence, although it is evidence which proves the commission of another offence by the accused In this case a person who was qualified to be and had acted as a surgeon was indicted for procuring a miscarriage The evidence was that he had used certain instruments and the defence was that he was performing a lawful operation It was proved that he had ceased to practise as a surgeon, and evidence was tendered by the prosecution that he had on a previous occasion used the same instruments in the same manner on another person with the avowed intention of procuring a miscarriage This evidence was held admissible by the Court of Crown Cases Reserved,—Lord Alverstone C J, and Ridley, J, dissenting on the grounds that *prima facie* there was no necessary connection between the act charged on the indictment and the other act alleged in the evidence, and that evidence of prior acts of a similar kind is not admissible when the only question is the purpose for which an act was done(4) In a recent case in the Allahabad High Court, where the accused was charged with cheating, it was held that evidence of his having cheated others not named in the charge was inadmissible because this section only applies to cases where a particular act is more or less culpable according to the state of mind of the accused(5) And in the Calcutta High Court it has been recently held that where evidence was tendered of false representations of the same character as the one charged and made to persons similarly situated, such evidence was admissible to prove dishonest intent in reference to the particular transaction charged, on the ground that section 15 is an application of the general rule laid down in this section, and that the words of this section and of Illustrations (o) of this section and (a) of section 15 show that it is not necessary that all the acts should form part of one transaction but only that they should form part of a series of similar occurrences(6) The Illustrations (e), (i) and (j) are on the point of

(1) *R v Parbhudas* supra.

(1881) 6 C 655

(2) *Id* at p 97(6) *R v Detendra Prosad* A C(3) *Makin v Attorney General of New South Wales* (1894) A C 57, cited in*R v Watt* (1904) A C 57(4) *R v Bond*, C C R (1906), 21 Cox p 252389, *R v Rhodes* (1899), 1 Q B 77,(5) *R v Abdul Wahid Khan* 34 A 94 following *R v Vajpooty Moodelkar**R v Ollis* (1900), 2 Q B, 758

intention (1). (a), (b), (c) and (d), of knowledge (f), (g) and (h) of good faith (n) of negligence and knowledge (k), (l) and (m) of mental and bodily feeling (n), (o) and (p) illustrate the explanation (2)

The question of intention is sufficiently illustrated by the Illustrations (e), Intention (i) and (j) to the present section, by the cases illustrating guilty knowledge, and by the next section, and is further considered in the notes to the last mentioned section and in the preceding and succeeding paragraphs (3) "A man is not excused from crimes by reason of his drunkenness, but although you cannot take drunkenness as any excuse for crime, yet when the crime is such that the intention of the party committing it is one of its constituent elements, you may look at the fact that a man was in drink in considering whether he formed the intention necessary to constitute the crime" (4) In the recent case of *R v Meade* the rule on this point was stated by the English Court of Criminal Appeal as follows "A man is taken to intend the natural consequences of his acts. This presumption may be rebutted in the case of a sober man in many ways. It may be rebutted in the case of a man who is drunk by showing his mind to have been so affected by the drink he had taken that he was incapable of knowing that what he was doing was dangerous, i.e., likely to inflict serious injury. If this be proved, the presumption that he intended to do grievous bodily harm is rebutted" (5) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him (6) The question of intention is to be inferred from legal evidence of facts, and not from antecedent declarations by the accused himself, upon occasions distinct from and antecedent to the transaction (7) In a recent case in the Madras High Court it was said that a man must be held to intend the natural and ordinary consequences of his acts, irrespective of his object in such acts, if at the time he knew what the natural and ordinary consequences would be, and that if he does an act which is *prima facie* illegal the fact that he did it with some other object, will not make it legal unless that object would, in the circumstances, make it legal (8) In this case, it was held that where a man with the object of establishing a fraudulent title to a house broke into it in its owner's absence and took forcible possession, he was rightly convicted irrespective of that object. And in a recent case in the Allahabad High Court where accused had been found in complainant's house at 2 A.M. and had proffered no explanation at the time, but had afterwards stated (without being able to prove) that he had gone there to have illicit intercourse with a widow, it was held that his presence there at such an hour raised a presumption of guilty intent (9) But on a subsequent and similar case in the same High Court where accused was able to prove his intercourse with a widow, it was held that he was guilty of no offence (10)

Facts which go to prove guilty knowledge may be proved. In *R v* knowledge
proved the guilty knowledge and notice
given of his having pre
be forged, observed that

(1) As to whether an act was accidental or intentional s 15 *post*

(2) See Norton F. 131

(3) See cases cited in first paragraph of Commentary *ante*

(4) *R v Doherty* 16 Cox 306 *per* Stephen J., *R v Ram Sahay* W. R. Gap No. Cr. 24 (1864)

(5) *R v Meade* C. C. A. (1909) 1 K. B. 895

(6) s 106 *post* Illustr. (a) *R v Han* 35 A. 379 (1913) *R v Subbappa Chinnappa* 15 B. 808 (1912), *R v Ham*

man 35 A. 560 (1913)

(7) *R v Petcherri* 7 Cox C. C. 83 *per* Greene B. as to declarations accompanying an act and notes thereto

(8) *Sellamuthu S. r. a. garen v. Pa. s. utlu Karuppan* 35 M. 1186 (1913) *per* Lenson C. J. (*Sarkaran Nair J. diss.*)

(9) *R v Malik* 37 A. 393 (1915)

(10) *R v Ghaya Bhar* 38 A. 517 (1916)

(11) 2 Leach C. C. 483 cited as *R v* *Iljle* 1 B. & P. (N. R.) 92

"without the reception of other evidence than that which the mere circumstances of the transaction itself could furnish, it would be impossible to ascertain whether they uttered it with a guilty knowledge of its having been forged or whether it was uttered under circumstances which showed their minds to be free from guilt." In the case of *R v Tattersall* mentioned by Lord Ellenborough in *R v Hiley*, the question reserved by Chambre, J., was "whether the prisoner had not furnished pregnant evidence, and whether the jury, from their knowledge in another?" The

were at liberty to make such an inference acted on are mostly common cases of uttering forged documents or base coins, but they are not confined to those cases" (1) Passing from the case of *guilty knowledge* knowledge may be inferred from the fact that a party had reasonable means of knowledge, i.e., possession of documents containing the information especially if he has answered, or otherwise acted upon, them, or from the fact that such documents properly addressed, have been delivered at, or posted to, his residence (2) So execution of a document, e.g., of a deed or a will, in the absence of evidence to the contrary, implies knowledge of its contents (3), though mere attestation necessarily does not (4) Access to documents may also sometimes raise a presumption of knowledge (5) But there is no presumption of law that a director knows the contents of the books of a company (6) And shareholders are not as between themselves and their directors, supposed to know all that is in the company's books (7) The publication of a fact in a *Gazette* or *newspaper* is receivable to fix a party with notice, though (unless the case is governed by Statute)

(1) *R v Francis* 12 Cox 612 616 per Lord Coleridge C. J., s.c. L. R. 2 C. C. R. 128 In this case the prisoner was indicted for endeavouring to obtain an advance from a pawn broker upon a ring by the false pretence that it was a diamond ring evidence was held to have been properly admitted to show that two days before the transaction in question the prisoner had obtained an advance from a pawn broker upon a chain which he represented to be a gold chain but which was not so see *R v Vajram* supra 443 *R v Cooper* 1 Q. B. D. 19 *R v Foster Dear* 456 *R v Weeks* L. & C. 18 Taylor Ex., § 345 as to guilty knowledge see *Lohit Mohun v R* 22 C., 313 327 (1894) *The Deputy Legal Remembrancer v Karuna Baistobi* 22 C. 168 169 (1894) *Re Meer & Co* 13 W. R. Cr. 70 71 (1870) [It is an error in law to consider the fact of the prisoner leaving his defence to his counsel as in any way whatever indicating any guilty knowledge] *R v Nobokristo Ghose* 8 W. R. Cr. 87, 89 (1867) *R v Shunrodden* 13 W. R. 26 (1870), *R v Abaji Ramchandra* 15 B., 89 (1890) *Re Ranjodh Kuriyokar*, 25 W. R. Cr. 10 13 (1876)

(2) *Phipson Ex.* 5th Ed. 130 *Vacher v Cocks* 1 M. & M. 353 *Cotton v James* ib. 25 as to documents found after the arrest of a prisoner s. 8 ante or intercepted in the post *R v Cooper* 1 Q. B. D. 15 [when a letter is put in course of transmission on the Postmaster General holds it as the agent of the receiver ib. 22]

(3) *In re Cooper*, 20 Ch. D., 611,

Taylor Ex. §§ 150 160

(4) *Harding v Crethorne* 1 Esp. 58 s. 8 ante it does not necessarily follow that a witness is aware of the contents of the deed of which he attests the execution *Salamat Ali v Budh Singh* 1 A. 306 307 (1876) See *Rajlaksh v Gokul Chandra* 3 B. L. R. P. C. 57 63 (1869), *Ranchunder v Hari Das* 9 C. 463 (1882), and notes to s. 115 post *Banga Chandra Dhur Biswas v Jagat Kishore* P. C. 44 C. 186 (1917) *Lakshpati v Rambodh Singh*, 37 A. 350 (1915) but see *Kandasami Pillai v Nagalinga Pillai* 36 M. 565 (1913) practice in Madras

(5) *E.g.* in the case of books kept between partners master and servant etc. s. 8 ante p. 137 *Lindley Partner ship* 536 Taylor Ex. § 812 see *Mackintosh v Marshall* 11 M. & W., 116 [The shipping list at Lloyd's stating the time of a vessel's sailing is *prima facie* evidence against an underwriter as to what it contains as the underwriter must be presumed to have a knowledge of its contents from having access to it in the course of his business]

(6) *Hall v. Case* L. R. 9 Ch. D. 329 per Bramwell J. ib. 333 'I will only add that it seems to me in general extremely objectionable to imply that a man had knowledge of facts contrary to the real truth This ought only to be done where there is some duty on the part of the man to inform himself of the facts

(7) *Lindley Company Law* 6th Ed., 432 433 and cases there cited

(10) *Radhakrishnan Padmakaram* (1913)

of its terms (1) And the acceptance of a contract in a common form without objection is constructive notice of its contents (2) So when title deeds were deposited by way of equitable mortgage with a Bank which omitted to investigate the title, the Bank was held to have constructive notice of a charge which they might have discovered (3) And when a share of a trust fund was assigned and the trustees did not enquire into the title of the alleged assignee they were held to have constructive notice of it (4) But a Company to whom a vessel is transferred cannot be fixed with constructive notice of the possible liability of the vendors for the unpaid costs of their solicitors even though the actual vendor and the promoter of the company were one and the same person (5) Where the sellers at an auction sale so conducted themselves with reference to the sale that bidders were induced to leave and the purchaser was present and had notice of these circumstances, it was held that he was affected with notice of the impropriety of the sale (6)

Good and
bad faith
fraud
malice

"It is a truth confirmed by all experience that in the great majority of cases fraud is not capable of being established by positive and express proofs. It is by its very nature secret in its movements, and if those whose duty it is to investigate questions of fraud are to insist upon direct proof in every case the ends of justice would be constantly, if not invariably, defeated. We do not mean to say that fraud can be established by any less proof or by any different kind of proof, from what is required to establish any other disputed question of fact, or that circumstances of mere suspicion which lead to no certain result should be taken as sufficient proof of fraud, or that fraud should be presumed against anybody in any case, but what we mean to say is that, in the generality of cases, the only resource in dealing with questions of fraud is to overcome the natural presumption of a reasonable mind of the existence of

fraud by raising a counter presumption there is no reason whatever why we should not act upon it' (7) A party's good faith in doing an act may generally be inferred from any facts which would justify its doing (8) In such cases the information (whether true or false) on which he acted will often be material. Where in answer to a charge of theft the accused alleges a claim to the property, the Court should not convict him of theft if the claim was made in good faith considering parties are imputation of a opinions and So to show to show the

state of his knowledge and that he had reasonable grounds for such belief (10)

(1) *Patman v Harland* 17 Ch D 353
Brett's L C in Eq 260 and cases there
cited *Rajaram v Krishnasami* 16 M 301
(1892)

(2) *Watkins v Ryall* 10 Q B D 178

(3) *Bank of Bombay v Suleman Sonji*
P C (1908) 33 B. 1 following *In re*
Queale's Estate (1886) 17 L R 17 Ch
D 361

(4) *Davis v Hutchings* (1907) 1 Ch
356 following *Jones v Smith* (1841) 1
Hare 43 (1843) 1 Ph 244

(5) *The Biria v Wood* C A (1907),
R 1

(6) *Chalidas Lallubhai v Dajal Mouji*
P C (1907) 31 B 566

(7) *Per Dwarkanath Mitter* J in

Motloora Pandey v Ram Ruchya 11 W
R 482 483 (1869) s c 3 B L R
(A C) 108 but fraud and dishonesty
are not to be assumed upon conjecture
however probable *Sleikh Imdad Ali v*
Yussu : at Kootby 6 W R. (P C) 24
(1842) s c 3 Moo I A 1 as to
secrecy as evidence of fraud see *Joshua v*
Alliance Bank of Simla 22 C 185 (1894)
see cases cited in notes to ss 10¹ 111
post

(8) *Whart* § 35 cited in *Pherson* Ev
5th Ed 134

(9) *Arjan Ali v Emperor*, 44 C 66
(1917)

(10) *Derry v Peek* 14 App Cas 337
A man's own assertion of what he be-
lieved or recollection of what he thinks

For though it is now settled that in order, apart from Statute, to maintain an action for deceit, there must be proof of fraud; a false statement made in the honest belief that it is true being not sufficient and there being no such thing as legal fraud in the absence of moral fraud, yet a false statement made through carelessness, and without reasonable belief that it is true, though not amounting to fraud, may be evidence of it, and fraud is proved where it is shown that a false representation has been made (a) knowingly, or (b) without belief in its truth, or (c) recklessly, careless whether it be true or false, and if fraud be proved, the defendant's motive is immaterial—it matters not that there was no intention to injure the person to whom the statement was made (1). To show the *bona fides* of a party's belief he may show that it was shared by the community, or even by individuals similarly situated to himself (2). "The relative positions and circumstances of the parties are in a transaction, a higher or lower, or fear or occupies the (3) As to the burden

of proof in such cases see section 111 *post*, and the notes thereto. Where the accused was charged under section 206 of the Indian Penal Code with fraudulently transferring three properties to three different persons on a certain day in order to prevent their being seized in execution of a decree, and the prosecution tendered evidence of five other fraudulent transfers of property effected by the accused on the same day and apparently with the same object, *held* that this evidence was admissible under this and the next section, to prove either that all those transfers were parts of one entire transaction, or that the particular transfers which were specified in the charge were made with a fraudulent intent (4). Evidence of similar frauds, committed on other persons by the same agent of the defendant company, in the same manner, with the knowledge and for the benefit of the company, is admissible to prove fraud (5). In like manner, in actions for false representation, where the question turns on fraudulent intent, other misstatements besides those laid in the statement of claim will be admissible in evidence, for the purpose of showing that the defendant

he believed at a certain time is worth very little without some kind of confirmation from the external conditions. Obviously the best and most natural corroborator would be found in circumstances showing that the alleged belief was such as with the means of knowledge then at hand a reasonable man might have entertained at the time. Pollock's Law of Fraud in India 44 45

(1) *Derry v Peek* supra 346 356 369 3 4 in which the distinction is made between facts which constitute fraud and those that are only evidence of it. Roscoe N P Lx 848 and cases there cited. Indian Contract Act s 17. Pollock's Law of Fraud in India 432—56 as to concealment of material facts see *Smith v Hughes* L R 6 Q B 597. *Hard v Hobbs* 4 App Cas 13 inadequacy of price as evidence of fraud see Indian Contract Act s 25. Specific Relief Act s 28 see generally as to fraud Roscoe N P Lx 633—63 84—85 it must be properly pleaded a case of fraud cannot be started in middle of cross-examination for the first time. *Lester v Gooden* W N (C A 1877, p 10

(2) Illust (f) ante. *Sheen v Bumpstead* 2 H & C 193. Roscoe N P Lx 853 see note ante to illust (f). In *Penny v Hanson* 18 Q B D 478 the question was whether A intended to deceive B by pretending to tell his fortune by the stars it was held that evidence that A or others *bona fide* believed in his ability to tell such fortunes was inadmissible. Denman J remarking "We do not live in times when any sane man believes in such a power and see *Lewis v Fermor* ib 532 536 per Willes J

(3) Phipson Ev 5th Ed 134. Pollock's Law of Fraud in India 60 66 76 77 see notes to s 111 *post*

(4) *R v Jayram* 16 B 414 (1892)

(5) *Blake v Albion Life Assurance Society* 4 C P D 94. See also *R v Hyslop* (1904) 1 K B 183 in which the question was whether upon an indictment for obtaining credit by means of fraud evidence could be given of similar acts committed by the accused at a period immediately preceding the offence for which the accused was being tried and the answer given by the Judges was in the affirmative

was actuated by dishonest motives (1). And the defendant may show representations made by him to others (2). Where *A* and *B* were charged that *A* owned certain property, and the representation, being himself the dupe of *A*, it was held that letters between *A* and *B* (not communicated to *C*) prior to the completion of the transaction, regarding it, were admissible in *B*'s favour (3). See further as to the question of good faith Illusts (f), (g), and (h), *ante*. "Malice in doing an act has generally to be proved by the previous or subsequent conduct (4) and relations of the parties, e.g., previous enmity, threats, quarrels and violence, while in rebuttal, previous expressions of good-will and acts of kindness may be shown" (5). Malice may even be implied from the manner in which an action is conducted in which it is in issue, and in cases of libel the mode of publication, or the repetition of the libel, is material to show the defendant's *animus* (6). "On questions involving negligence and other qualities of conduct, when the criterion to be adopted is not clear, the acts or precautions proper to be taken under the circumstances, or even the general practice of the community on the subject, are admissible as affording a standard by which the conduct in question may be gauged" (7). In a suit in which the question was whether the pupils at a certain school were properly treated, evidence was held to be admissible of the general treatment of boys at schools of the same class, as affording a criterion of what the treatment should have been at the school in question (8). As to state of body and bodily feeling, see Illusts (i) and (m), and *ante*, s. 14.

Explanations

The explanations to the section are illustrated by the Illustrations (n), (o), (p) and (q) appended to it. The rejection of the general facts rest on the ground that the collateral matter is too remote, if, indeed, there is any connection with the *factum probandum* (9). The meaning of the first Explanation is "that the state of mind to be proved must be not merely a general tendency or disposition, towards conduct of a similar description to that in question,

(1) *Huntingford v Massey* 1 F & F, 690, Taylor Ev, § 340.

(2) *Shreusbury v Blount*, 2 M & Gr, 475.

(3) *R v Whitehead* 1 Dowl & Ry, 61.

(4) Thus in *Taylor v Williams* 2 B & Ad 845 the question being whether *A* acted maliciously in prosecuting *B*,—an affidavit filed by the clerk to *A*'s solicitor and used for the purpose of preventing persons becoming bail for *B* when he was arrested was held admissible as showing *A*'s malice.

(5) For meaning of malice and fair comment and for tests of good faith, see *R v Aldool Waddood Ahmed* (1907), 31 B 293.

(6) *Phipson Ev*, 5th Ed 135 136, Taylor, Ev, §§ 340 347. See Illust (e), *ante*, as to *bona fides*, see *R v Labouchere*, 14 Cox 419, *Scott v Sampson*, 8 Q B D, 491.

(7) *Ib*, citing Ball Leading Cases on Tort 224—227, East, P C, 263, 264, Whart Negligence s 46, and cases, *post*. See also Bevan's Principles of the Law of Negligence (1889), Roscoe, N P Ev, 736, *et seq* and cases there cited and Best, 1 v p 86 when the facts are settled the existence of negligence is a question of law though reference is thereby implied to

a standard of reasonable care and common experience with which the judge must often be necessarily unacquainted." In the case of a railway accident Willes J, said "I go further and say that the plaintiff should also show with reasonable certainty what particular precaution should have been taken *Daniel v Metropolitan Ry Co* L R 3 C P 216 222. In some cases however negligence will be presumed from the mere happening of an accident, see Taylor Ev § 188.

(8) *Boldron v Widous* 1 C & P, 65, but evidence is not admissible of the comparative treatment of boys at any other particular school *ib*.

(9) *Norton Ev* 139, see remarks of Willes J in *Hollingham v Head*, 27 L J C P 241. To admit such speculative evidence would I think be fraught with great danger. If such evidence were held admissible it would be difficult to say in an action of an assault that the plaintiff might not give evidence of former assaults committed by the defendant upon other persons of a particular class for the purpose of showing that he was a quarrelsome individual, and therefore that it was highly probable that the particular charge of assault was well founded. The extent to which this sort of thing might be carried is inconceivable."

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immediate reference
man is generally dis-
honest in his proceedings

particular occasion or matter
is accused of receiving stolen
when to be generally dishonest
this particular transaction is

perhaps increased, but only in a vague and indefinite way, but if, at the time,
he is found in possession of a number of other stolen articles, this fact throws
a distinct light on his knowledge and intentions as to the articles of which
he is found in possession. It would be dangerous to infer that because a man
was generally dishonest, he was dishonest in any single case, but it is not
dangerous to infer that a man, who is found in possession of 50 articles, which
are shown to have been stolen from different people, came by each and all in a
dishonest manner' (1) The Criminal Procedure Code (2) contains provisions
as to the procedure to be adopted in the case of previous conviction. These
provisions have been made with the view of preventing the jury or assessor,
from

But r
may
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convictions become relevant when the existence of any state of mind or body or
bodily feeling is in issue or relevant (1) Under the present section the previous

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portion, but is merely an application of the rule contained in it, to those parti-
cular circumstances in which the acts sought to be given in evidence in proof
of intention have been themselves adjudicated upon in a criminal proceeding
previously taken (5) The proof must always be strict. Thus extracts from a

insufficient without
e offence under sec
dacoity are relevant

under this section. Convictions previous to the time specified in the charge or to
the framing of the charge are relevant under the second Explanation to this
section, but convictions subsequent to the time specified in the charge and to the
framing of the charge are not so admissible (7) Where an accused person is
charged with belonging to a gang of persons associated for the purpose of
habitually committing dacoity under S. 400 of the I. P. Code, evidence showing
that

ive
his

such offences in addition to evidence of previous convictions when, under section
401 of the Penal Code, association for the purpose of habitually committing theft
has been proved and that for this purpose evidence of bad livelihood is of no

(1) Cunningham L. 118 119

(2) S. 310 as amended by Act III of
1891 s. 9

(3) Act III of 1891 s. 9, s. 9, under
the present section or s. 43 & 44 post

(4) R. v. Illoomiya Hassan s. 14 m
L. K. 505 (1903) s. c. s. P. 179

(5) See illust. (b) ante

(6) Emperor v. S. Kh. B. ul. 43 C.,
118 (1916)

(7) R. v. Naba Kaur s. 1 C. W. N.
146 150 referred to in Mankura Pass

v. K. s. 19 243 (1879) s. c. 4
C. W. N. 9

(8) King Emperor v. H. S. Sher Vaidya-
s. 46 1 m. 959

weight than evidence of isolated thefts (1) In a trial for an offence of keeping a common gaming house under the fourth section of the Prevention of Gambling Act (IV of 1887, Bom), evidence that the accused had been previously convicted of the same offence is admissible to show guilty knowledge or intention (2) In a case in the Calcutta High Court it was held that evidence of association with men accused in a different trial was irrelevant under this section because it was not "in reference to the particular matter and also under the next section because it did not form part of a series of similar occurrences" (3)

In *Commonwealth v. ...* charge of sedition
series of speeches
it was held that

any of such speeches or lectures were admissible under this section as evidence of the intention of the speaker in respect of the speeches which formed the subject of the charge (4) In another case it was held that seditious articles published in the same newspaper, but not forming part of the subject of the charge on which the prisoner was then being tried, were admissible to show the intention of the persons who printed or published the articles which were the subject of the charge, since under Act XXV of 1865, section 7 (which throws the *onus* on the accused), the printer or publisher is responsible for everything that appears in the newspaper unless he can prove absence in good faith, without knowledge that during his absence seditious matter would be published (5) In another case it was held that articles not forming part of the subject of the charge and appearing in other issues of the newspaper were not admissible to show the intention of the writer, in absence of proof of his identity, and it was declared that while the printer or publisher would be amenable on proof that the article was calculated to excite feeling of hatred, disaffection or contempt towards the Government, the writer would only be amenable on proof that such feelings were actually excited by it or that he intended them to be so (6) and it has also been held that under the Newspapers (Incitement and Abatement) Act VII of 1908, s. 3, no question of intention arises (7)

Facts bearing on question whether act was accidental or intentional

15. When there is a question whether an act was accidental or intentional [or done with a particular knowledge or intention] (8), the fact that such act formed part of a series of similar occurrences in each of which the person doing the act was concerned, is relevant

Illustrations

(a) A is accused of burning down his house in order to obtain money for which it is insured

The facts that A lived in several houses successively each of which he insured, in each of which a fire occurred, and after each of which fires A received payment

- (1) *Bhona v R* (1911) 38 C 408
(2) *R v Alloomiya Hassan* 5 Bom. L R., 805 (1903), Jacob J diss s c, 28 B 129 (1903)
(3) *Amrita Lal Hazra v Emperor*, 42, C 957 (1915)
(4) *Chidambaram Pillai v R* (1908) 32 M 3 and see *R v Jogendra Chundra Bose* (1892) 19 C 35, *Apurba Krishna Bose*
Tilak
Prosa
(1906) 2 N B 359
(5) *P v Phandira Nath Mitter* (1908), 30 C 945 dissenting from *R v Bal Ganga*

- dhar Tilak* (1897) 22 B 112
(6) *Manomohan Ghose v R* (1910), 38 C 253, *R v Amba Prasad* (1897), 20 A 55
(7) *Girija Sundar Chuckerbutty v R*, 36 C 405
(8) The words in brackets were added by s 2 Act III of 1891 and appear to have been overlooked in *R v Alloomiya Hassan* 5 Bom L R., 805 (1903), s c 28 B 129 where Jacob J states that this section invites consideration of the question of intention only as opposed to accident. See also *per Chaudhuri J*, in *Emperor v Panchu Das* 47 C, 671, F B

from a different Insurance Office, are relevant, as tending to show that the fires were not accidental.(1)

(b) *A* is employed to receive money from the debtors of *B*. It is *A*'s duty to make entries in a book showing the amounts received by him. He makes an entry showing that on a particular occasion he received less than he really did receive. The question is, whether this false entry was accidental or intentional.

The facts that other entries made by *A* in the same book are false, and that the false entry in each case was in favour of *A*, are relevant (2).

(c) *A* is accused of fraudulently delivering to *B* a counterfeit rupee. The question is, whether delivery of the rupee was accidental.

The facts that, soon before or soon after the delivery, to *B* *A* delivered counterfeit rupees to *C*, *D* and *E*, are relevant, as showing that the delivery to *B* was not accidental (3).

Principle.—The facts are admitted as tending to show system and therefore intention, this section is therefore an application of the rule laid down in the preceding one (4). It will always be a matter of discretion, whether there is a sufficient and reasonable connection between the fact to be proved and the evidentiary fact. If there is no common link they cannot form a *series*, and this is the gist of the section (5).

s. 14 (Facts relevant to show knowledge or intention) s. 3 (Relevant")

Steph Dig, Art 12, Norton, Ev, 140, Cunningham, Ev, 120, Taylor, Ev, § 328, Phipson, Lr, 5th Ed, 157, Wills, Ev, 2nd Ed, 67

COMMENTARY.

So where the question was whether *Z* murdered *A* (her husband) by poison in September 1818, the facts that *B*, *C* and *D* (*Z*'s three sons) had the same poison administered to them in December 1818, March 1819, and April 1819, and that the meals of all four were prepared by *Z*, were held to be relevant to show that such administration was intentional and not accidental, though *Z* was indicted separately for murdering *A*, *B* and *C*, and attempting to murder *D* (6). This case and the case of *R v Garner* (*infra*) were discussed in *R v Neil Cream* (7) when Hawkins, J, admitted evidence of subsequent administrations of strychnine by the prisoner to persons other than and unconnected with the woman of whose murder the prisoner was then convicted. Where *A* promised to lend money to *B* on the security of a policy of insurance, which *B* agreed to effect in an Insurance Company of his (*A*'s) choosing, and *B* paid the first premium to the company, but *A* refused to lend the money except upon terms which he intended *B* to reject, and which *B* rejected accordingly, it was held that the fact that *A* and the Insurance Company had been engaged in similar

(1) This illustration is founded on the case of *R v Cray* 4 F & F 1102 the authority of which is doubted in Steph Dig Art 12 note and see Norton Ev 140, 141, but see contra *R v Vajram* 16 E 433 v also *R v Debendra Prosad A C* (1909) 36 C 573.

(2) Founded on *R v Richardson* 2 F & F, 343, Steph Dig Art 12 illust (b).

(3) This illustration is very like illust. (b) to s 14. The one speaks of possessing the other of passing other false coins. The presumption is the same. Norton Ev 140.

(4) See Steph Dig Art 12 and

Cunningham Ev 170 and *R v Debendra Prosad* (supra).

(5) Norton Ev 140.

(6) *R v Geering* 18 L J M C, 215, cited in *R v Richardson* 2 F & F 346. *R v Frances* 12 Cox C C 615. *Blate v Albion Life Assurance Society* 4 C P D, 101 102 see *R v Garner* 3 F & F, 681, *R v Cotton* 12 Cox 400. *R v Heason*, 14 Cox 40. *R v Roden* 12 Cox 630 see Taylor Ev § 328 and note and Steph Dig Art 12 illust. (c) and note.

(7) Cited in Steph. Dig., p. 20, note, 116 C C C Sess Pa., 1451.

transactions was relevant to the question whether the receipt of the money by the company was fraudulent (1) Where a prisoner was charged with the murder of her child by poison, and the defence was that its death resulted from an accidental taking of such poison, evidence to prove that two other children of hers and a lodger in her house had died previous to the present charge from the same poison was held to be admissible (2) Upon the trial of a prisoner for the murder of her infant by suffocation in bed *held* that evidence tendered to prove the previous death of her other children at early ages was admissible, although such evidence did not show the causes from which these children died (3) Upon the trial of an indictment for using a certain instrument with intent to procure a miscarriage, it is relevant, in order to prove the intent, to show that at other times, both before and after the offence charged, the prisoner had caused miscarriages by similar means (4) In a trial for forgery evidence of similar transactions not included in the charge is relevant as proof of intention though not as proof of the forgery (5) Under an indictment for arson, where the prisoner was charged with wilfully setting fire to her master's house — *Held* that two previous and abortive attempts to set fire to different portions of the same premises were admissible, though there was no evidence to connect the prisoner with either of them (6) Where the plaintiff in an action of negligence alleged that he had contracted an infectious disease through the negligence of the defendant, a barber in using razors and other appliances in a dirty and insanitary condition and in support of his case he tendered the evidence of two witnesses who deposed that they had contracted a similar disease in the defendant's shop — *Held* that as the negligence alleged was not an isolated act or omission, but was a dangerous practice carried on by the defendant, the evidence of those witnesses was admissible (7) Facts to establish that A and B have "hunted in couples" and in several instances, taken part in thefts from rich prostitutes, that is, a series of incidents from 1914 to 1918, to establish that they have lived together and had transactions together, that a system had been followed by them, that they used to go about together under different names, and had associated together with an evil motive, namely, the commission of thefts from rich prostitutes were sought to be given in evidence *Held* (Chaudhuri, J, dissenting) that such evidence was not admissible either under s 14 or under s 15 of the Evidence Act The gist of this section is that unless there is sufficient and reasonable connection between the fact to be proved and the evidentiary fact, that is unless there is in substance some common link, they cannot form a series Evidence of general disposition, habit and tendencies is not relevant Evidence of collateral offence cannot be received as substantive evidence of the offence on trial though under s 14, evidence may be on like evidence

re the *factum* of such intention
not merely the weight of the
conduct as would authorise a
reasonable inference of a systematic pursuit of the same criminal object *Per*

(1) *Blake v Albion Life Assurance Society* L R, 4 C P D 94, Steph Dig Art. 12 illust (d) See *R v Wyatt* 1904 1 K B, 188 cited in notes to last section

(2) *R v Cotton*, 12 Cox, 400, *R v Weaving* supra followed

(3) *R v Roden* 12 Cox 630, following *R v Cotton* supra, it was objected by the counsel for the prisoner that the evidence admitted in *R v Cotton* pointed directly to prior acts of poisoning, but in this case it was not proposed to prove that the four children died from other than natural causes *per* Lush, J The value of the evidence cannot affect its

admissibility 'The principle of *R v Cotton* applies'

(4) *R v Dale* 16 Co, 703, *R v Bond* C C R 1906 21 Cox 256 in which Lord Alverstone C J said 'If *R v Dale* is to be construed to authorize the admissibility of evidence of prior acts of a similar kind where the act is admitted and the only question is the purpose for which it was done it goes too far'

(5) *Krishna Govinda Pal v Emperor* 43 C 783 (1915)

(6) *R v Bailey* 2 Cox C C 311

(7) *Hales v Kerr* (1908), 2 K B, 601 'Times' L. R, V 24, p 779

Chaudhuri, J.—It is wrong to say that this section only deals with intention as opposed to accident. Evidence tending to show that the accused have been guilty of criminal acts other than those covered by the indictment is not admissible, unless upon the issue whether the acts charged against the accused

In general, whenever it is necessary to rebut, even by anticipation, the defence of accident, mistake or other innocent condition of mind, evidence may be given to prove that the accused has been concerned in a systematic course of conduct of the same specific kind and proximate in time to the conduct in question (2)

16. When there is a question whether a done, the existence of any course of business, it naturally would have been done, is a relevant fact.

Illustrations

(a) The question is, whether a particular letter was despatched.

The fact that it was the ordinary course of business for all letters put in a certain place to be carried to the post, and that that particular letter was put in that place, are relevant. (3)

(b) The question is, whether a particular letter reached A

The facts that it was posted in due course, and was not returned through the Dead letter Office, are relevant (4)

Principle.—Evidence of the existence of the course of business is relevant as laying a foundation for the presumption which the Court may raise from the course of business when proved. The Court may then presume that the common course of business has been followed in the particular case (5), and this presumption is but an application of the general maxim *omnia præsuntur rite esse acta*, and proceeds on the well-recognised fact that the conduct of men in official and commercial transactions is regulated by a strong probability. If circumstances be shown when their existence will increase or diminish the probabilities

(1) *Emperor v Panchu*, 47 C., 671 (F B), s c, 24 C W N, 501, 31 C. L. J., 402

(2) *Amrita Lal Hazra v Emperor*, 42 C, 957 (1915) in which it was said that *R v Holt* 8 Cox 44 (1860) is no longer of authority

(3) *Hetherington v Kemp*, 4 Camp, 193, *Ningata v Bharmappa*, 23 B, 65, 66 (1897) and see *Silbeck v Garbett*, 7 Q B, 846, *Trotter v Maclean*, L R, 13 Ch D, 574, *Ward v Lord Lonsborough*, 12 C B., 252, Steph Dig, Art 13, illust. (b), but the course of business may be contradicted *Stocken v Collin* 7 M & W 515, see also ss 50 and 51 of the Repealed Act II of 1855

(4) *Warren v Warren*, 1 C M & R., 250, 3 Esp, 54 J C & P, 250, and see *Saundersen v Judge*, 2 H L., 500; *Wood-*

cock v Houldsworth, 16 M & W, 124, *Abbey v Hill*, 5 Bing 299, *Plume's case*, R & R, 264, *Kent v Louen* 1 Camp, 178, Steph Dig, Art 13, illust. (c), see *Jogendra Chundro Chunder v Duarka Nath* 15 C, 681, 683 (1888)

(5) S 114, illust. (f), post, the matter dealt with by this section is treated by English text-writers under the subject of presumption.—The ordinary course of business is proved and the Court is asked to presume that on the particular occasion in question, there was no departure from the ordinary and general rule see authorities cited *supra*, and Field Ev 122, *Duarka Doss v Ba'oo Jankee* 6 M I A., 90 ["It is reasonable to presume that that which was the ordinary course was pursued in this case"]

contest (1)
a thing, or
the habit of
doing or not doing it (2) But the course of business must be clearly made out
in order to establish that connection between the facts proved and sought to be
proved which is the foundation of the presumption (3)

s 114, *Illustr (f) (Presumption as to course of business)* s 3 ("Relevant.")
s 3 ("Fact")

Steph. Dig., Art 13, Powell, Ev., 9th Ed., 316—323, Norton, Ev., 141, Roscoe, N P
Ev., 43, 374, 213, Phipson, Ev., 5th Ed., 91, Taylor, Ev., §§ 176—182, Field, Ev., 6th Ed.,
82, Best, Ev., § 403, Cunningham, Ev., 121, Wigmore, Ev., § 92

COMMENTARY.

Course of
business

As to the meaning of the words "course of business," see *notes* to the second
clause of thirty second section, *post* The section relates to private as well as
public offices Illustration (a) relates to the former, Illustration (b) to the
latter, namely, the post office itself (4) Where it was sought to prove that a
certain indorsement had been made on a (lost) license entered at the Custom
House, it was held to be relevant to show that the course of office was not to
permit the entry without such indorsements (5) And where the question was
whether the defendant was bound to pay all the proceeds of milk sold daily to customers by the
defendant as agent to the plaintiff, and it appeared that the course of dealing
was for the defendant to pay the plaintiff every day the money which she had
received, without any written voucher passing it was ruled that it was to be
presumed that the defendant had in fact accounted, and that the *onus* of proving
the contrary lay on the plaintiff (7) Where evidence was admitted of a book
to the teller as indicating that
it is really immaterial whether
tries and prove his invariable
custom These things being proven, the presumption arises therefrom that the
usual course of business was pursued in this particular instance Every one is
presumed to govern himself by the rules of right reason and consequently that
he acquires himself of his engagements and duty Whenever it is established
that one act is the usual concomitant of another, the latter being proved, the
former will be presumed, for this is in accord with the experience of common
life It is simply the process of ascertaining one act from the existence of
another" (8)

The fixed methods and systematic operation of the postal and telegraph
service is evidence of due delivery of matter placed for that purpose in the cus-
tody of the proper authority. "If a letter properly directed (9) is proved to

(1) *Walker v Barron* 6 Minn., 508
512 (Amer)

(2) *State v Railroad*, 52 N. H., 528,
532 (Amer), *per* Sargent, C. J See
Wigmore Ev., § 92

(3) See Cunningham Ev., 121

(4) Norton Ev., 141

(5) *Butler v Allnut*, 1 Starkie 222,
Phipson Ev., 5th Ed 106, Taylor, Ev.,
§ 180A see also *Van Omceeron v Downick*,
2 Camp 44 *Waddington v Roberts* L R.,
3 Q B 579 *Mason v Wood* 1 C. P. D.,
63

(6) *Lucas v Navosteski*, 1 Esp., 296,

Phipson Ev 5th Ed 107 Roscoe, N P
Ev 37, and see *Sellen v Norman*, 4 C &
P 80

(7) *Evans v Birch* 3 Camp, 10, Roscoe
N P Ev 37

(8) *Mathias v O'Neil*, 94 Mo., 527, 6
S W 253 (Amer)

(9) See *Walter v Haynes* Ray & M
149, *Burmester v Barron* 17 Q B, 823,
Taylor Ev s 179, no inference should
be drawn from the posting of a letter
that it was properly addressed, *Ram Das*
v The Official Liquidator, Cotton Ginning
Co., Ltd, Cawnpore 9 A., 366, 384 (1837)

have been either put into the post office or delivered to the postman(1) it is presumed, from the known course of business in that department of the public service, that it reached its destination at the regular time and was received by the person to whom it was addressed"(2) "Again, if letters or notices properly directed to a gentleman be left with his servant, it is only reasonable to presume, *prima facie*, that they reached his hands(3) The fact, too, of sending a letter to the post office will in general be regarded by a jury as presumptively proved, if the letter be shown to have been handed to, or left with, the clerk, whose duty it was in the ordinary course of business to carry it to the post, and if he can declare that, although he has no recollection of the particular letter, he invariably took to the post office all letters that either were delivered to him or were deposited in a certain place for that purpose(4) Where a registered letter is posted to a firm's correct address but is returned with the word 'refused' endorsed upon it, the presumption under this section in favour of the existence of common course of business is that the letter reached the firm's place of business and it may also be presumed that it was refused by an agent or partner of the firm(5) Upon the settlement of the list of contributories to the assets of a company in course of liquidation one of the persons named in the list denied that he had agreed to become a member of the company or was liable as a contributory The District Court admitted as evidence on the record, but at the hearing on the appeal, it was alleged by the official liquidator and denied by the objector, that such notice had been in fact given to the objector, was duly com-
letter appeared

on the record, but at the hearing on the appeal, it was alleged by the official liquidator and denied by the objector, that such notice had been in fact given to the objector, was duly com-
letter appeared
he address
letter book
Secretary
had been

copied in the letter book The objector denied having received the letter or any notice of allotment, *held* that the Court should not draw the inference that the original letter was properly addressed or posted, that the press copy letter was inadmissible in evidence, and that there was no proof of the communication of any notice of allotment(6) Where a notice to quit was sent by registered letter the posting of which was proved, and which was produced in Court in the cover in which it was despatched, that cover containing the notice with an indorsement upon it purporting to be by an officer of the post office stating the refusal of the addressee to receive the letter, *held* that this was sufficient service of notice(7) Postmarks on letters—when capable of being

(1) *Silbeck v Garbett* 7 Q B 846

(2) *Best Ev* § 403 *Taylor Ev* § 179 and cases there cited *Saunderson v Judge* supra *Woodcock v Houldsworth* supra *Warren v Warren* supra. If a letter is sent by the post it is *prima facie* proof until the contrary be proved that the party to whom it is addressed received it in due course *per Parke B* in *Warren v Warren* supra. *Loofft Ali v Pearce Mohun* 16 W R 223 (1871) [if a letter is forwarded to a person by post duly registered it must be presumed that it was tendered to him] See also s 14 ante *see* presumption as to post letters summarised in *Powell Ev* 94

(3) *Macgregor v Keady* 3 W H & G

794 *Taylor Ev* § 182 *Powell Ev* 97

(4) *Taylor Ev* § 182 and cases cited there and ante *Silbeck v Garbett*

Heatherington v Ken p Trother v Maclean Ward v Lord Landborough To prove the sending of a notice by post the plaintiff's clerk was called who stated that a letter containing the notice was sent by post on a Tuesday morning but he had no recollection whether it was put in by himself or another clerk it was held that this was not sufficient evidence of putting into post *Harkes v Salter* 4 Bing, see *Roscoe N P Ev* 574 and *Loosey v Williams* 1 M & M 179

(5) *Louis Dreyfus v Himndas Ishimdar* 50 I C 194 12 S L R 142 s c

(6) *Ramdas v The Official Liquidator Cotton Ginning Co Ltd* *Campbell* 9 A 366 (1887)

(7) *Jogendra Chunder v Dwarka Nath*, 15 C 681 (1888)

deciphered—are *prima facie* evidence that the letters were in the post at the time and place therein specified(1), the postmark on a letter has been admitted postmark may be contradicted
 The presumption, in the case and posted will be delivered
 in due course(4), will be extended to postal telegrams now that the inland telegraphs form part of the Government postal system (5)

In certain cases special provision has been made by Statute with respect to matters with which this section is concerned. Thus in the case of documents served by post on companies, in proving service of such a document it is sufficient to prove that it was properly directed and that it was put as a registered letter into the post office (6)

(1) *Fletcher v Braddell* 3 Stark. R 64
Stocken v Collin 7 M & W 515
R v Johnson 65 Taylor Ev s 179
 and cases there cited Powell Ev 94
Wigmore Ev § 95

(2) *Abbey v Hul'* 5 Bing 299, *R v Plumer* R & Ry 264
Keit v Lowen 1 Camp 177
Roscoe N P Ev 213 & 214 & Steph Dig Art 13 illust (a) a letter is presumed to have arrived at its destination at the time at which it would be delivered in the ordinary course of postal business
Stocken v Collin ante Powell Ev 95

(3) *Stocken v Collin* supra Burr Jones Ev § 46

(4) *British and American Telegraph Co v Colson* L R 6 Ex 122 per Bramwell B

(5) *Roscoe N P Ev* 43 see also as to the telegraphic messages s 88 post

(6) Act VII of 1913 (Indian Companies) If a notice given under the Negotiable Instruments Act (XXVI of 1881 s 94) is duly directed and sent by post and miscarries such miscarriage does not render the notice invalid

ADMISSIONS.

17), deal with the subject of admissions said to form exceptions to the rule
rely correct Admissions are some-

times used as merely discrediting a party's statement by showing that he has on other occasions made statements inconsistent with the case afterwards set up Their effect in such a case is merely destructive It is their inconsistency with the party's present claim that gives them logical force and not their testimonial credit For in such cases the truth of the admission is not relied on, and therefore they are not obnoxious to the hearsay rule (1) In effect and broadly it may be stated that anything said by a party may be used against him as an admission, provided it exhibits the quality of inconsistency with the facts now asserted by him in pleadings or testimony It follows that the subject of

's interest at the time, for statements is increased where time, that circumstance has on in the legal is not always t which at the time it was

But an admission or a fact relied evidence of the

truth of its contents and as possessing an evidentiary force *per se* It is then equivalent to affirmative testimony for the party offering it Admissions in such cases have a testimonial value independent of the contradiction, and being the statements of persons not witnesses, form exceptions to the hearsay rule In this sense it has been said that — "The general rule is, that every material fact must be proved by testimony on oath There is an exception to that rule, namely, that the declarations of a party to the record, or of one identified in interest with him, are, as against such party, admissible in evidence" (4) The statements which are the subject of these sections are admitted *firstly* as infirmative of the case made and *secondly*, when amounting to proof for the adversary, because in respect of the persons making them there is some security for their accuracy

An admission relative in interest shall not be al to hearsay testimony does it or his representative general one that a man

But as universal experience testifies that, as men consult their own interest, and seek their own advantage whatever they say or admit against their interest or advantage may, with tolerable

the contrary appear

as to the nature of

to whether the person who made the admission was or was not acquainted with

(1) Wigmore Ev § 1048 *et seq*

(2) *Ib*

(3) Phipson Ev 5th Ed 213

(4) *Spargo v Brown* 9 B & C. 935, 938 *per Bayley J*

(5) S 21 and note thereto post the exceptions to this rule are contained in s 21 cls (1) (2) The admissibility of books of account under s. 34 is also an

instance of statements made by a person being offered on his own behalf An admission may further be proved on behalf of a party if it is relevant otherwise than as an admission s 21 cl (3)

(6) Best Ev. § 519

(7) Best, Ev § 519, Taylor, Ev. § 723

the incidents of the property when he made the statement (Chatterjee and Panton J J)(1)

Admissions

An admission has been defined to be a *statement* which suggests any inference as to any fact in issue or relevant fact and which is made by any of the persons and under the circumstances in the following sections mentioned (2) In English law, the term *admission* is usually applied to civil transactions and to those statements of fact in criminal cases which do not amount to acknowledgments of guilt or which do not suggest the inference of guilt the term 'confession' being generally restricted to acknowledgments of guilt or statements which suggest the inference of guilt (3)

Besides admissions written and oral a party may make admissions by his conduct These are not mentioned in the seventeenth section as they have already been dealt with in the eighth section *ante* Admissions by assumed rule
1 they
as as
admissions by a party statements made in his presence and not denied by him provided the circumstances were such as to make a denial necessary or appropriate (5)

Confessions

A confession is an admission made at any time by a person charged with a crime stating or suggesting the inference that he committed that crime (6) There is a distinction between admissions and confessions in the Act(7) which however as it does not contain a definition of the word confession does not itself declare in what that distinction exists The nature of this distinction has however been the subject of judicial consideration in the Bombay and Allahabad High Courts In the first place as sections 17—31 deal with admissions generally and include sections 24—30 which treat of confessions as distinguished from admissions it would appear that confessions are a species of which an admission is the genus All admissions are not confessions but all confessions are admissions Thus a statement amounting under sections
admission under the
le to the police
subject matter
evidence against
are admissible

as evidence with regard to the ownership of the property in an enquiry under section 523 of the Criminal Procedure Code (8) The present portion of the Act adopts the term Admission as the generic term for both civil and criminal proceedings and uses the particular term confession for admissions (a) in criminal proceedings (b) made by a particular person viz an accused

(1) *Dnabandhu Nandi v Mannu Lal Par k* 52 I C 443

(2) S 17 *post* see Wills Ev 2nd Ed 149

(3) Taylor Ev 724

(4) Best, Ev American Notes p 488 Norton Ev 142 As to admissions by conduct see Powell Ev 277 Taylor Ev § 804 s 8 *ante* Confessions like admissions in civil cases may be inferred from the conduct of the prisoner and from his silent acquiescence in the statement of others made in his presence respecting himself Taylor Ev § 907

(5) Best Ev *ib* see notes to s 8 *ante*

(6) Section Dg Art. 21 the Act contains no definition of a confession

(7) *R v Macdonald* 10 B L R App 2 (1872) *per* Phear J *R v Dabee Per shad* 6 C 530 (1881) *R v Meher Ali* 15 C 389 593 (1888) *R v Nalinadhub* 15 C 595 (1888) *per* Petheram C J —

If the contents of the document did not amount to a confession the document itself would be relevant as an admission under s 21 *ib* 607 None however of the above cases indicate the difference between admissions and confessions See as to this *R v Babu Lal* 6 A 509 539 (1884) *R v Jagrup* 7 A 646 (1885) *R v Pandharinath* 6 B 34 (1881) *R v Anna* 14 B 260 263 (1884)

(8) *R v Triloban Maneckchand* 9 B 131 134 (1884)

person(1), (c) of the particular character denoted in the following definition "A confession is an admission made at any time by a person charged with a crime (a) stating, or (b) suggesting the inference that he committed the crime" (2) Therefore not only statements which amount to a direct acknowledgment of guilt are confessions, but also inculpatory statements, which, although they fall short of actual admissions of guilt yet suggest an inference of guilt. All inculpatory statements, however, are not "confessions" but only such as fall short of being an admission of guilt, and from which an inference of guilt follows (3) A statement which is intended by the maker to be self exculpatory may be nevertheless an admission of an incriminating circumstance whether a statement amounts to a confession or not. The fact that it leads to a confession is a statement which it is proposed to prove against a person accused of an offence to establish that offence(5), while under the term 'admission' are comprised all other statements amounting to admissions within the meaning of the seventeenth and eighteenth sections *ante*. Statements by way of confession which are excluded by sections 21—30 are inadmissible under the eighth section *ante*. This latter section therefore, in so far as it admits a statement as included in the word conduct must be read in connection with the twenty fifth and twenty sixth sections and cannot admit a statement as evidence which would be shut out by these sections (6) As in the case of admissions in civil suits the principle upon which the reception of confessions depends is the presumption that a rational being will not make admissions prejudicial to his interest and safety unless when urged by the promptings of truth and conscience (7) In such cases the maxim is '*Habemus optimum testem, confidentem reum*' (8) If prisoners really voluntarily confess, their confessions are the best possible evidence against them and a verdict based on voluntary confessions is just as good as a verdict based on the testimony of credible witnesses (9)

But self harming evidence is not always receivable in criminal cases as it is in civil. There is this condition precedent to its admissibility that the

(1) *R v Tribhovan Maneckchand* 9 B 131 134 *R v Jagrup* 7 A 646 648 (1885)

(2) Steph Dig Art 21 adopted and followed in *R v Babu Lal* 6 A 509 539 (1884) *R v Nana* 14 B 260 263 F B (1889) *R v Kangal Mal* 41 C 1905 see *Rampal v Emperor* 20 All L J, 128 *R v Jagrup* 7 A 646 (1885) [In this last case Straight J was of opinion that the word confession cannot be construed as including a mere inculpatory admission which falls short of being an admission of guilt but he also added that he did not find anything in Mr Stephens definition at variance with the view he took. It may however be pointed out that the rule contended for is not that every inculpatory statement is a confession but only such as fall short of being an admission of guilt and from which an inference of guilt follows. As to plenary and not plenary statements see Best Ev § 5241 see also *R v Pandharinath* 6 B 34 (1881)

(3) *Hakiman v R* 51 P L R 1905 2 Cr 1 J 230 and see notes to s 25 post

(4) *R v Pandharinath* 6 B 34 37

(1881)

(5) *R v Tribhovan Maneckchand*, 9 B, 131 134 (1884) it is an admission of a criminating circumstance on which the prosecution mainly relies. *R v Pandharinath* 6 B 34 37 (1881) *R v Nana* 14 B 260 263 (1889)

(6) *R v Nana* 14 B 260 (1889) see also *R v Jora Hasy* 11 Bom H C R 74 (18 4) *R v Rama Birpa* 3 B 12 (1878) and s 82 post

(7) Taylor Ev § 865 Best Ev § 524 Phillips & Arnold Ev 401 *R v Jellaraddi* 6 Bom L R 773 in which also the question of the importance to be attached to variation in confessional statements is discussed

(8) In criminal cases a deliberate confession carries with it a greater probability of truth than an admission in civil cases the consequences being more serious and penal. Phillips & Arnold Ev 402 In *R v Baldry* 2 Den at p 446 Erie J. said I am of opinion that when a confession is well proved it is the best evidence that can be procured

(9) *R v Bazar Mundal* 25 W R, Cr., 25 26 (1876)

party against whom it is adduced must have supplied it voluntarily or at least freely (1)

A prisoner may be convicted on his own uncorroborated confession (2) But in order to support a conviction the admission by the prisoner must be an admission of guilt. So where some prisoners during a preliminary investigation stated that the crime was committed by other persons and that any share they had in it was under compulsion it was pointed out that though such a statement contained an important admission it was not an admission of guilt and that upon such a statement alone no person ought to be convicted (3) Confessions have been divided by English text writers into two classes namely judicial and extra judicial. Judicial confessions are those which are made

Either
in the presence of
a magistrate or
other competent
officer or before
a Court

this term embracing not only *express* confessions of crime but all those admissions and acts of the accused from which guilt may be implied. All voluntary confessions of this kind are receivable in evidence on being proved like other facts (5) Whether however extra judicial confessions if uncorroborated are under English law of themselves sufficient for conviction has been doubted. In each of the English cases usually cited in favour of the sufficiency of this

that view which regards such confessions when uncorroborated as insufficient is an opinion which certainly best accords with the humanity of the criminal law and with the great degree of caution applied in receiving and weighing evidence of this kind. And taken together with the fact that the accused are usually posing to a confession themselves arrived from the answers which the accused gave to questions put by them (10) As to retracted confessions see note to s 24 post

Admissions may be made by (a) a party to the proceeding (11) And a party to the proceeding may be affected by the admissions of the following persons

(1) Best Ev § 551

(2) *R v Ranjeet Sonal* 6 W R Cr 73 (1866) *R v Hyder Jalaha ib* 83 (1866) or on his own admission coupled with the evidence *R v Kailychurn* 7 W R Cr 59 (1867) as to the effect of extra judicial confession *see post*

(3) *R v Kristo Mundul* 7 W R Cr 8 (1867)

(4) Taylor Ev., § 866 *ante R v Bhutta n Rujuan* 12 W R Cr 49 (1869) as to the effect of judicial confessions and as to retracted confessions *see s 24 post*

(5) Taylor E § 867 *R v Gopee nath* 13 W R. 69 (1870) [a confession on made to a private individual may be evidence against the prisoner if proved by

the person before whom the confession was made] *R v Moan Lal* 4 A 46 94 (1881) *R Bysago Nostyo* 8 W R Cr 28 (1877)

(6) Taylor Ev § 868

(7) *Feld Ev* 6th Ed 109 The report of the case there cited in this connection [*R v Jhurree* W R Cr 41 (1867) (a voluntary and genuine confession is legal and sufficient proof of guilt)] does not state the nature of the confession

(8) Taylor Ev s 868

(9) *Pka Bua v R* (1912) 39 C. 835

(10) *R v Soobjan* 10 B L. R. 332 335 (1873) *R v Mohan Lal* 4 A 46 49 (1881)

(11) S 18, post

Persons by whom admissions may be made

(b) an agent to such party duly authorized(1), (c) a person who has a proprietary or pecuniary interest in the subject matter of the suit(2), (d) a predecessor in title or a person from whom the party to the suit has derived his interest(3), (e) a person whose position it is necessary to prove in a suit when the statement would be relevant in a suit brought by or against himself(4), (f) a referee, or a person to whom a party to the suit has expressly referred for information(5). Where several persons are jointly interested in the subject matter of a suit, the general rule is that the admissions of any one of those persons are receivable against himself and his fellows, whether they be all jointly sued or sued, provided that the admissions relate to the subject matter in dispute and were made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered(6). The requirement of the identity in the legal interest between the joint owners is of fundamental importance. The admission of one co-plaintiff or co-defendant is not receivable against another merely by virtue of his position as a co party in the litigation. If the rule were otherwise, it would in practice, permit a litigant to discredit an opponent's claims merely by joining any person as the opponent's co-party, and then employing that person's statements as admissions. Consequently, it is not by virtue of the person's relation to the litigation that the admission of one can be used against the other, it must be because of some priority of title or of obligation(7). Plaintiffs who were two out of five brothers sued to establish their right to a two fifth share in properties, which were sold in execution of a money decree against another brother 'U' and purchased by the defendant on the allegation that the properties, when sold, were the joint family properties of the five brothers. The defendant, whose case was that the brothers were not joint at the date of the sale, and that the properties were exclusively owned by U, put in a deposition given by another brother K in the suit in which the money decree against U was passed, in the course of which K stated that the family was not joint and the properties belonged exclusively to U. Held, that the deposition of K in the previous suit was not admissible as admission against the plaintiff(8). Guardians of person of an infant are not competent to bind the ward by an admission as to his proprietary rights. An admission by a Court of Wards cannot bind or prejudice the infant proprietor(9). An admission made by a landlord is not binding on his tenant, and this being so, a compromise entered into between the proprietors of certain land and others, whereby the parties to the compromise become joint proprietors of the land has no binding effect upon the tenants of the land(10). In a criminal trial, if it is intended to bind a master by the statement of his servant the relationship of master and servant must be strictly proved(11). Generally with respect to the person whose admissions may be received, the doctrine is, that the declarations of a party to the record or of one identified in interest with him are as against such party receivable in evidence(12). But if they proceed from a stranger they are in general inadmissible(13). The act has rendered

(1) S 18 *post*(2) *Id*(3) *Id*(4) S 19 *post*(5) S 20 *post* see notes to ss. 18—20 *post*(6) *Dileshwar Ram v. Nohar Singh* 48 I C 193(7) *Ambar Ali v. Lutfe Ali* 45 C. 159 s c 25 C. L. J. 619 21 C. W. N. 996(8) *Nagendra Nath Ghosh v. Lawrence Jute Co.* 25 C. W. N., 89(9) *Bansari Lal Singh v. D.arka Nath Misra* 29 C. L. J. 57 s c 57 I C., 825(10) *Puran Pande v. Dhanpat Tewari* 57 I C 739(11) *Esiperor v. Pitharan Singh* 19 Cr. L. J. 789 s c 4 Pat. L. W. 120(12) *Taylor F. & S. 740 Spargo v. Bro. Co.* 9 B. & C. 919(13) *Id. Baugh v. H. & C. 4 B. & C.* 329

admission within the meaning of the eighteenth section (1) *Entries in books of account*, though proved not to have been regularly kept, may yet be relevant as admissions (2) Admissions may be also contained in *recitals and descriptions in deeds* (3), *horoscopes* (4), *receipts*, or mere *acknowledgments* given for goods or money, whether on separate papers, or indorsed on deeds, or on negotiable securities, banker's *pass books*; *accounts rendered*, such as a solicitor's bill; sworn *inventories* and declarations by executors which operate as an admission of assets (5), and *survey maps* (6) The omission of a claim by an insolvent in a *schedule of the debts* due to him given on oath is an admission that it is not due (7) A statement in a *bill of sale* is evidence against those who are parties to it, the seller and the purchaser and the person who purchased from such last mentioned purchaser (8) Statements recorded in a rent-suit under Act X of 1859 which do not conform to the requirement of the sixtieth section, cannot be relied on as admissions (9) Even an *invalid instrument* may operate as an admission as to collateral matters (10), but not one which is not *duly stamped* (11), except in criminal cases (12) A *return made to a collector* by an occupant of land stating the amount of the rent, is an admission as to the amount of the rent binding upon the occupant and all who claim under him (13) As to admissions in *deci fehrsts*, or in *notices to enhance rent*, see cases noted below (14) Though a *judgment* is generally irrelevant as between strangers, it may be relevant as between strangers if it is an admission (15) Thus where A sued B, a carrier for goods delivered by A to B, a judgment recovered by B against a person to whom he had delivered the goods, was held to be relevant as an admission by B that he had them (16) "It is true that a record is sometimes admitted in

the party himself that the fact to the principles governing belongs" (17) And where in V, the second son of K, was the plaintiff, was consequently entitled to a moiety of the family property as representative of A, the other moiety going to branch, a judgment and other do K, in which suit the adoption of V evidence against the

(1) *Harish Chander v Prosunno Coommar*, 22 W R, 303 (1874), as to pleadings in the same proceedings, *v post* As to the admissibility in England of pleadings in other actions, see Phipson Ev, 5th Ed, 237

(2) *R v Hanmantia* 1 B 610, 617 (1877), *v post*

(3) *Taylor Ev*, 91—100, 858, *Roscoe*, N P Ev, 76, *Powell Ev*, 9th Ed, 465, 466, *v post*, *Konuar Doorganath v Ram Chunder*, 4 I A., 52 (1876)

(4) *Raja Goundan v Raja Goundan*, 17 M 134 (1893)

(5) *Taylor Ev*, §§ 859, 860

(6) See notes to s 36 *post*, and cases there cited

(7) *Taylor Ev* § 804, *Nicholls v Davies*, M & Rob, 13, *Hart v Newman*, 3 Camp, 13

(8) *Soojan Dibee v Achmut Ali*, *supra*

(9) *Pogha Mahtoon v. Gooreo Baboo*,

24 W R 114 (1875)

(10) *Whart* § 1124 cited in Phipson, Ev 3rd Ed 193 194

(11) Act II of 1859 (Stamp), s 34, amended in 1922

(12) *Id* cl (2) other than proceedings under Ch XII (Disputes as to immovable property) Ch XXXVI (Maintenance of wives and children) of Act V of 1858 (Criminal Procedure)

(13) *Atudh Beharee v Ram Rai*, 18 W. R., 105 (1872)

(14) *Gunga Pershad v Gogun Singh*, 3 C, 2 (1877), see also *Narain Coomary v Ram Krishna*, 5 C 864 (1880), *Judoo-nath v Rajah Baroda*, 22 W. R., 220 (1874)

(15) *Steph. Dig.*, Art. 44

(16) *Tiley v Cowling* 1 Ld Ry., 744, s c B N P, 243, *Steph Dig.*, Art. 44,

illustr (c), *Taylor Ev*, § 1694

(17) *Taylor Ev*, § 1694

section, *post*, unless they come within the provisions of the twenty eighth section. But if no inducement (within the meaning of the twenty fourth section) has been held out relating to the charge, it matters not as far as admissibility is concerned in *what way* a confession has been obtained though of course the manner in which it has been procured may affect its weight (1). Before using a statement (oral or written) as an admission the facts which make it an admission must be proved (2).

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"Admissions are receivable to prove matters of law, or mixed law and fact though (unless amounting to estoppels) these are generally of little weight being necessarily founded on mere opinion. Thus a defendant's admission that his trade was a nuisance has been received (3). So a prisoner's admission of a former valid marriage is some though not sufficient, evidence to support a conviction for bigamy (4). Matters of fact simply may always be proved in this manner. Thus, a wife's admission of adultery, though uncorroborated has on more than one occasion been held sufficient evidence where considered trustworthy, upon which to grant a divorce (5) though if corroboration is available (6) it must be produced (7). But, contrary to the English rule oral admissions are not receivable to prove the contents of documents except where secondary evidence is admissible or the genuineness of a document produced is in question (8). The execution of documents (whether attested or not) which are not required by law to be attested may be proved by admission or otherwise (9). And even in the case of documents required by law to be attested the admission of a party to an attested document of its execution by himself is sufficient proof of its execution as against him (10). Admissions may even sometimes be received as to matters protected by privilege provided they are proved by a third person (*v. ante*).

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The whole statement containing the admission must be taken together (11), for though some part of it may be favourable to the party and the object is only

(1) See Taylor Ev § 881 s 29 *post* and notes thereto

(2) *Barindra Kumar Ghose v R* (1909) 37 C. 91

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(5) *Robinson v Robinson* 1 S & T 362 *Willams v Willams* L R 1 P & D 29 *Gelly v Gelly* (1907) P 334

(6) *White v White* 62 L T 663

(7) *Phipson Ev* 5th Ed. 219 in regard to admissions involving matters of law it is said in *Phillips Ev* p 344 10th Ed. — Where admissions involve matters of law as well as matters of fact they are obviously in many instances entitled to very little weight and in some cases they have been altogether

rejected. Thus it has been held that the discharge of a defendant by a Court of Quarter Sessions under an Insolvent Act could not be established by proof of an acknowledgment of the discharge by the plaintiff himself for the discharge might have been irregular and void or might have been mistaken by the plaintiff. *Scott v Clare* 3 Camp 236 *Somersett v Adamson* 1 Bing 73 *Morris v Miller* Burr 2057 As to admissions and estoppels on points of law see *Tagore v Tagore* 1 A Sup Vol 71 (1872) *Surendra Keshav v Doorgasundari* 19 I A 115, 116 (1892) *Gopee Lall v Musst Sree Chandrasekhar* 11 B L R. 395 (1872) and *Dungaria v Chand Lal* 3 A L J 53 an admission on a point of law is not a thing within the meaning of s 115

(8) S 22 *post* as to written admissions see s 65 cl (b) *post*

(9) S 72 *post* see Taylor Ev §§ 414 1843 Common Law Procedure Act 1854 s 26

(10) S 70 *post* Taylor Ev §§ 1848 1853

(11) Taylor Ev., § 725 *Wills Ev.* 2nd Ed 159 *Sooltan Ali v Chand Bibee* 9 W R. 130 (1868) explained in *Shaikh Shurfuras v Shaikh Dhunoor* 16 W R. 257 (1871) [a party cannot select particular passages and read them without the context], *Jodunath Roy v Raja Baroda*

to ascertain what he has conceded against himself, and what may therefore be presumed to be true, yet, unless the whole is received, the true meaning of the part which is evidence against him, cannot be ascertained.

the circumstances, how much of the entire statement they deem worthy of belief, including as well the facts asserted by the party in his own favour, as those made against him (2) The rule applies equally to written, as to verbal admission (3) Thus where in a suit for rent at an enhanced rate after notice the plaintiff set forth that the defendant and his predecessors had been holding the tenure without any change in the rent, but alleged also that the tenure had its origin at a period long after the permanent settlement, it was held that the defendant was not at liberty to avail himself of such portion of the admission as afforded a ground for the presumption of uniform payment from the permanent settlement without accepting the latter part of the admission which rebutted such presumption (4) The principle upon which the rule is grounded is, that if a party makes a qualified statement, that statement cannot be used against him apart from that qualification, an unfair use is not to be made of a party's statement, by trying to convert into a particular admission by him that which he never intended to be such an admission (5) But though it is the rule that an admission which is qualified in its terms, must be ordinarily accepted as a whole, or not taken at all as evidence against a party, yet when a party makes *separate and distinct* allegations without any qualification, this rule does not apply It is by no means the case that no portion of a party's statement can by any possibility be given in evidence against him, without every portion of the statement from the beginning to the end being also read (6) A distinction must also be drawn between the case where an admission by one party has merely the effect of relieving the other party from giving proof of a particular fact, and the case where one party, failing to adduce independent evidence in his favour, attempts to rely on the statement of the other party as an admission In the latter case, as

22 W R 220 (1874) *Niamut Ullah v Himmat Ali* 22 W R 519 (1874) *Pulin Beharee v Watson & Co* 9 W R 190 (1868) explained in *Baikanthanath Kumar v Chandra Mohan* 1 B L R (A C) 133 10 W R 190 *Radha Charan v Chander Moonce* 9 W R 200 (1868) *Rajah Nilmoney v Ramanoograh Roy* 7 W R 29 (1867) *Tarince Pershad v D Carkath* 13 W R 451 (1871) [A plaintiff abandoning his own case and falling back on the admissions of the defendant is bound to take those admissions as they stand in their entirety by so taking them he would on his own part concede the truth of these statements contained in the admissions if the defendant other than the particular statements on which he specifically relied] *Ishan Chunder v Haran Sirdar* 11 W R 535 (1869) *Lallah Probhoo v Sheonath* W R 1864 Act V 27 *Konuar Doorganath v Kam Chunder* 4 I A 52 (1876)

(1) *Taylor Ex* § 725 *Thomson v Austen* 2 D & R 361 *Fletcher v Froggatt* 2 C & P 566 *Cobbett v Grey* 4 I R 29

(2) *Taylor Ex* § 725 and cases there

W, L R

cited *Rajah Nilmoney v Ramanoograh Roy* 7 W R 29 (1867) [the Court is not bound to believe the whole of the statement] *Soolian Ali v Chand Bibee* 9 W R 130 (1868) *Shaikh Shurfuraz v Shaikh Dhunoo* 16 W R 257 (1871) *id* *Stanton v Percival* 5 H L C 293 *Ishan Chunder v Haran Sirdar* 11 W R 535 (1869) [For instance if the Judge upon the evidence really believes that the payments credited in a plaintiff's book were made although he disbelieves the entry as to the amount of debits there is nothing inequitable in his giving the defendant the benefit of the payments] But though the Judge may believe one part and disbelieve the other he ought not to do so without some good reason *Lallah Probhoo v Sheonath* W R 1864 Act V 27

(3) *Taylor Ex* § 726

(4) *Judoonath Roy v Rajah Perodas* 22 W R 220 (1874)

(5) *Baikanthanath Kumar v Chandra Mohan* 1 B L R (A C) 133 (1868). 10 W R 190 explained *Poolia Fekaree v Watson & Co* 9 W R 190 (1868)

(6) *Id* see s 30 post and notes there

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(10) S 70 *post* Taylor Ev §§ 1838 1853

(11) Taylor Ev. § 725, Wills Ev. 2nd Ed., 159 *Sooltan Ali v Chand Bibee* 9 W R. 130 (1868) explained in *Shaukh Shurjura v Shaukh Dhunoor* 16 W R. 257 (1871) [a party cannot select particular passages and read them without the context], *Jodunath Roy v Raja Baroda*

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deem worthy of belief, including as well the facts asserted by the party in his own favour, as those made against him (2) The rule applies equally to written, as to verbal admission (3) Thus where in a suit for rent at an enhanced rate after notice the plaintiff set forth that the defendant and his predecessors had been holding the tenure without any change in the rent, but alleged also that the tenure had its origin at a period long after the permanent settlement, it was held that the defendant was not at liberty to avail himself of such portion of the admission as afforded a ground for the presumption of uniform payment from the permanent settlement without accepting the latter part of the admission which rebutted such presumption (4) The principle upon which the rule is grounded is, that if a party makes a qualified statement, that statement cannot be used against him apart from that qualification, an unfair use is not to be made of a party's statement, by trying to convert into a particular admission by him that which he never intended to be such an admission (5) But though it is the rule that an admission which is qualified in its terms, must be ordinarily accepted as a whole, or not taken at all as evidence against a party, yet when a party makes *separate and distinct* allegations without any qualification, this rule does not apply. It is by no means the case that no portion of a party's statement can by any possibility be given in evidence against him, without every portion of the statement from the beginning to the end being also read (6) A distinction must also be drawn between the case where an admission by one party has merely the effect of relieving the other party from giving proof of a particular fact, and the case where one party, failing to adduce independent evidence in his favour, attempts to rely on the statement of the other party as an admission. In the latter case, as

22 W R 220 (1874) *Niamut Ullah v Hummut Ali* 22 W R 519 (1874) *Pulin Beharee v Watson & Co* 9 W R 190 (1868) explained in *Baikanthanath Kumar v Chandra Mohan* 1 B L R (A C) 133 10 W R 190 *Radha Charan v Chander Monee* 9 W R 200 (1868) *Rajah Nilmoney v Ranaoograh Roy* 7 W R 29 (1867) *Tar nec Persad v Daarka* 15 W R 451 (1871) [A plaintiff abandoning his own case and falling back on the admissions of the defendant is bound to take those admissions as they stand in their entirety, by so taking them he would on his own part concede the truth of the statements contained in the admissions of the defendant other than the particular statements on which he specifically relied] *Ishan Chunder v Haran Sirdar* 11 W R 535 (1869) *Lallah Praboo v Dhanonath W* 1864 Act 27 *Kantiar Doorganath v Ram Chunder* 4 I A 52 (1876)

(1) Taylor Fv § 725 *Thomson v Austen* 2 D & R 361 *Fletcher v Froggatt* 2 C & P 566 *Cobbett v Grey* 4 Ex R 29

(2) Taylor Fv § 725 and cases there

cited *Rajah Nilmoney v Ranaoograh Roy* 7 W R 29 (1867) [the Court is not bound to believe the whole of the statement] *Sooltan Ali v Chard Bibee* 9 W R 130 (1868) *Shaikh Shurfuraz v Shaikh Dhanoo* 16 W R 257 (1871) *id* *Stanton v Percival* 5 H L C 293 *Ishan Chunder v Haran Sirdar* 11 W R 535 (1869) [For instance if the Judge upon the evidence really believes that the payments credited in a plaintiff's book were made although he disbelieves the entry as to the amount of debits there is nothing inequitable in his giving the defendant the benefit of the payments] But though the Judge may believe part and disbelieve the other he ought not to do so without some good reason *Praboo v Sheorath W* 1864 Act 27

(3) Taylor Fv § 726

(4) *Judeonath Roy v Rajah Peroda* 22 W R 220 (1874)

(5) *Baikanthanath Kumar v Chandra Mohan* 1 B L R (A C) 133 (1868), 10 W R 190 explaining *Poolia Beharee v Hatton & Co* 9 W R 190 (1868)

(6) *Id* see 30 *post* and *notes* thereon

"Evidence of oral admissions ought always to be received with great caution. Such evidence is necessarily subject to much imperfection and mistake; for either the party himself may have been misinformed, or he may not have understood him, or sed. It also sometimes happens that few words, will give an effect to the that the party actually said." (1) So where a plaintiff sued for a sum said to be due upon a settlement of account

means of proving the case, if a true one" (2) But where an admission is deliberately made, and precisely identified, the evidence it affords is often of the most satisfactory nature (3) Admissions depend very much upon the circumstances under which they are made (4)

As in the case of admissions in civil proceedings, the evidence of oral confessions of guilt ought to be received with great caution (5) But a deliberate statement effectual estimated

part of the confession is on record, it may be relied on in preference to that part (9) In order to determine whether statements are confessions the whole of the statements must be taken into consideration, and where the statements are self-exculpatory they are inadmissible (10) Although a confession must be taken as a whole and considered along with the admitted facts of the case, the accused being judged by his whole conduct, the Court is at liberty to disregard any statement contained in the confession which it disbelieves (11) In trials by jury, it is the duty of the Judge to lay the confessions properly before the jury, pointing out the circumstances bearing for, and against, their value, but it is for the jury to form an opinion as to their weight (12) "A judge, in fact, is hardly justified in treating a confession made by a prisoner before a magistrate, as a mere piece of evidence which a jury may deal with in the same way as they would with the evidence of a witness of doubtful veracity. If a prisoner has confessed before a magistrate, the attention of the jury should be

(1) Taylor Ev, § 161

(2) *Lalla Sheopershad v Juggernath* 10 Ind Ap 74 79 13 C L R 271

(3) Taylor Ev § 861

(4) *R v Simonstone* 1 C & K 164 166 see notes to s 31 post

(5) Taylor, Ev § 862

(6) *Id*, § 865, v ante Introduction See as to the degree of credit to be given to confessions *Roscoe Cr L* 13th Ed 35, 36, 1 Phillips & Arn Ev 402 10th Ed, R v *Dada Ana*, 15 B at p 480 (1889)

(7) *Emperor v Pramañanath Pagchi* 30 C L J 503 as to whether statement suggesting inference of guilt was confession

see *Pan Gang v Emperor* 19 Cr L J 42 A statement which suggests an inference of guilt may amount to a confession though the person making it may directly repudiate his participation in the crime *Jasoda v Emperor* 53 I C 691

(8) *Smith v Emperor* 19 Cr L J 189

(9) *Hasnu v Emperor*, 20 Cr L J 737 s c 53 I C, 145

(10) *4th Foong v Emperor* 22 C W N 834 s c 28 Cr L J 105

(11) *Kamooz v Emperor* 19 Cr L J 785 s c 46 I C 705

(12) *R v Dada Ana* 15 B 452 461, 478 (1890) *R v Mera Daval* 10 B, 49 502 (1886)

drawn to the question whether there was any reason to suppose that that confession was made under any undue influence, and if there is no reason to suppose anything of the kind, the jury should be told so and advised that they may act upon it¹ (1) The infirmative hypotheses affecting self criminative evidence have been in particular dealt with in the works of Bentham and Best (2) False confessions are either the result of mistake (which may be of fact or of law) or are intentional In the case of intentionally false confession the field of motive must be searched for such causes as mental and bodily torture, desire to stifle further inquiry, weariness of life vanity desire to benefit or injure others, and motives originating in the relation of the sexes False confessions are not confined to cases in which there has really been a crime committed
From entire confession one may have a ————

language used and incompleteness of the statement (3)

Admission
defined

17 An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned

Admission
by party to
proceeding
or his agent

18 Statements made by a party to the proceeding, or by an agent to any such party, whom the Court regards, under the circumstances of the case, as expressly or impliedly authorised by him to make them, are admissions

By sutor in
representa-
tive charac-
ter

Statements made by parties to suits, suing or sued in a representative character, are not admissions, unless they were made while the party making them held that character,

Statements made by—

By party
interested
in subject
matter

(1) Persons who have any proprietary or pecuniary interest in the subject matter of the proceeding, and who make the statement in their character of persons so interested, or

By person,
from whom
interest
derived

(2) Persons from whom the parties to the suit have derived their interest in the subject matter of the suit,

are admissions, if they are made during the continuance of the interest of the persons making the statements

Admission
by person
whose posi-
tion must
be proved
as against
party to
suit

19 Statements made by persons whose position or liability it is necessary to prove as against any party to the suit, are admissions, if such statements would be relevant as against such persons in relation to such position or liability in a suit brought by or against them, and if they are made whilst the person making them occupies such position or is subject to such liability.

(1) *R v Shahabul Sheikh* 13 W R.,
Cr 47 43 (1870) per Norman C. J
(2) Best Ev §§ 554—573, Norton,

Fv 155 161
(3) *Id*

Illustration.

A undertakes to collect rents for *B*

B sues *A* for not collecting rent due from *C* to *B*

A denies that rent was due from *C* to *B*

A statement by *C* that he owed *B* rent is an admission, and is a relevant fact as against *A*, if *A* denies that *C* did owe rent to *B*

20 Statements made by persons to whom a party to the suit has expressly referred for information in reference to a matter in dispute are admissions

Admissions by person expressly referred to by party to suit

Illustration

The question is, whether a horse sold by *A* to *B* is sound.

A says to *B*— Go and ask *C*, *C* knows all about it. *C*'s statement is an admission

Principle.—The reception of admissions considered as exceptions to the rule against hearsay is grounded upon the fact that what a person says may be presumed to be true as against himself and when not obnoxious to that rule upon the fact of inconsistency. But the very ground of this presumption excludes such an inference when the declarations of a person are tendered as

When broadly stated in such a manner as to include these exceptions, the rule is that the declarations of a *party to the record*, or of one *identified in interest with him*, are as against such party receivable in evidence (3). This identity of interest which determines the relevancy of the admission includes (a) agency (4), (b) proprietary or pecuniary interest (5), which includes (a) joint interest (6), (b) real as opposed to nominal interest (7), (c) derivative interest (8). Statements by *strangers* are not generally relevant (9). But to this general rule also there are certain exceptions (10). In respect of the admissions of one to the general principle applies *qui facit per* the agent with the principal, tative in a certain transaction, of that transaction is the act of the principal (11). Agency is the ground of reception of declarations by partners and joint contractors and referees (12). In respect of declarations by persons having a *proprietary or pecuniary interest* in the subject matter the rule in respect of *joint* interest is that the admission of one party may be given in evidence against another, when the party against whom the admission is sought to be read has a joint interest with the party thing to which the admission Court where the plea for had asked him before the institution of the suit to arrange a settlement this was held admissible against

(1) Best Ev. § 519 Wills Ev. 103 but see also Taylor Ev. § 723 *ante* Introduction and s. 21 *post*

(2) In re *Hitchley* L. R. 1 Ch. (1891) 558 563 564 *Stanton v Percival* 5 H. L. Cas. 273

(3) Taylor Ev. § 740

(4) Ss. 18, 20 see *post*

(5) S. 18 cl. (1) see *post*

(6) See p. 196 *post*

(7) See *post*

(8) S. 18, cl. (2) see *post*

(9) Steph. Dig. Art. 18 Taylor Ev. § 40 see *post*

(10) Taylor Ev. §§ 749—"65 see *post* and s. 19

(11) Taylor Ev. s. 602 Best Ev. § 531 see *post* As to admissions by agents see the judgment of Sir W. Grant in *Faulstich v Hastings* 10 Vessey J. 123

(12) See *post* and Introduction *ante* (13) In re *Hitchley* L. R. 1 Ch. (1891), s. 563 *Chako Singh v Jharko Singh* 39 C. 595 (1912)

all the defendants (1). This rule depends upon the legal principle that persons seized jointly are seized of the whole, each being seized of the whole the admission of either is the admission of the other and may be produced in evidence against that other. That is applied from real property law to other matters (2). In the case of parties who have a real as opposed to a nominal interest the law in regard to this source of evidence looks chiefly to the real parties in interest, and gives to their admissions the same weight as though they were parties to the record (3). Lastly, in the case of derivative interest the party against whom the admission is sought to be used takes what he claims in the subject matter from the person who made the admission as where it is sought to read against the heir an admission made by the ancestor. The ground upon which admissions bind those in privity with the party making them is (as in the case of the other above mentioned exceptions) that they are identified in interest (4). "He (the person against whom the admission is read) stands in the shoes of the party making the admission. He can only claim what he claims because he derives title in that way, and therefore it is only fair according to legal principles, that he should be bound by the admissions of him through whom he claims" (5).

s. 3 ("Document")

s. 3 ("Fact in issue")

s. 3 ("Relevant fact")

ss. 22, 65, cl. (b) (Admissions as to documents) s. 21 (Proof of admission)

s. 31 (Effect of admissions)

s. 23 (Admissions "without prejudice")

ss. 24-30 (Rules with regard to admissions which do not to confessions)

Admissions generally—Steph Dig. Arts 15—20 Taylor Iv. §§ 723—801, Whart. n. Iv. 1076—120; Rose & N. Iv. 62—70 Chipman Iv. 213—240; Wills, Iv., 2nd Ed., 140—170; Best, Iv., §§ 618 et seq. Iwell Iv. 420—445; Norton, Iv., 142—164; Gresley, Iv., 456; Ellipson & Arn Iv. 308—401 Greenleaf Iv. Ch. VI Wigmore, § 1018, et seq. *By agents*—Steph Dig. Art 17 Taylor Iv. §§ 602 605, Rose, N. Iv. 60—71; Best Iv. § 631 p. 487 Evans Principal and Agent 187—193 2nd Ed.; Norton Iv., 144; *Learned a Law of Agency in British India* 40—428; Iwell Iv. 290; *Story on Agency*, §§ 174, 135; Rose Cr. Iv. 13th Ed. 47 Wigmore Iv. § 1078. *By persons having proprietary or pecuniary interest*—Steph Dig. Art 16 17; Taylor, Iv. §§ 745—754 787, 766—778; Rose & N. Iv., 67; Act Iv. of 1904 (Limitation) s. 21. *By persons from whom interest is derived*—Steph Dig. Art 16 Taylor Iv., §§ 787—794 759 90. *By stranger*—Steph Dig. Art. 18; Taylor Iv., §§ 740, 750—765. *By referees*—Steph Dig. Art 19; Taylor Iv., §§ 760—765.

COMMENTARY.

As to admissions by parties (when sued or suing personally) made when a minor, or when holding a representative character *ante* p. 220 and as to nominal parties, guardians and next friends, *post*, admissions may be made by parties at any time (6), and either in a present or past (7) litigation. It is not

(1) *Mrajan Mathar v Almulda Mia* 44 C. 130 (1917) per Sankey & C. J. & Mookerjee J.

(2) In *re Whiteley* per Kekewich J. The declarations of partners and joint contractors are admissible both on the ground of joint interest and of agency Taylor Iv. §§ 598 743 Steph. Dig. Art 17 see *post*.

(3) Taylor Iv. § 756 see *post*.

(4) *Id.* § 787.

(5) In *re Whiteley* L. R. 1 Ch. (1871) 558 561 per Kekewich J.

(6) Unless the admission is one made by a person suing or sued in a representative character in which case it must be made whilst the person making it sustains that character s. 18 *ante* and see Steph Dig. Art 16 *ante* Introduction.

(7) *Hurish Chunder v Irosmann* Commr. 22 W. R. 303 (1874) *Odhav Chund v Deefoy Gobind* 9 W. R. 162 (1879) *Sheo Yuen v Kam Ahelan* 14 W. R., 165 (1870) *Crish Chunder v Shana Churn* 15 W. R. 417 (1871) *Bhugnan Chunder v Mechoo Tall* 17 W.

necessary that the prior litigation should have been between the same parties and in this respect a distinction must be drawn between statements admissible under the present sections, and those admissible under the thirty third section, *post*. And so it was held that the deposition of a person in a suit to which he was not a party, was, in a subsequent suit in which he was defendant, evidence against him and those who claimed under or purchased from him although he was alive and had not been called as a witness. The thirty third section (*post*) did not apply to such a deposition which was admissible under the present section although it might have been shown that the facts were different from what they were stated to be in the former case (1). And an admission by a *jagirdar*, in a suit brought by Government to assess the lands, that the lands were comprised in a *zemindari*, is evidence of that fact in a suit by the *zemindar* to resume those lands (2). Admissions by the parties in a former arbitration may be used in evidence in a subsequent suit (3). The section settles a point which appears to be (4). Therefore, where parties sue or are sued in a assignees of an insolvent (5), executors, administrators, statements made by them before they were clothed with that character will not be admissible against them so as to affect the interest of the persons they represent (6). Thus the declarations of a party suing as assignee of a bankrupt

The admissions
of the donor (8)
admission by parties
of the deceased (9)

The representative capacity of a person who represents a minor comes to an end by the death of that minor (10). In respect of co-representatives it seems that the admission of one executor will not bind another, at any rate, if the admission was not made in the character of executor (11). The admissions of an executor are not receivable against an administrator appointed during the absence of the executor (12). Where one of several trustees had admitted that he had money of the trust estate in his hands, and it was submitted that this admission of one of them bound the rest, it was held that it would, if they were all personally liable, but not where they were only trustees (13). Under the

R 372 (1872) *Kashee Kishore v Bama Soondaree* 23 W R 27 (1875) *Forbes v Mir Mahomed Taki* 5 B L R 529 (1870) 14 W R (P C) 28 13 M I A 438 see also cases cited ante p 221. In a suit by A and B parties not entitled to the property of a deceased Hindu as his heirs against C and D an admission by the person legally entitled to the property made in a petition filed in the suit that by her gift or relinquishment plaintiffs had a title to the property was held to be evidence that such title existed anterior or to the commencement of the suit (*our Lall v Molesh Naran* 14 W R 484 (1871)).

(1) *Soojan Bibee v Achmut Ali*, 14 B I R App 3 (1874) 21 W R 414.
(2) *Forbes v Mir Mahomed Taki* supra.
(3) *Hurenath v Preonath* 7 W R 249 (1867) and admissions made before an arbitrator are receivable in a subsequent trial of the cause the reference having proved ineffectual (*Gregory v Howard* 3 Esp., 113 *Slack v Buchanan* Pea P., 5).
(4) *Taylor Ev*, § 755 *Steph Dig*,

(5) Merely to speak of the "plaintiff assignee" is not an admission of the plaintiff's title as assignee *Clarke v Mullick* 2 M I A 263 269 (1839).

(6) S 18 ante *Legge v Edmunds* 25 L J Ch 125 140 141.

(7) *Fenwick v Thornton* 1 M & M., 51 see *Taylor Ev*, § 755.

(8) *Dwarkanath Bose v Chundec Churn* 1 W R 339 (1865).

(9) *Chunder Kant v Ramnaram Dey* 8 W R 63 (1867).

(10) *Hulodhur Roy v Jufoo Nath* 14 W R 162 (1870).

(11) *Chunder Kant v Dey* 8 W R 63 (1867), and see *Clark v Dunn Ry & M.*, 416, *Sc* 12 M & W 513 54, *Far* 12 A & E., 43 *Taylor Ev* of 1908 s 21 (*Indian Williams on Executors*).

(12) *Rush v Pea*

(13) *Davis v R*

Skaife v Jac
it is also
is not

eighteenth and twenty-first sections the admissions of a person accused in criminal proceedings will be receivable. But in England it appears to be doubtful whether in any case a prosecutor in an indictment is a party to the inquiry in such a sense as that an admission by him could be received in evidence to prove facts for the defence. Of course this does not refer to the admission of facts which would go to his reputation for credibility as a witness in the case, these may always and under all circumstances be proved by the admission of the witness himself (1).

Co-defendants

can only be given in evidence against other party (2). An admission or even oral defendants in a suit, is no evidence fundamental proposition that a plaintiff and that no defendant can, by an ad delegate the authority to one, for more than his own share in property (4). In general, the statement of defence made by one defendant cannot be read in evidence, either for or against his co-defendant: neither can the answers to interrogatories of one defendant be read in evidence, except against himself, the reason being that, as there is no issue between the defendants, no opportunity can have been afforded for cross examination, and moreover, if such a course were allowed, the plaintiff might make one of his friends a defendant and thus gain a most unfair advantage. But this rule does not apply to cases where the other defendant claims through the party whose defence is offered in evidence nor to cases where they have a joint interest, either as partners or otherwise in the transaction. Wherever the admission of one party would be good evidence against another party, the defence of the former may *a fortiori* be read against the latter (5). Similarly, the admissions or confessions of a respondent are not admissible evidence against a co-respondent (6) nor *a fortiori* against the petitioner (7). Nor are those of parties engaged in a joint tort, or joint crime, receivable against each other, except to the limited extent, and under the circumstances, in the tenth section (*ante*), mentioned.

Agents

He who sets another person to do an act in his stead as agent is chargeable by such acts as are done under that authority and so too properly is affected

acknowledgment that the money has been paid]. But a receipt may operate as a waiver. *Kailas Chandra Nath v. Sheikh Chhenu* 42 C 546 (1915).

(1) *Roscoe Cr. Ev.* 12th Ed. 47. see *R v. Arroll* 8 Cox 439 and note in 3 Russ Cr. 489. As to whether the admissions of an accused may be used for purely probative purposes that is to relieve the prosecutor of the proof of facts essential to his case see *R v. Flaherty* 2 C & K 782 which was a bigamy case: it was held that an admission of the first marriage by the prisoner made to a constable was some though not sufficient evidence of the marriage and in *R v. Savage* 13 Cox 178 a similar case (overruling *R v. Newton* 2 W & Rob 503) an admission by the prisoner was tendered to prove the first marriage but was rejected. *ante* Introduction. As to admission for the purpose of the trial see s. 58 *post*.

(2) *In re Whiteley* L R 1 Ch (1891) 558.

(3) *Amritlal Bose v. Rajonchikant Mitter* 15 B L R 10 26 (1874), 23 W

R 214 2 I A 113 *Niamutoollah Khadim v. Himmat Ali* 22 W R 519 (1874) *Lachman Singh v. Tansukh* 6 A 325 (1884) *Aszullah Khan v. Ahmad Ali* 7 A 353 (1858) *Kali Dutt v. Abdul Ali* 16 C 627 635 (1888) *Taylor Ev.* § 754 *Narain Dass v. Nurroohurry Mohunto Marshall* 70 (1862) See Article in 1 A L J 233n.

(4) *Aszullah Khan v. Ahmad Ali* *supra* (5) *Taylor Ev.* § 754 and cases there cited but as to cross examination by defendant of co-defendant see s. 137 *post*, as to admissions by co-defendants who are joint tenants or joint contractors see *Chundereshwar Narain v. Chuni Ahir* 9 C L R 359 (1881) *Kousuliah Sundari v. Mukta Sundari* 11 C 588 (1855) and *post*.

(6) *Robinson v. Robinson* 1 S & T 363 see also *Hay v. Gordon* 10 B L R 20 207 208 (1872) as to the effect of of

by admissions made by the agent in the course of exercising that authority. The question, therefore, turns upon the scope of the authority. This question frequently enough a difficult one, depends upon the doctrine of agency applied to the circumstances of the case and not upon any rule of evidence (1). The principle upon which admissions of an agent, within the scope of his authority, are permitted to be proved is that such admissions, as well as his acts, are considered as the acts or admissions of the principal. What is said or done by an agent is said or done by the principal through him, as his mere instrument (2). A statement, therefore by an agent, whom the Court regards under the circumstances of the case as expressly or impliedly authorized to make it, is admissible though not on oath (3).

Before the admissions of an agent can be received the fact of his agency must be proved. This can be done by proving that the agent has acquired credit by acting in that capacity and that he has been recognised by the principal in other instances of a similar character to that in question (4). A person either may expressly constitute another his agent to make an admission thus if a person agree to admit a claim provided *J S* will make an affidavit in support of it, such affidavit is proof against him (5) or he may authorize another to represent him in a particular business when admissions made by that other within the scope of his authority in the ordinary course of and with reference to, such business will be evidence against him. When the principal constitutes the agent as his representative in the transaction of certain business whatever the agent does in the lawful prosecution of that business is the act of the principal (6). Where the acts of the agent will bind the principal then his representations, declarations and admissions, respecting the subject matter will also bind him, if made at the same time and constituting part of the *res gestæ* (7). The admission must be one having reference to the subject-matter of the agency (8). So whatever is said by an agent, either in the making of a contract for his principal, or at the time and accompanying the performance of any act, within the scope of his authority having relation to and connected with and in the course of the particular contract or transaction in which he is then engaged is, in legal effect, said by his principal and admissible in evidence (9). "The representation, declaration, or

(1) Wigmore Ev. § 1078

(2) *Franklin Bank v Pennsylvania D & M S N Co* 11 G & J 28 33 (Amer.)

(3) *Gorindji Jhatar v Chotalal Velsi* 2 Bom L R 651 (1900)

(4) *Roscoe N P Ev. 71*, *Evans's Principal and Agent* 192 *Watkins v Vince* 2 Stark 368 *Courteen v Touse* 1 Camp 43n *Neal v Erving* 1 Esp 61. See also to proof of agency *Ram Buks v Kishori Mohun* 3 B L R A C J 273 (1869)

(5) *Lloyd v Ballan* 1 Esp 178, *Stevens v Thacker*, Peake 187 *Roscoe N P Ev. 69*, see s. 20 *ante* and note on "Referees"

(6) *Taylor Ev. § 602* and see generally ib. §§ 602—605 *Wills Ev. 2nd Ed. 161*, *Steph Dig Art 17* *Roscoe v P Ev. 69—71* *Powell Ev. 290* *Pearson v Law of Agency in British India* 476—428, *Evans's Principal and Agent* 187—193 *Best, Ev. p. 487* *Norton Ev. 144* as to the acts contracts and representations of the agent which are original evidence and receivable for as well as against his principal v. *ante* Introduction

(7) *Story on Agency* § 134 "*res gestæ*" here means the business regarding which the law identifies the principal and agent and must not be taken to import that the declarations must form a part of the *res gestæ* in the evidentiary sense of that term it has been said that the declarations of an agent are not receivable as to bygone transactions see *Evans supra* 189 citing *Great Western Railway Company v Halls* 18 C & B N 748 *Fairlie v Hastings* 10 Ves 128, *Kahl v Jansen* 4 Taunt 565, see also *Pearson supra* 427 but this is misleading for so long as the representations are made concerning the principal's business and in the ordinary course of it it is immaterial if they relate to past or present events *Phipson Ev. 5th Ed. 232* citing *Prof Thayer in the Irish Law Times*, Feb 19 1901

(8) *Sie P supra* and cases there cited

(9) *Per n C J in Franklin Bank v D & M S N Co*, 11 33 (Amer.), Ev. § 1

admission of the agent does not bind the principal, if it is not made at the very time of the contract, but upon another occasion, or if it does not concern the subject matter of the contract but some other matter, in no degree belonging to the *res gestæ*"(1) It does not follow that a statement made by an agent is an admission merely because, if made by the principal himself, it would have been one, for the admission of an agent cannot always be assimilated to the admission of the principal (2) "The party's own admission, whenever made, may be given in evidence against him, but the admission or declaration of his agent"

opus When the agent's right the principal can no longer be affected by his declarations any more than by his acts, but they will be rejected in such case as mere hearsay"(3) Therefore admissions by an agent of his own authority and not accompanying the making of a contract or the doing of an act on behalf of his principal, nor made at the time he is engaged in the transaction to which they refer, are not binding upon his principal, not being part of the *res gestæ*, and are not admissible in evidence, but come within the rule excluding hearsay, being but an account or statement by an agent of what has passed or been done or omitted to be done—not a part of the transaction, but only statements or admissions respecting it (4) The words of the eighteenth section (*ante*) "*whom the Court regards under the circumstances of the case as expressly or impliedly authorised by him to make them,*" leave it open to the Courts to deal with each case that arises upon its own merits(5), having regard to the law of agency applicable and the particular facts of each case But it is apprehended that the Courts will, in

down by the
ons are receiv-
hem (7) As an
or admissions
they fall within

the nature of his employment as such agent (8) Account books, though proved not to have been regularly kept in the course of business, but proved to have been kept on behalf of a firm of contractors by its servant or agent appointed for that purpose, are relevant as admissions against the firm The fact, however, that the books had not been regularly kept might be a good reason for

(1) Story on Agency § 135

(2) Steph Dig Art 17 Taylor Ev, § 602

(3) Taylor, Ev *ib*, and cases there cited the authority to make admissions is at once put an end to by the determination of the agency whether or no such determination has been properly brought about *Kalee Churn v Bengal Coal Co* 21 W R 405

(4) *Franklin Bank v Pennsylvania* supra narratives of explaining or admitting a past act are not admissible even though the agency continue unless the agent be empowered to speak for his principal at the time *Wharton Cr Ev* p 594m For instance an agent might be specially sent to make a statement on behalf of his principal as to what had occurred

(5) Field, Ev 6th Ed 87, 88 "The point to be regarded in this clause is not only the establishment of an agency as to which the Court must be satisfied but that there was authority given sufficient to cover the particular statement relied

on as admissions Norton Ev 144

(6) *v post* remarks of Tindal, C. J., in *Garth v Howard* 8 Bing 451

(7) Taylor Ev § 602 Evans supra 188 189 if the statements of the agent are admissible the statements of the agent's interpreter acting as such in the agent's presence are admissible without calling the interpreter and it must be assumed as against the principal that the interpreter interpreted faithfully *Reid v Hoskins* 26 L J Q B 5 S E & B 729, admissions which consist of hearsay evidence are not receivable against the principal *Kahl v Jansen* 4 Taunt 565

(8) *Garth v Howard* 8 Bing, 451, see *Venkataramanna v Chavela Atchayamma* 6 Mad H C R 127 (1871) as illustrations of the admission and rejection of statements upon this principle see *The Kirkstall Brewery Company v The Furness Railway Company* L R, 9 Q B, 463, 43 L J Q B, 142, *Garth v Howard*, supra

rejecting the account, if offered in evidence against any person other than the contractor or his partners (1) It is of course open to the contractor or any of his partners to show that the entries have been made after such a fashion that no reliance can be placed upon them, but if made by a clerk of the firm, they are relevant (2) An agent's reports to his principal are not, in general, receivable against the latter in favour of third persons, as admissions (3) Thus letters account of the the principal (4) ers of the latter

were held admissions as explanatory of the statements of the former (5) As the declarations of an agent are admissible on the ground of the legal identity of the agent with the principal the declarations and acts of an agent cannot bind an infant, because the latter cannot appoint an agent (6) Evidence may be given against companies, of admissions made by their directors or agents relating to matters within the scope of their authority (7) Thus a letter written by the secretary of a company by order of the acting directors (8), stating the number of shares held by M, was admitted on behalf of his executors in proceedings against them (9) But the confidential reports of directors to a meeting of the shareholders (10), admissions at a board meeting of less than the requisite number of members (11) have been held not to be receivable The manager of a banking company may make admissions against the bank as to its practice, in making loans to customers (12) As to admissions by servant of companies see cases noted below (13) The admissions of a surveyor of a corporation, respecting a house belonging to the corporation, are evidence against the latter in an action for an injury to the plaintiff's house by work done on the defendant's premises (14), but the report of a surveyor to the corporation as to the value of lands about to be purchased by it, is not evidence, either of the truth of the facts or to explain the resolutions or letters of the corporation as to the

receipt of shop goods) of a shopman are evidence against his master but not his admissions as to a transaction outside the usual business (17) An admission by a person who has generally managed A's landed property and received

(1) *R v Hanmanta* 1 B 610 617 (1877) See s 34 post and notes thereon

(2) *Ib*

(3) *Steph Dig Art 17 Langhorn v Allnutt* 4 Taunt 511 *Re De ala Co L R* 22 Ch D 593 *Cooper v Metropolitan Board of Works* 25 Ch D 472 *Kahl v Jansen* 4 Taunt 565 *Rayner v Pearson* ib 662 *Belham v Benson* Gow 45 *Fairlie v Hastings* 10 Ves 123 though see contra *Solway* 10 P D 137 see *Phipson* Ex 5th Ed 233 *Roscoe N P Ex* 70 *Evans supra* 190

(4) *Langhorn v Allnutt supra*

(5) *Coates v Bainbridge* 5 Bing 58

(6) *Taylor, F v* § 605 and v ante Introduction

(7) *Roscoe N P Ex* 70 *Lindley Company* 1vw 181

(8) But unless acting under the express order of the directors the secretary of a company cannot make admissions against the company even as to the receipt of a letter *Bruff v Great N Ry Co*, 1 F & F 345, see also *Burnside v Dayrell*, 3 Exch 225, *Roscoe N P Ex*, 70, 71

(9) *Meux Executor's case* 2 D M & G 522

(10) *Re Detala Co* 22 Ch D 593 v ante

(11) *Ridley v Plymouth Baking Co* 2 Exch 711

(12) *Simmons v London Joint Stock Bank* (1892) A C 701

(13) *Kirkstall Brewery Co v Furness Ry Co* L R 9 Q B 468 *Gr H Ry Co v Willis* 18 C B N S 748 *Mayhew v Nelson* 6 C & P 58 *Stiles v Cardiff S Navigation Co* 33 L J Q B 310 *Agassiz v London Tram Co* 27 L T 492

(14) *Paxton v St Thomas Hospital* 3 M & Ry 675n

(15) *Cooper v Met Board of Works* 25 Ch D 5472 *supra* v ante

(16) *Loughboro Highway Board v Curzon* 55 L T., 50

(17) *Garth v Howard* 8 Bing. 451, *Schwack v Lock* 10 B, Moo., 39, and see *Clifford v Burton* 1 Bing., 199, *Meredith v Footner*, *supra* *Roscoe N P Ex*, 70 72

admission of the agent does not bind the principal, if it is not made at the very time of the contract, but upon another occasion, or if it does not concern the subject matter of the contract but some other matter, in no degree belonging to the *res gestæ*"(1) It does not follow that a statement made by an agent is an admission merely because if made by the principal himself, it would have been one, for the admission of an agent cannot always be assimilated to the admission of the principal (2) "The party's own admission, whenever made, may be given in evidence against him, but the admission or declaration of his agent binds him only when it is made during the continuance of the particular matter has ceased, then depending, *et dum ferretur* the principal's declarations any more than by his acts, but they will be rejected in such case as mere hearsay"(3) Therefore admissions by an agent of his own authority and not accompanying the principal, nor made refer, are not binding are not admissible in being but an account or statement by an agent of what has passed or been done or omitted to be done—not a part of the transaction but only statements or admissions respecting it (4) The words of the eighteenth section (*ante*) "*whom the Court regards under the circumstances of the case as expressly or impliedly authorised by him to make them,*" leave it open to the Courts to deal with each case that arises upon its own merits (5), having regard to the law of agency applicable and the particular facts of each case But it is apprehended that the Courts will, in the application of this section, be guided by the principles laid down by the English and American cases and text writers (6) The admissions are receivable in evidence without calling the agent himself to prove them (7) As an agent can only act within the scope of his authority, declarations or admissions made by him as to a particular fact are not admissible unless they fall within the nature of his employment as such agent (8) Account books though proved not to have been regularly kept in the course of business but proved to have been kept on behalf of a firm of contractors by its servant or agent appointed for that purpose, are relevant as admissions against the firm The fact, however, that the books had not been regularly kept might be a good reason for

(1) Story on Agency § 135

(2) Steph Dig Art 17 Taylor Ev § 602

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(1) *R v Hanman* 1 B 610 617 (1877) See s 34 post and not s thereto

(2) *Id*

(3) *Steph Dig Art 17 Langhorn v Allnutt* 4 Taunt 511 *Re Detala Co* L R 22 Ch D 593 *Cooper v Metropolitan Board of Works* 25 Ch D 472 *Kahl v Jansen* 4 Taunt 565 *Rayner v Pearson* 1b 662 *Betham v Benson* Gow 45 *Fairlie v Hastings* 10 Ves 123 though see contra *Soltay* 10 P D 137 see *Phipson* Ev 5th Ed 233 *Roscoe N P Ev* 70 *Evans supra* 190

(4) *Langhorn v Allnutt supra*

(5) *Coates v Bainbridge* 5 Bing 58

(6) *Taylor* Ev § 605 and v ante Introduction

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(9) *Meux Executor's case* 2 D M & G 522

(10) *Re Detala Co* 22 Ch D 593 v ante

(11) *Ridley v Plymouth Baking Co* 2 Exch 711

(12) *Simmons v London Joint Stock Bank* (1892) A C 201

(13) *Kirkstall Brewery Co v Furness R Co* L R 9 Q B 468 *Gr Ry Co v Mills* 18 C B N S 748 *Mayhew v Nelson* 6 C & P 58 *Silks v Cardiff S Navigation Co* 33 L J Q B 310 *Agassiz v London Tram Co* 27 L T 492

(14) *Paxton v St Thomas Hospital* 3 M & Ry 625n

(15) *Cooper v Met Board of Works* 25 Ch D 5 472 supra v ante

(16) *Loughboro' Highway Board v Curzon* 35 L T 50

(17) *Garth v Howard* 8 Bing 451, *Schumack v Lock* 10 B, Moo., 39, and see *Clifford v Burton* 1 Bing 199, *Meredith v Footner*, supra, *Roscoe N P Ev*, 70, 72

his rents, is not evidence against *A*, as to his employer's title, there being no other proof of his agency *ad hoc* (1) As to admissions made by partners and joint contractors, *v post*

The manager of a joint Hindu family, or *karta*, is the agent for the other members, and is supposed to have their authority to do all acts for their com-
 1 in the absence
 the family (3)
 1 if the parties
 sung were minors during the period for which the accounts are asked (4) In respect of the admission of debts he may acknowledge, as he may create, debts on behalf of the family, but he has no power to revive a claim barred by limitation unless expressly authorised to do so (5)

The admissions of a wife merely as such cannot affect her husband They will only bind him where she had expressed or implied authority from him to make them Whether she had such authority or not, is a question of fact to be found by the Court, as in the other cases of agency The cases on this subject are mostly those of implied authority, turning upon the degree in which the husband permitted the wife to participate either in the transaction of his affairs in general, or in the particular matter in question (6)

It has been already observed (7) that certain rules of admissibility are applicable in criminal cases only, but this is because the issues arise in criminal cases only, but in general the rules of admissibility are the same for the trial of civil and criminal causes Conformably to this general doctrine the admissions of an agent may be equally received in a criminal charge against the principal But it is a totally different question in the consideration of criminal as distinguished from civil justice how the person on trial may be affected by the fact when so established It might involve him civilly and yet be not sufficient to convict him of a crime Whether the fact thus admitted by the agent would suffice to charge the principal criminally without his personal knowledge or

Admissions
by agents
in criminal
cases

(1) *Ley v Peter* 3 H & N 101 27 L J Ex 239 and generally as to admissions see *Roscoe N P Ev* 62 *et seq* as to admissions by ships officers see *Phipson Fv* 5th Ed 238

(2) *Kota Ramasami v Bangari Seshama* 3 M 145 150 (1881) in which case it is also pointed out that the position of a Polygar differs from that of a manager of a Hindu family see also as to the *karta* and his relations to adult and minor members *Chunckun Lall v Poran Chunder* 9 W R 483 (1868) *Obhoy Chunder v Pearce Mohun* 1 W R F B 75 (1870) *Gopalnarain v Uddomutti* 14 B L R 21 32 (1874) [Silence evidence of ratification of acts of *karta*] *Succaram Morari v Kalidas Kaliaji* 18 B 631 (1894) [widow manager] *Chakaji Shridhar v Vishnu Babaji* ib 534 (1893) [The manager must be allowed a reasonable latitude in the exercise of his powers]

(3) *Jagan Nath v Mannu Lall* 16 A 231 233 (1894)

(4) *Obhoy Chunder v Pearce Mohun* supra

(5) *Chinnaya Najudu v Gurunagham* 5 M 169 T B (1881) [overruling *Kumara Sami v Pala Nagappa* 1 M 385

(1878) *Kondappa v Subba* 13 M 189 (1889) *Bhasher Taiya v Vijalal Nathu* 17 B 512 (1892) *Gopalnarain v Moddomutti* 14 B L R 21 49 (1874) followed in *Dinkar v Appaji* 20 B 155 (1894) The manager of a joint Hindu family or the executor of a Hindu will has no power by acknowledgment to revive a debt barred by law of limitation except as against himself] *Shobanadri Appa v Sriraniulu* 17 M 221 (1893)

(6) See generally *Taylor Ev*, §§ 766—771 *Roscoe N P Ev* 22 *Powell Ev* 299 see judgment of Alderson B. in *Meredith v Footner* 11 M & W, 202 as to wife carrying on business see *Taylor Ev* § 605 and as to admissions in matrimonial causes which differ in some respects from ordinary *nisi prius* causes in so far as in the former the interests of public morality are concerned *Pinner v Pinner* 4 S & T 263 ib 768 769

(7) And see *Wigmore Ev* § 4 where the learned author observes that this is the more worth emphasizing because the occasional appearance in works on the law of the title Criminal Evidence has tendered to foster the fallacy that there are some separate groups of rules or some large number of modifications

connivance would depend upon the particular rule of criminal law and not of evidence involved (1) Thus it has been said that —“An admission by an agent is never evidence in criminal, as it is sometimes in civil cases, in the sense in which an admission by a party himself is evidence. An admission by the party himself is in all cases the best evidence which can be produced, and supersedes the necessity for all further proof, and in civil cases the rule is carried still further, for the admission of an agent made in the course of his employment, and in accordance with his duty, is as binding upon the principal as an admission made by himself. But this has never been extended to criminal cases. Thus, in order to make a client criminally responsible for a letter written by his solicitor, it is not sufficient to show that such letter was written in consequence of an interview, but it must be shown that it was written in pursuance of instructions of the client (2) Where personal knowledge and authority are shown the admissions will be receivable. Hence the declarations of a messenger sent to a third party by the prisoner, if made with reference to the object of the mission, are admissible in evidence against him, where the evidence shows they were made by his authority (3) If in other cases the evidence is not admitted it is because in those cases the criminal law requires evidence of personal knowledge and authority of and in respect of the particular act charged before criminal liability can be established. This, however, is a matter of substantive law which may admit of real or apparent exceptions, as in the case of a newspaper proprietor who is *prima facie* criminally responsible for any libel it contains, though inserted by his agent or servant without his knowledge (4) Where a party is charged with the commission of an offence through the instrumentality of an agent, then it becomes necessary to prove the acts of the agent, and in some cases, as where the agent is dead, the agent's admission is the best evidence of those acts which can be produced. Thus on the impeachment of Lord Melville by the House of Lords (5), it was decided that a receipt given in the regular and official form by Mr. Douglas who was proved to have been appointed by Lord Melville to be his attorney to transact the business of his office as treasurer of the Navy, and to receive all necessary sums of money in the ordinary course of business” (6)

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a person
a certain

A vakil in this country has not ordinarily any greater power to bind his client than that which is possessed by an attorney in England (7) An attorney employed in a matter of business is not an agent to make admissions for his client, except after action commenced, and in matters relating to that action (8) An admission made before action will, however, of course, affect the client if

Pleaders
Solicitors
Counsel

(1) Wigmore Ev § 1078
(2) *R v Dorrner*, 14 Cox C C 486
(3) *Brorning v State* 33 Miss 48
(4) *Amer v Wharton* Cr Ev § 1078

(5) *Wharton* Cr Ev p 595 Lord Tenterden however considered this case as falling within the general rule. It has been argued generally that to impute the agent's act to the principal criminal design must be brought home to the latter see *Cooper v Glad* 6 H L C 746

(6) 29 How St Tr 746 *ante*

(7) *Roscoe* Cr Ev 12th Ed 46, 47 In which the following criticism on this case is made: Had however Mr Douglas been alive at the time there can be no doubt that he must have been called and that he might have been called to prove

the receipt of the money would probably not have been questioned. This case does not therefore as sometimes appears to have been thought in any way touch upon the rules that the admission of an agent does not bind his principal in criminal cases but merely shows that where the acts of the agent have to be proved those acts may be proved in the usual way

(8) *Prem Sooth v Furthce Ram*, 2 Agra Rep 2 (186) See Pearson's Law of Agents in British India pp 16 157 and 241 Sukhtankar pp 17 114

(9) *Wasson v Watson* 4 B & Ad 111 112 113 114 115 116 117 118 119 120 121 122 123 124 125 126 127 128 129 130 131 132 133 134 135 136 137 138 139 140 141 142 143 144 145 146 147 148 149 150 151 152 153 154 155 156 157 158 159 160 161 162 163 164 165 166 167 168 169 170 171 172 173 174 175 176 177 178 179 180 181 182 183 184 185 186 187 188 189 190 191 192 193 194 195 196 197 198 199 200 201 202 203 204 205 206 207 208 209 210 211 212 213 214 215 216 217 218 219 220 221 222 223 224 225 226 227 228 229 230 231 232 233 234 235 236 237 238 239 240 241 242 243 244 245 246 247 248 249 250 251 252 253 254 255 256 257 258 259 260 261 262 263 264 265 266 267 268 269 270 271 272 273 274 275 276 277 278 279 280 281 282 283 284 285 286 287 288 289 290 291 292 293 294 295 296 297 298 299 300 301 302 303 304 305 306 307 308 309 310 311 312 313 314 315 316 317 318 319 320 321 322 323 324 325 326 327 328 329 330 331 332 333 334 335 336 337 338 339 340 341 342 343 344 345 346 347 348 349 350 351 352 353 354 355 356 357 358 359 360 361 362 363 364 365 366 367 368 369 370 371 372 373 374 375 376 377 378 379 380 381 382 383 384 385 386 387 388 389 390 391 392 393 394 395 396 397 398 399 400 401 402 403 404 405 406 407 408 409 410 411 412 413 414 415 416 417 418 419 420 421 422 423 424 425 426 427 428 429 430 431 432 433 434 435 436 437 438 439 440 441 442 443 444 445 446 447 448 449 450 451 452 453 454 455 456 457 458 459 460 461 462 463 464 465 466 467 468 469 470 471 472 473 474 475 476 477 478 479 480 481 482 483 484 485 486 487 488 489 490 491 492 493 494 495 496 497 498 499 500 501 502 503 504 505 506 507 508 509 510 511 512 513 514 515 516 517 518 519 520 521 522 523 524 525 526 527 528 529 530 531 532 533 534 535 536 537 538 539 540 541 542 543 544 545 546 547 548 549 550 551 552 553 554 555 556 557 558 559 560 561 562 563 564 565 566 567 568 569 570 571 572 573 574 575 576 577 578 579 580 581 582 583 584 585 586 587 588 589 590 591 592 593 594 595 596 597 598 599 600 601 602 603 604 605 606 607 608 609 610 611 612 613 614 615 616 617 618 619 620 621 622 623 624 625 626 627 628 629 630 631 632 633 634 635 636 637 638 639 640 641 642 643 644 645 646 647 648 649 650 651 652 653 654 655 656 657 658 659 660 661 662 663 664 665 666 667 668 669 670 671 672 673 674 675 676 677 678 679 680 681 682 683 684 685 686 687 688 689 690 691 692 693 694 695 696 697 698 699 700 701 702 703 704 705 706 707 708 709 710 711 712 713 714 715 716 717 718 719 720 721 722 723 724 725 726 727 728 729 730 731 732 733 734 735 736 737 738 739 740 741 742 743 744 745 746 747 748 749 750 751 752 753 754 755 756 757 758 759 760 761 762 763 764 765 766 767 768 769 770 771 772 773 774 775 776 777 778 779 780 781 782 783 784 785 786 787 788 789 790 791 792 793 794 795 796 797 798 799 800 801 802 803 804 805 806 807 808 809 810 811 812 813 814 815 816 817 818 819 820 821 822 823 824 825 826 827 828 829 830 831 832 833 834 835 836 837 838 839 840 841 842 843 844 845 846 847 848 849 850 851 852 853 854 855 856 857 858 859 860 861 862 863 864 865 866 867 868 869 870 871 872 873 874 875 876 877 878 879 880 881 882 883 884 885 886 887 888 889 890 891 892 893 894 895 896 897 898 899 900 901 902 903 904 905 906 907 908 909 910 911 912 913 914 915 916 917 918 919 920 921 922 923 924 925 926 927 928 929 930 931 932 933 934 935 936 937 938 939 940 941 942 943 944 945 946 947 948 949 950 951 952 953 954 955 956 957 958 959 960 961 962 963 964 965 966 967 968 969 970 971 972 973 974 975 976 977 978 979 980 981 982 983 984 985 986 987 988 989 990 991 992 993 994 995 996 997 998 999 1000

proof be given that he authorised the communication (1) A pleader or solicitor has in civil cases implied authority to make admissions of fact against his client during the actual progress of litigation, and the client is affected by admissions of fact made by them. But a plaintiff is not bound by an admission of a point of law, nor precluded from asserting the contrary in order to obtain the relief to which, upon a true construction of the law he may appear to be entitled (2) Nor is an opinion expressed by a *vakil* in the course of argument adversely to a claim which he undertook to advocate binding on his client when it is not in accordance with the law applicable to the case, and it is clearly not binding on the other contending defendant (3) These admissions of fact during litigation may be made either incidentally in reference to matters connected with the action and without any view to obviate necessity of proof admissions in such cases may be made in Court, or in chambers, or by documents or correspondence connected with the proceedings, and when made amount only to *prima facie* evidence (4) thus an undertaking (which is a step in the cause) to appear for A and B "joint owners of the sloop X," by the solicitor who afterwards appears for them is *prima facie* evidence of the joint ownership of A and B (5), so in an action on a bill, a notice, served by the defendant's solicitor, to produce "all documents relating to the bill which was accepted by the said defendant, is *prima facie* evidence of the acceptance (6) This class of admissions which are made, not indeed with the express intent of dispensing with proof of certain facts, but as it were incidentally, is generally the result of carelessness and though not regarded as conclusive admissions, is still considered, not unfrequently, as raising an inference respecting the existence of facts, which the adversary would otherwise have been called upon to prove (7) Admissions, however, made by solicitor during litigation the solicitor's admissions made for use on a the two trials, admissions (9) admissible Admissions made on the receivable

(1) See foot note 8 p 237

(2) *Jotendra Mohun v Ganendra Mohun* 18 W R 359 367 (1872) *Musst Achyoo v Lallah Ranchandra* 23 W R 400 401 (1875) See as to admissions by legal practitioners cases cited under s 58 *post* Field Ev 30 31 Phipson Ev 5th Ed 10 234 235 Taylor Ev §§ 772-774 Steph Dig Art 17—Barristers and solicitors are the agents of their clients for the purpose of making admissions whilst engaged in the actual management of the cause either in Court or in correspondence relating thereto but statements made by a barrister or solicitor on other occasions are not admissions merely because they would be admissions if made by the client himself

(3) *Krishnasami v Rajagopala* 18 M 73 83 (1895)

(4) Cordery 82 Phipson Ev 5th Ed 234 235 Taylor Ev § 773 In criminal cases a solicitor has no implied authority

as in civil cases to affect his client by admissions of fact incidentally made *R v Downer* 14 Cox 486 *v ante* see s 58 *post*

(5) *Marshall v Cliff* 4 Camp 133

(6) *Holt v Squire* Ry & M 282, Taylor Ev § 773

(7) Taylor Ev § 773

(8) *Petch v Lyon* 9 Q B 147, Taylor Ev § 774 Cordery 82 83 and cases there cited

(9) *Doe v Bird* 7 C & P 6 but see also *Elton v Larkins* 5 C & P 385 386

(10) *Omabutte v Parushnath* 15 W R, 135 (1871) but see *Blackstone v Wilson* 26 L J Ex 229 and remarks in Pearson's Law of Agency in British India p 428 and see *Doe v Ross* 7 M & W, 102 122

(11) *Standage v Creighton* 5 C. & P 406 Taylor v Hill 12 B & Ad 845 856 Taylor Ev § 774

as those of the solicitor, not only against the client(1), but against the solicitor in favour of the client (2) Admissions by *counsel* stand upon similar though a narrower footing A solicitor, admitted to prosecute or defend, represents his client throughout the cause, but a counsel represents his client only when speaking for him in Court (3) Therefore admissions made by counsel out of Court in conversation with the solicitor for the opposite side, are not evidence against his client Where, therefore, pending a rule nisi the attorney served with the rule inferred, from a conversation, out of Court, with the counsel who had moved the rule, that the latter would forbear to move to make it absolute for a certain time, and the rule was made absolute by that counsel within the time mentioned, the Court refused to re open the rule (4) But statements made by counsel during the conduct of the case are *prima facie* evidence against the client (5) Besides admissions of fact made *incidentally* during litigation they may also be *expressly* made for the purpose of dispensing with proof at the trial, in which case, in civil suits they are generally conclusive whether made by solicitor or counsel (6)

A guardian has, under the Hindu law, a qualified power of dealing with the property of an infant under his charge He can, in case of necessity, sell, charge, or let it for a long term But the infant is not absolutely bound by the act of the guardian, he could, on attaining majority, recover the property if it had been disposed of without legal necessity, and in the case of an uncertificated guardian, the burden of proving legal necessity would, generally speaking, be on the person asserting it (7) But he will be bound by the act of his guardian, in the management of his estate, when *bonâ fide* and for his interest, and prudently have done for a contract has been validly in such contract, it may be specifically enforced (9) Even an alienation made without necessity by an unauthorized *de facto* guardian will not necessarily be set aside (10) Where a minor will be bound by the act of his guardian, there he may be affected by his declarations made at the same time and forming part of the *res gesta*, in respect of the particular act which constitutes a proper exercise of the functions of guardianship But although a guardian may have authority to manage the estate, or possibly even to make a partition it does not follow that he would have power to make admissions of *previous* transactions, so as to affect the

Guardian
and Ward

(1) *Taylor v Willans* supra

(2) *Ashford v Price* 3 Stark, 185 Cordery 83

(3) *Richardson v Peto* 1 M & G 896, per Tindal C J *Taylor* Ev § 783 and in one sense counsel is not the representative of the client for he has the power to act without asking his client what he shall do *R v Registrar of Greenwich County Court* 15 Q B D 54 58 Nor is he the agent (in the ordinary sense) of the client his position is a peculiar one *Colledge v Horn* 3 Bing 119 121 *Matters v Munster* L R 20 Q B D 141 *Swinfen v Lord Climsford* 5 H L 890 see *Wills* Ex 2nd Ed 169 and also s 58 post

(4) *Richardson v Peto* supra and as to the practice of entering warrants of attorney on the record

(5) *Jan Hart v Holley* Ry & M 4 *Hall v Hornan* 2 L & F 165

affirmed 3 L T N S S 741 Cordery 83 see also notes to s 58 post and *Taylor* Ev § 783

(6) See s 58 post and as to power of counsels and pleaders to compromise as to admissions in criminal trials ib

(7) *Jugal Kishori v Anunda Lal* 22 C 545 550 (1895) see *Maynes Hindu Law* 5th Ed §§ 191—197

(8) *Maynes Hindu Law* § 196 and cases there cited As to the onus in a suit by a minor to set aside a compromise made by a guardian see *Lekraj Roy v Mahabab* 10 B L R 35 (1891)

(9) *Mr Sarvarjan v Fakharuddin Mahomed Chodhury* (1906) 34 C., 163 (Full Bench)

(10) *Tayammal v Kuppara Rowndan* 38 M 1125 (1915) (Art 44 of Limita- tion Act does not apply to alienation by unauthorized guardian)

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"When several persons are *jointly* interested in the subject-matter of the suit, the general rule is, that the admissions of any one of these persons are receivable against himself and his fellows, whether they be all jointly suing or sued or whether an action be brought in favour of, or against, one or more of them separately, provided the admission relate to the subject-matter in dispute, and be made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered (10) Thus, as has been already seen, the representation or misrepresentation of any fact made by one partner with respect to some partnership transaction will bind the firm (11), and so also in the case of a joint-contract where *A, B, C and D* make a joint and several promissory note, either can make admissions about it as against the rest (12) In order to render the admission of one person receivable in evidence against another, it must relate to some matter in which either both were *jointly* interested or one was *derivatively* interested (13) through the other, and

(1) *Wood v Braddick*, 1 Taunt, 104, Roscoe N P Ev 71 Taylor Ev § 743

(2) *Latich v Wedlake*, 11 A & E, 959, Taylor Ev, § 598, as to acknowledgments of debt by partner giving new period of limitation *v post*

(3) As to the principle on which partnership books are evidence see *Hill v Manchester and Salford Waterworks Co*, 5 B & Ad 875

(4) *Hutcheson v Smith*, 5 Ir Eq, 117, *Stewart's case*, 1 Ch App 58, Lindley Partnership 536

(5) Phipson, Ev, 5th Ed, 231

(6) *Rapp v Latham*, 2 B & Ald, 795, *Moore v Knight* (1891) 1 Ch 547

(7) Taylor, Ev, § 749, and cases there cited

(8) *K R V Firm v Seetharama*, 37 M, 146 (1914), Wallis J expressing reluctance to be bound by other rulings as for instance *Valasubramania Pillai v Ramanathan Chettiar*, 32 M, 421 (1909).

Shahkh Mohideen Sahib v Official Assignee 35 M, 143 (1912)

(9) *Shanmuganatha Chettiar v Sri Naraya Ayyar* 40 M 727 (1917) following *Karmali Abdulla v Karimji Jiraji* P C, 39 B 261 (1915) distinguishing *Muthu Sastrigal v Viswanatha Pandhara* 26 M L J 19 (1914)

(10) Taylor, Ev, § 743 cited and adopted in *Kasuliah Sundari v Mukta Sundari* 11 C 588 590 (1888) s 18 cl (1) ante *Hutchinson v Whiting* 2 Doug 652 *Wood v Braddick* 1 Taunt, 104 as to acknowledgments of joint-debts for the purpose of the law of limitation *v post* and Taylor Ev §§ 600 601, 724—747

(11) Taylor Ev § 743 and *ante*

(12) *Hutchinson v Whiting* 2 Doug 652 1 S L C 644 Steph Dir Art. 17, illust. (f)

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(12) *Hitcomb v Hitcomb* 2 Doug-
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(13) See s 18 cl. (2) and *post*

mere community of interest will not be sufficient. Thus, where two persons were in partnership, and an action was brought against them as part owners of a vessel, an admission made by the one as to a matter which was not a subject of co partnership, but only of co-part ownership, was held inadmissible against the other (1). Nor will the admissions of one tenant in common be receivable against his co tenant though both are parties on the same side of the suit (2). And an admission by a co tenant as to who is the landlord of a hold

(3) Nor is an admission by one ryot against his own interest, evidence to holds (4). And, where a joint contract

is severed by the death of one of the contractors nothing that is subsequently done or said by the survivor, can bind the personal representative of the deceased (5), nor can the acts or admissions of the executor bind the survivor (6).

The rule that where there are several co contractors, or persons engaged in one common business or dealing, a statement made by one of them with reference to any transaction which forms part of their joint business is admissible as against the others (7), was applied in the case of *Kowsuliah Sundari Das v Mukta Sundari Das* (8).

The facts of this case were that, in a suit between a zemindar and his *vyaradars* for rent a person who was one of several *jotedars* in the mehal, was called as a witness for the zemindar and admitted the fact that an arrangement existed whereby he and his co *jotedars* had agreed to pay rent to the zemindar direct. This suit was decided in favour of the zemindar. The *vyaradars* then brought a suit against the *jotedars*, amongst whom was the witness abovementioned, to recover the sum which the *jotedars* ought to have paid to the zemindar direct, and which the *vyaradars* had been decreed to pay

to payment to the *vyaradars*. In this suit the zemindar's suit was received as evidence all the defendants. It was contended that

the statement of the *jotedar* might have been received as an admission against himself only, but not as against the other defendants but it was held on the principle above stated, that the evidence was admissible. As to admissions founded on derivative interest (v post). In an action for negligence or trespass, or in any other action for tort, the admission of one defendant will not be evidence against the others the same rule prevails in criminal proceedings as the law cannot recognise any partnership or joint interest in crime (9).

The joint interest must be proved independently. An apparent joint

(1) Taylor Ev § 750 and other cases there and in §§ 751-753 cited Steph Dig Art. 17 *Jagers v Earnings* 1 Stark. R. 64 *Brodie v Howard* 17 C B 109 as to statements by co executors and admissions by one of several trustees v ante first para of commentary

(2) *Dan v Brown* 4 Cawen 483, 492

(3) *Kali Kissen v Gopi Mohan* 2 C. W N 166 (1897)

(4) *Nurroohurry Mohanto v Naraince Dassee* W R F B 23 (1862)

(5) *Atkins v Tredgold* 2 B & C 23, *Fordham v Walsh* 10 Hare 217 *Slaymaker v Gundackers Ex*, 10 Serg & P 75

(6) *Slater v Lawson* 1 B & Ad, 396, *Hathaway v Haskell* 9 Pick, 24

(7) *Per Garth C J in Kowsuliah Sundari v Mukta Sindari* 11 C. 588 590 (1888) citing Taylor Ev § 743 *Kemble v Farren* 3 C & P 623 *Lucas v De la Cour* 1 M & S 249

(8) *Loc cit supra*.

(9) Taylor Ev § 751 admissions by joint defendants in actions for tort are not generally evidence, except against themselves unless there be proof of common object or motive *Norton Ev* 143 see s 10 ante and so as to conspirators in crime Taylor Ev §§ 597 590 *Daniel v Potter* 1 M & M 503 *Roscoe N P Ev* 68 and observations in *R v Hardwicke* 11 East 578 nor in actions *ex contractu* unless they relate to a matter in which there is an identity of interest, *Fox v Waters* 12 A & E, 43

exists Where, therefore, it is sought to charge several as partners, an admission of the fact of partnership by one is not receivable in evidence against any of the others, to prove the partnership, but it is only after the partnership is shown to exist by independent proof satisfactory to the judge, that the admissions of one of the parties are received in order to affect the others (1) In the case of admissions of persons who are not parties to the record, but who are interested in the subject matter of the suit, the law looks chiefly to the

though
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one of
fit(1),

those of the ship owners in an action by the master for freight(5), and, in short, those of any persons who are represented in the cause by other parties, are receivable in evidence against their respective representatives (6) The admis-

sted (v post),
the interests
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the record, has a substantial interest(8) in the result(9), so conversely the admission

touching
cipal, an

bare trustee, whose name is used only for purposes of form(12) But the declarations of a guardian for the suit, or next friend of a minor, are not receivable against the latter, because these persons, though their names appear on the record, are not in fact parties to the action, but are considered as officers of the Court specially appointed to look after the interest of the minor (13)

"The admissions of a principal can seldom be received as evidence in an action against the surety upon his collateral undertaking In these cases the main inquiry is whether the declarations of the principal were made during

Principal
and surety.

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(1) Taylor, Ev § 753 and cases there cited and as to admissions as to the nature or extent of the partnership business see Lindley Partnership 166 or as to the extent of partner's authority to bind the firm Ex parte Agace 2 Cox Fq 312

(2) Taylor Ev § 756 Roscoe N P Ev 67 Phillips & Arn 1 v 364

(3) Hanson v Parker 1 Wills 257, as to statements by a cestui que trust see Roscoe v P Ev 67 68

(4) Bell v Ansley 16 East 143

(5) Smith v Lyon 3 Camp 460

(6) Taylor Ev § 756

(7) Id, § 757

(8) The 'interest' is so qualified in Steph Dig Art 16 the words of s 18 are however any proprietary pecuniary interest

(9) v ante Taylor Ev §§ 756 757, Roscoe N P Ev 67 Steph Dig Art 16 Wills 1 v 2nd F1 17

(10) Legge v Edmonds 25 L J, Ch

125 Fena ch v Thornton 1 M & M 51 Metters v Brown 32 L J Ex 340

(11) Fox v Waters 12 A & E 43

Stanton v Percival 5 H L C 257

(12) Moriarty v L C & D Co, L R 3 Q B 314 what the plaintiff on the record has said is always evidence against him its weight being more or less even if the plaintiff is merely a nominal plaintiff a bare trustee for another though slight in such a case still it would be admissible ib per Blackburn J Steph Dig Art 16 Roscoe N P Ev 67 Bauernan v Radenius 7 T R 663 Phillips Ev 367 though see Taylor Ev, 41

(13) Taylor Ev § 42 and cases there cited Phillips Ev 363 Roscoe Ev 69, as to the admissions of committees of lunatics see Stanton v Percival 5 H L C 257 v ante as to admissions by guardians and as to solemn admissions for the purpose of trials see s 58 p 5

all his declarations made subsequent to the act to which they relate, and out of the course of his official duty' (1)

Limitation Act.

The Limitation Act deals with the subject of the effect of acknowledgment in writing to bar limitation. But one of several joint contractors, partners, executors, or mortgagees (2) is not chargeable by reason only of a written acknowledgment signed by, or by the agent of, any other or others of them (3).

In England it appears now to be settled law that a payment on account of debt or a written acknowledgment made by a partner in the usual course of business is sufficient to take a partnership debt out of the Statute of Limitations as against the other members of the firm, the partner being presumed to have authority

to bind one another (4), unless the facts are such as lead to the inference that the partner was acting as agent for the other partners (6). The acknowledgment by the executor of a deceased obligor and severally liable with other obligors on a bond is an acknowledgment jointly

of the several liability of the deceased obligor (7). An agreement by a debtor not to raise the plea of limitation is void under section 23 of the Indian Contract Act as an attempt to defeat the provisions of the Limitation Act (8).

Persons from whom interest is derived

The subject of the second clause of s. 18 is usually included under the head of "privity," (9) the rule being that the admissions of one person are evidence against another in respect of privity between them (10). Statements made by persons in possession of property and qualifying or affecting their title thereto are receivable against a party claiming through them by title subsequent to the admission (11). Thus where *A* sued *B* to recover a watch which *B* claimed

(1) *Taylor, Ev.*, § 785, and *id.*, § 786, so if a man become surety in a bond conditioned for the faithful conduct of a clerk or collector, confessions of embezzlement made by the principal after his dismissal cannot be given in evidence if the surety be sued on the bond. *Smith v. Whittingham* 6 C. & P. 78. Rough entries made by the principal in the course of his duty or whereby he has charged himself with the receipt of money will at least after his death be received as proof against the surety not altogether as declarations made by him against his interest but because the entries were made by him in those accounts which it was his duty as clerk to keep and which the defendant had contracted that he should faithfully keep. *Whitnash v. George* 8 B. & C. 556. *Goss v. Wallington*, 3 B. & C. 132.

(2) Act IX of 1908 s. 19. The liability must appear upon the face of the acknowledgment and such liability cannot be read into it by proof *alunde*. *Itapan v. Nannu*, 12 Mad. L. J. 101 s. c. 26 M. 34 and as to the essentials of a valid acknowledgment, see *Srinivas Krishna Shiralkar v. Narhar Klandoo Khanolkar* (1903) 32 B., 296.

(3) *Id.*, s. 21, see The Indian Limitation Act with notes by H. T. Rivaz 6th Edn. 98—101 and Field *Ev.* 125—127, Steph. Dig. Art. 17 as to principal and surety see *Cockrill v. Sparkes* 1 H. & C.

699. *Re Poors* 30 Ch. D. 201.

(4) *Goodwin v. Parton* (1880), 42 L. T. 568 in *re Tucker* (1894) 3 Ch. 429 and see *Taylor Ev.* § 600 and § 598 and *Lindley on Partnership* 6th Ed. p. 271.

(5) *Watson v. Woodman* (1875), 20 Eq. 30.

(6) In *re Tucker*, supra.
(7) *Read v. Price* (1909) 1 K. B. 577. *Roddan v. Morley* 1 De G. & J. 1. In *re Lacy* (1907) 1 Ch. 330.

(8) *Ramanurthy v. Gopayya* 40 M. 701 (1917) see *Sitarama v. Krishnaswami* 38 M. 374 (1915).

(9) See Steph. Dig. Art. 16, *Taylor Ev.* § 78 and generally as to admissions on the ground of privity *id.* §§ 90 758 787—794. *Wills Ev.* 2nd Ed. 174.

(10) *Taylor Ev.* § 787, the term "privity" denotes mutual or successive relationship to the same rights of property, and privies are distributed in several classes according to the manner of this relationship: (1) privies in blood as heir and ancestor and coparceners (2) privies in law as executor to testator or administrator to intestate and the like (3) privies in estate or interest, donor and donee lessor and lessee joint tenants and the like *id.*

admissions by parties through whom

to retain as administrator of *C*, deceased, a declaration by *C* that he had given the watch to *A* was held to be evidence against *B* (1) In proceedings for probate of a will a witness, who attended on the testatrix during her last illness, was asked to depose to a statement made to the witness by the testatrix as to a disposition of her ornaments by will The question was disallowed, but the Court of Appeal held that the question was improperly disallowed since a statement by the testatrix suggesting any inference as to the execution of a will would be an admission relevant against her representatives and would therefore be admissible as evidence (2) Where execution of a mortgage deed has been

chaser by private contract than against an auction purchaser but it is clearly evidence as against both (3) "The ground upon which admissions bind those in privity with the party making them is that they are identified in interest, and of course, the rule extends no further than this identity (4) If a person who adopts another makes an admission after the adoption this admission will not bind the person adopted If the making of the admission is before the adoption it has been said to be a nice question upon which there is no authority, as to the effect of admissions made by a person who subsequently adopts in binding the person adopted, namely, whether the person adopted can be said to derive title from the adopter in such a way as to make the admission evidence against him (5) The case of co parceners and joint tenants are assimilated to those of joint promisors, partners, and others having a joint interest, which have been already considered In other cases, where the party by his admissions as heir, executor, or administrator is identified at the time the admission is made in evidence against the representative, in the same manner as they would have been against

others claim see also *Forbes v. Mir Mahomed* 5 B L R 529 540 (1870) s c 14 W R P C 28 13 M I A 438 *Mohun Shaloo v. Chuttoo Mehar* 21 W R 34 (1874) *Khemum Kurce v. Gour Chunder* 5 W R 268 (1866) *Nund Pandah v. Gjadhur* 10 W R 89 (1868) *Azudh Beharee Singh v. Ram Raj* 18 W R 105 (1872) *Situl Pershad v. Monohur Das* 23 W R 325 (1875) *Krishna samu Ayyangar v. Rajagopala Ayyangar* 18 M 73 (1894) *Anundmoyee Choudhrai v. Sreeb Chunder Marshall* 455 (1862) *Goreebollah Sircar v. Boyd* 2 W R 190 (1865) *Jnan Choudhry v. Doolar Choudry* 18 W R 347 (1872) *Sonu Garukhal v. Rangammal* 7 Mad H C R 13 (1871)

(1) *Smith v. Smith* 3 Bing N C, 29

(2) *Nana v. Shankar* 1 Bom L R 465 (1901) not however under s 11 as the head note suggests but this section But see also *Atkinson v. Morris* L R 1897 P D 40 [statements made by a testator are not admissible to prove the execution by him of a will] which was held inapplicable as it was based on the fact that the English Wills Act prescribes a particular form of proof while to the

will in the case cited no such rule applied

(3) *Narain Das v. Dilaxar*, 41 A, 250, s c 521 C 830

(4) Taylor Ev § 787 "It is to be observed that admissions are relevant only so far as the interests of the persons who made them or of those who claim through such persons are concerned. On this principle a distinction must be made between statements made by an occupier of land in disparagement of his own title and statements which go to abridge or encumber the estate itself For example an admission by a *patnidar* or other holder of a subordinate tenure affects the *patni* or other tenure as against him and those who derive their title from him but it will not affect the proprietary interest as against the *zemindar* or other superior so as to encumber or diminish his rights" Field Ev 6th Ed 90 91 see *Seelies v. Chadwick* 2 M & Robb 507 R v *Bliss* 1 A & F 550 *Papendi v. Eridgewater*, 5 L & B 166 *Howe v. Malkin*, 40 L T, 196 and Taylor Ev § 789

(5) *Brijendra Coomoor v. Chakrman of Da. a Municipality* 20 W R, 223 224 (1871) per Couch C J

the party represented (1) Thus the declarations of the ancestor that he held the land as the tenant of a third person, are admissible to show the seisin of that person in an action brought by him against the heir for the land (2), and the declarations of an intestate are admissible against his administrator or any other claiming in his right (3) Where tenants sued for a declaration that their holding was *mokururee* at a given rent and the *surbarahar* of their zemundar admitted the right on behalf of the zemundar, who himself filed a petition corroborating his *surbarahar's* statement it was held that these admissions would bind any subsequent zemundar not being an auction purchaser at a sale for arrears of Government revenue (4) The same principle holds in regard to admissions made by the assignee of a personal contract or chattel previous to the assignment where the assignee must recover through the title of the assignor and succeeds only to that title as it stood at the time of its transfer (5) But a distinction must be drawn between the case of an assignee of land or other property and that of an ordinary assignee of a negotiable instrument For, whereas the former has in general no title unless his assignor had, the latter may have a good title though his assignor had none Thus the declaration of a former holder of a note showing that it was given without consideration though made while he held the note was held to be not admissible against the indorsee, to whom the instrument had been transferred on good consideration and before it was overdue (6) For such an indorsee derives his title from the nature of the instrument itself and not through the previous holder Accordingly unless the plaintiff on a bill or note stands on the title of a former holder (as if he have taken the bill overdue or without consideration) the declarations of such former holder are not evidence against him. (7)

Sales in execution and for arrears of revenue

The purchaser of an estate sold for arrears of revenue is not privy in estate to the defaulting proprietor He does not derive his title from him, and is bound neither by his acts nor by his laches (8), nor by his admissions (9), nor by a decree against him (10) and proceedings between the defaulting proprietor and third parties with respect to the title to the land are not admissible in evidence in a subsequent suit brought by the auction purchaser as against him. (11)

(1) *Coole v Braham* 3 Ex. R. 185 per Parke B See *Rani Srimati v Klagendra Narayan* 31 C 871 (1904)

(2) *Doe d Pettitt v B & A* 223 In a suit it was attempted to prove a *kabuliat* by amongst other evidence proof of a so-called petition by the defendants father in which he was represented as having admitted the *kabuliat* it appeared that the defendants father represented to certain persons that this petition was his petition and requested them to verify his signature or to identify him as one of the petitioners It was held that this request amounted to a statement on the part of the defendants father to these witnesses of all that was contained in the petition and amounted to a statement to them that he made the statements which appeared in the petition and that even if the petition had not been filed it was just as effective against the defendants as if it had been in fact filed *Mohun Saloo v Chuttoo Moosar*, 21 W. R., 34 (1874)

(3) *Smith v Smith*, 3 Biaz N C 29 ante *Taylor Ex.*, § 787

(4) *Watson & Co v Nobin Mohun* 10 W. R. 72 (1868)

(5) *Taylor Ex.*, § 790

(6) *Woolway v Roue* 1 A & F 114 116 explaining *Barogh v White* 4 B & C 325 *Taylor Ex.*, § 791 *Byles on Bills*, 15th Ed (1891) 433

(7) *Byles on Bills loc cit* and cases there cited

(8) *Moonslee Buool v Pran Dhan*, 8 W. R. 227 (1867) (and see p 67) followed in *Radha Gobind v Rakhal Das* 12 C 87 90 (1885) *Watson & Co v Nobin Mohun* 10 W. R. 72 (1868) as to the rights of the auction purchaser see *Kool deep Nuran v Government of Ind* a 11 B L R 71 (1871) *Forbes v Meer Mahomed* 20 W. R. (P C) 44 (183)

(9) *Rungo Monee v Raj Coomaree* 6 W. R. 197 (1866)

(10) *Id Radha v Rakhal supra*, 12 C, 82 90 but as to purchasers of *pattai taluqs* sold under Reg VIII of 1819 see *ib id* at p 90 and *Taraprasad v Ram Arsing* 6 B L R App 5 (1870) 14 W. R. 233

(11) *Radha Gobind v Rakhal Das supra*

It has in some cases(1) been considered that a similar rule applies to ordinary execution sales and that a purchaser at such a sale is not in privity with, or the representative in interest of, the judgment debtor so as to be affected of the latter. This view appears of certain Privy Council decisions distinction between a private sale in satisfaction of a decree and a sale in execution of a decree (3) In both cases the purchaser merely acquires the right, title and interest of the judgment-debtor(4); and therefore a suit to enforce an interest purchased at an execution sale is held to be barred as against a purchaser, even if the interest had interest would have between a private decree, that under the former, the purchaser derives title *through* the vendor and cannot acquire a better title than that of the vendor Under the latter, the purchaser notwithstanding he acquires merely the right, acquires that title by operation of law freed from all alienations or incumbr the attachment of the property sold in sions only show that the rights of an execution-purchaser are in some respects different from those at a private sale They do not afford any basis for the aforementioned broad proposition deduced from them (7) It is true that an execution-purchaser makes his purchase not from the judgment-debtor and

(1) *Lala Parbhu v Mysine*, 14 C., 401, 411—414 (1887), *Gour Sundar v Hem-Chunder*, 16 C., 355, 360 (1889), *Bashi Chunder v Enayet Ali*, 20 C., 236, 239 (1892), for earlier decisions, see *Rungo Monec v Raj Coomaree*, 6 W. R. 197 (1886), *Musst Imrit v Lalla Debee*, 18 W. R., 200 (1872)

(2) *Ishan Chunder v Beni Madhub*, 24 C., 75—77 (1896)

(3) *Dinendronath Sanial v Ram Kumar Ghose*, 7 C., 107, 118, s. c., 8 I. A., 65 10 C. I. R., 281 (1880), *Srimati Anandmayi v Dhanendra Chandra B. L. R. (P. C.)*, 122, 127 (1871)

(4) *Id* All that is sold and bought, at an execution sale is the right, title and interest of the judgment debtor with all its defects, *Dorab Ally v Abdool Azeez* 5 I. A. 116 125 (1878), followed in *Sundara Gopalan v Venkatarada Ayyangar*, 17 M. 228 (1893), the creditor takes the property subject to all equities which would affect it in the debtor's hands *Megji Hansraj v Ramji Josta* 8 Bom. H. C. R., 169, 174, 175 (1871), *Sobhag Chand v Bhachand* 6 B., 193, 202 (1882) as to the different means available to purchaser of investigating title in the respective cases of private and execution sales, see *Dorab Ally v Abdool Azeez* supra 125 See also *Kishan Lal v Ganga Ram* 13 A. 28 (1890), *Bashi Chunder v Enayet Ali* 20 C., 236, 239 (1892) *Bapuji Balal v Satyabhamabai*, 6 B., 490 (1882)

(5) *Raja Enayet v Giridhars Lal*, 2 B. L. R. (P. C.), 75, 78 (1869) explained in *Sobhag Chand v Bhachand*, 6 B., 193,

205 (1882) and see *Kishna Lal v Ganga Ram* supra

(6) *Dinendronath Sannial v Ramkumar Ghose*, supra, see also *Srimati Anandmayi v Dhanendra Chandra*, 8 B. L. R. (P. C.), 122 127 (1871), 14 M. I. A., 101, explained in *Sobhag Chand v Bhachand*, 6 B., 193, 205 (1882), *Musst Imrit v Lalla Debee* 18 W. R. 200 (1872), *Lalu Mulji v Kashiabai* 10 B., 400, 405 (1886) *Lala Parbhu v Mysine*, 14 C., 401, 413 (1887), *Bashi Chunder v Enayet Ali*, 20 C. 236 239 (1892), in the case of *Gour Sundar v Hem Chunder*, 16 C. 355 (1889), it was held that a purchaser at a public sale in execution of a decree is not, but a purchaser at a private sale is the representative of the judgment debtor, followed in *Janki Prasad v Ulfat Ali* 16 A., 284 (1894) but dissented from in *Ishan Chunder v Beni Madhub*, 24 C., 62 (1896) [as to the meaning of the terms 'representative and legal representative' see *Badri Narain v Joy Kissen* 16 A. 483 487 (1894) *Ishan Chunder v Beni Madhub*, 24 C. 62 71 (1896) and s. 21 post] See also *Vishronath Chaudh v Subraja Shitapa* 15 B. 290 (1890), referred to in *Burjorji Dorabji v Dhunbai*, 16 B. 21 (1891)

(7) *Ishan Chunder v Beni Madhub*, 24 C., 76 (1896) the case of *Lala Parbhu v Mysine* supra based on an erroneous interpretation of the Privy Council decisions cited supra and is followed by *Bashi Chunder v Enayet Ali*, supra. See 24 C., at p. 77, approved in *Gulzari Mai v Madho Ram*, F. B., 1 All. L. J., 65 (1904).

often against his wish, and he is not bound by some of the acts of the judgment-debtor, such as alienations made by the latter to defeat the decree but that does not show that his rights are not derived from the judgment debtor, or that he is not the representative in interest of the judgment debtor in *any sense* or for *any purpose*. Even a purchaser at a private sale is not bound by any prior alienation made by the vendor to defraud him, but that does not show that such purchaser is not a representative in interest of the vendor. Because the rights of an execution purchaser and a purchaser at a private sale are in some respects different, it does not follow that the execution purchaser is not to be regarded as a representative in interest of the judgment debtor even in those respects in which, and for those purposes for which his rights are not higher than those of the judgment-debtor whose right title and interest he has purchased (1). In a previous edition of this work it was pointed out in respect of admissions made by a judgment-debtor prior to attachment that in so far as the purchaser acquires only the title of the debtor, he should acquire it as qualified by the latter's admissions, though certain decisions of the Calcutta High Court would appear to have held otherwise. The view thus taken received support from some of the earlier cases (2) and has since been confirmed by recent decisions of the Privy Council (3) and the Calcutta High Court (4). The Judicial Committee have held that the equitable principle of estoppel laid down in the case of *Ram Coomar Koondoo v Macqueen* (5) which applies to any person, is equally binding on the purchaser of his right, title and interest at a sale in execution of a decree (6). If such a purchaser may be estopped, he may *a fortiori* be affected by the admissions of the judgment debtor whose interest he has purchased. The result of the cases would therefore appear to be that a purchaser at an ordinary execution sale is in privity with, and the representative in interest of, the judgment debtor within the meaning of the twenty first section, *post*, so as to be affected by the latter's admissions. Prior to the last mentioned decision of the Privy Council it had been held that, where the execution purchaser is himself an actual party to the admission, it may, so far as it can be considered as his, be used as evidence against him (7), and that a mortgagee differed from a simple money creditor in that he derives his title directly from the mortgagor, and is bound by his previous conduct in respect of the property mortgaged (8), therefore a purchase by a mortgagee at a sale in execution of a decree upon his mortgage of the right, title and interest of the mortgagor, who has been estopped from asserting a

(1) *Ib* 75 76

(2) *Unaipoorna Dasse v Nisfar Poddar* 12 W R 148 (1874) [The purchaser at a sale in execution of a decree is the representative in interest of the judgment debtor within the meaning of the Evidence Act (I of 1872) s 21] referred to in *Kishan Lal v Ganga Ram* 13 A 28 51 (1890) *Musst Irit v Lalla Debee* (1872) *supra* at the utmost the statements would be nothing more than evidence certainly they will not conclude him *per Couch C J*

(3) *Mahomed Mozuffer v Kishori Mohun* 22 C 909 (1895), s c 22 I A 129 1 C W N 38

(4) *Ishan Chunder v Beni Madhub* 24 C 62 (1896)

(5) L. R. I A Sup Vol 40 43 s c

11 B L R 46 18 W R 166

(6) *Mahomed Mozuffer v Kishori Mohun* 27 C 909 919 (1895) *Islam Chunder v Beni Madhub* 24 C 62 77 (1896)

(7) *Musst Imit v Lalla Debee* 18 W R 200 (1872)

(8) *Lala Parbhu v Mjine* *supra* at p 413

(9) *Poreshnath Mookerjee v Anathnath Deb* 9 C 265 (1882) 9 I A 147 reported in lower Court *sub nom Anathnath Deb v Bishtu Chunder* 4 C 783 see also *Kishori Mohun v Mahomed Mozuffer* 18 C 188 198 (1890) s c in appeal to Privy Council 22 C 909 (1895)

(10) *Krishnabhapati Devu v Vihrama Devu* 18 M 13 18 (1894)

judgment debtor to the extent of such right, title and interest as he had in the property purchased at the date of the sale and represents the execution creditor in so far as he had a right to bring such right, title and interest to sale in satisfaction of his decree, and that when the plea of estoppel is available to a decree holder, it is likewise available to the purchaser at the execution sale as his representative or as one claiming under him. It has, however, also been held that a Court sale cannot *by itself* be taken to create an estoppel either in favour of or against a Court-purchaser as against or in favour of the person whose right, title and interest, the Court-purchaser buys from the Court, because the Court purchaser derives his title from proceedings which are entirely *in iudicio* as regards the judgment-debtor (1). And where property purchased in execution of a money decree was subject to a mortgage, but not a mortgage executed by the judgment debtor, although he would have been estopped from denying liability under the mortgage on account of his conduct in the mortgage transaction, it was held by the Calcutta High Court that the purchaser was bound equally with the judgment debtor inasmuch as the right, title and interest of the latter had passed to him and his purchase was therefore subject to the mortgage (2). Where a purchaser claimed under a title partly created by a mortgagor it was held that he was estopped from pleading non transferability of the holding (3). Where a mortgagee was himself the purchaser it was held by the Allahabad High Court that he was estopped from denying the mortgagor's right to execute a prior mortgage of the property (4).

A man may bind himself by an admission, but he cannot bind by his admission those who do not claim under him but who before the admission had acquired a right (5). But part payment of the mortgage debt by the mortgagor and appearing in his handwriting, will give a fresh start of limitation to the mortgagee, even as against a person who had purchased a portion of such mortgaged property prior to such payment (6).

Statements whether made by parties interested (7), or by persons from whom the parties to the suit have derived their interest (8), are admissions only if they are made during the continuance of the interest of the persons making the statement (9). It would be manifestly unjust that a person who has parted with his interest in property, should be empowered to divest the right of another claiming under him by any statement which he may choose to make (10). And so admissions made by a debtor (whose property has been sold) subsequently to such sale are not evidence against the purchaser of the property (11). A statement relating to property made by a person when in possession of that property may be evidence against himself and all persons deriving the property from him after the statement but a statement made by a former owner that he had conveyed to a particular person could not possibly be evidence against third persons. If it were so I might sell and convey to B and afterwards declare that he had sold and conveyed to C, and

The admissions must be made during the continuance of the interest

(1) *Gajanan v Nilo* 6 Bom L R 864 (1904)

(2) *Prajag Rag v Sidhu Prasad Tewari* (1908) 35 C 17 and as to the estoppel see *Sivat Chandra Dey v Copal Chandra Lala* (1897) 20 C 296. *Porter v Ince* (1905) 10 C W N 313 and *Ganesh v Pursottan* (1908) 18 B 311

(3) *Ratha Kanta Chakravarti v Ramaranta Shahu* (1917) 39 C 51

(4) *Tota Ram v Hargobind* 36 A 141 (1914) see *Pakshi Ram v Luladhar* 35 A 353 (1913). *Bharadhar Dyal v Parsad Lal* 10 A 1 J (1910)

(5) *Mosatt v Castle Steel and Iron*

Works Co 14 Ch D 58 63

(6) *Domi Lal Sahu v Roshan Dubey* 11 C W N 107. *Arsila Chandra Saha v Bhairab Chandra Saha* 9 C W N 8 (1907)

(7) 518 cl (1) ante

(8) 518 cl (2) ante

(9) 518 ante. *Taylor Ex* 11 794

509, 599

(10) *Doe v Hether* 1 A & E 740. *Alnun Kurie v Gour Chandra S W R* 268 (1886). *Taylor Ex* 11 794

(11) *Ahenum Kurie v Gour Chander* supra

C might use the statement as evidence in a suit brought by him to turn *B* out of possession. If such evidence were admissible no man's property would be safe (1). As for partners, by the very act of association each is constituted the agent of the others and of the firm for all purposes within the scope of the partnership concern and his acts and declarations bind his co partners and the firm unless he has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority or does not know or believe him to be a partner (2). But an admission made by a partner before the partnership is not evidence against his co partner (3). After dissolution of a partnership the subsequent acts of the individual members are binding on themselves alone, except so far as they may be acts necessary to wind up the affairs of the partnership or to complete transactions begun but unfinished at the time of the dissolution (4). Declarations and admissions made after the dissolution relating to the previous business of the firm are admissible against all the partners interested in the transaction (5). Bankruptcy (6), or death will sever the joint interest, therefore in the latter case, the admissions of the survivors will not bind the estate of the deceased (7), nor conversely will those of his representatives bind the survivors (8). So, also, the declaration of a bankrupt, though good evidence to charge his estate with debt, if made before his bankruptcy, is not admissible at all if it were made afterwards (9). This equitable doctrine applies to the cases of vendor and vendee, grantor and grantee and generally, to all cases of rights acquired, in good faith, previous to the time of making the admission in question (10).

To be admissible the declarations must qualify or affect the title of the predecessor and not relate to independent matters. The statement must be one which directly affects the person's interest in the property itself, a mere statement against his interest in other respects as for instance that he is in debt, whence it might be inferred that he would be likely to part with or charge his property, does not come within this rule (11). It may further be added that it is not sufficient that the interest be subsequent in point of time, it must (as the words of the section point out) have been *derived* from the person who made the statement sought to be used as an admission (12).

Proof of
admissions

These admissions by third persons, as they derive their legal force from the relation of the party making them to the property in question may be proved by any witness who heard them, without calling the party by whom they were made. The question is, whether he made the admission and not merely whether the fact is as he admitted it to be. Its truth, where the admission is not conclusive—and it seldom is so—may be controverted by other testimony, and even by calling the party himself, but it is not necessary to produce him, for his declarations when admissible at all, will be received as original evidence, and not as hearsay (13).

Admissions
by stran-
gers

Statements by strangers to a proceeding are not generally relevant as against the parties (14), but in some cases the admissions of third persons

(1) *Per curiam* in *Clarke v Bindabun Chunder*, W R, F B, 20 (1862), s c, Marshall 75

(2) Taylor 598

(3) *Tunley v Evans* 2 Dow & L 747
Catt v Howard 3 Stark, 3

(4) Taylor 598

(5) *Pritchard v Draper* (1830) 1 Russ & My 91

(6) *In re Wolmershausen* 38 W R (Eng) 537

(7) *Atkins v Tredgold* 2 B & C, 23

(8) *Slater v Lauson* 1 B & Ad 396

(9) *Bateman v Bailey* 5 T R 513

(10) Taylor Ev § 794 and cases there cited

(11) *Beauchamp v Parry* 1 B & Ad 89
Wills v 122 Coole v Bram 3 Ex 183, Taylor Ev § 792

(12) Field Ev 6th Ed 90 91 s 18 cl (2) ante

(13) Taylor, Ev, § 793

(14) Steph Dig Art 18, *Coole v Braham*, 3 Ex 183, Taylor Ev § 740, *Barrough v White* 4 B & C 323

strangers to the suit, are receivable (1) "These exceptions to the general rule arise when the issue is substantially upon the mutual rights of such persons at a particular time, in which cases the practice is to let in such evidence, in general, as would be legally admissible in an action between the parties themselves. Thus the admissions of a bankrupt made before the act of bankruptcy, but if made after cannot furnish of creditors and the danger of fraud" (4) So his answers on public examination are inadmissible

not all parties other than process against debtors, to the execution creditor of a person whose position party to prove against another, are in the nature of original evidence, and not hearsay, though such person is alive and has not been cited as a witness (7) In the case noted plaintiffs who were two out of five brothers sued to establish their right to a two fifth share in properties which were sold in execution of a money decree against another brother U, and purchased by the defendant on the allegation that the properties when sold were the joint family properties of the five brothers. The defendant whose case was that the brothers were not joint at the date of the sale, and that the properties were exclusively owned by U put in a deposition given by another brother K in the suit in which the money decree against U was passed, in the course of which K stated that the family was not joint and the properties belonged exclusively to U. It was held that the deposition of K in the previous suit was not admissible against the plaintiffs (8)

"The admissions of a third person are also receivable in evidence against the party who has expressly referred another to him for information in regard to an uncertain or disputed matter. In such cases the party is bound by the declarations of the party referred to in the same manner, and to the same extent, as if they were made by himself" (9) Thus in an action against executors, the defendants having written to the plaintiff that if she wished for further information as to the assets it could be obtained from a certain merchant—the replies of the merchant were held receivable against the executors (10) In the application of this principle, it matters not whether the question referred to be one of law or of fact, whether the person to whom reference is made,

Referees

(1) Taylor Ev. § 759, see s 19, ante
(2) See Coole v Braham 3 Ex, 185
(3) Jarnett v Leonard, 2 M & S, 265
in action by the trustees of bankrupts
the petitioning creditor's debt is deemed to be
relevant against the defendants Steph
Dig Art 18

(4) Taylor, Ev. § 759 and cases there
cited see also Ex parte Eitards Re
Tollmache 14 Q B D 415 Ex parte
Re all Re Tollmache 13 Q B D 720

(5) Re Brunner 19 Q B D 572

(6) Steph Dig Art. 18 Kempland v
Maccanley Peake 95 Williams v Bridges
2 Stark 42 as to admissions of an under
sheriff or bailiff against the sheriff see
Snowball v Co Truice 4 B & Ad 541
Jacobs v Humphreys 1 C & M 413
Scott v Marshall 2 C & J 218 North
v Miles 1 Camp 189 Edwards on Exe
cution p 12

(7) Ali Mo din v Eliza Hanidathil 5

M 239 (1882)

(8) Nagendranath Ghosh v La rence
Ind Co 25 C W N 89 (1921)

(9) Taylor, Ev. § 760, see s 20, ante.
Roscoe N P Ev 69 Steph Dig, Art
19 this comes very near to the case of
arbitration ib note xiii

(10) Williams v Innes, 1 Camp, 364
see also Daniel v Pitt 1 Camp 366
Pea Ad Cas 238 as to the applicability
of the rule in criminal cases see R v
Mallory 15 Cox 458 [the accused told a
constable that his wife would make out
a list of certain property a list afterwards
made out by her and handed to the
constable in the husband's presence was
held evidence against the latter Coleridge
C J however expressly refrained from
giving an opinion upon the question if the
prisoner had been absent] As to refer
ence to accused to examination of others
taken in his presence see Russ Cr., 487,
1 C

have or have not any peculiar knowledge on the subject, or whether the statements of the referee be adduced in evidence in an action on contract, or in an action for tort (1) Whether the answer of the person referred to is conclusive against the party is, in England, a matter of some doubt (2) They will not be so conclusive under this Act unless the admission operates as an estoppel (3) To render the declarations of a person referred to equivalent to a party's own admission, it is not necessary that the reference should have been made by express words, but it will suffice if the party by his conduct has tacitly evinced an intention to rely on the statements as correct. Therefore, where a party on being questioned by means of an interpreter, gave his answers through the same medium, it was held that the language of the interpreter should be considered as that of the party, and that, consequently, it might be proved by any person who heard it, without calling the interpreter himself (3)

On the same principle (4) (though, as a general rule, the affidavits, depositions or *interlocutory* statements of a party's witnesses are not receivable against him in subsequent proceedings) (5), documents or testimony which a party has expressly *caused to be made, or knowingly used as true* in a judicial proceeding, for the purpose of proving a particular fact are evidence against him in subsequent proceedings to prove the same fact, even on behalf of strangers (6)

Proof of admissions against persons making them and by or on their behalf

21. Admissions are relevant, and may be proved as against the person who makes them, or his representative in interest; but they cannot be proved by or on behalf of the person who makes them, or by his representative in interest, except (7) in the following cases —

- (1) An admission may be proved by, or on behalf of, the person making it, when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under section 32
- (2) An admission may be proved by, or on behalf of, the person making it, when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable
- (3) An admission may be proved by, or on behalf of, the person making it, if it is relevant otherwise than as an admission

(1) Taylor, Ev § 761 and case there cited

(2) v s 31 post

(3) Taylor Ev, § 763 *Fabrigas v Vostyn* 20 How St Tr 122 123

(4) The following class of cases are explained in *Boileau v Rutlin* 2 Exch 660 675 as instances of admissions by conduct see *Richards v Morgan* 4 B & S 641 657 658 in which the grounds upon which such evidence is admitted are considered

(5) *Gardner v Moulit* 10 A & E, 464, *Brickell v Hulst* 7 A & E 454 *Richards v Morgan* supra

(6) *Brickell v Hulst* supra, *Gardner v Moulit* supra, *Boileau v Rutlin* supra, *Richards v Morgan* supra, *Prichard v Bagshawe* 20 L J, C. P. 161 11 C. B. 459, *White v Douling* 8 Ir L R., 128, Taylor, Ev §§ 763 764

(7) *Müller v Babu Madho* 19 A., 70 (1896), s c 23 I A., 106

Illustrations

(a) The question between *A* and *B* is, whether a certain deed is or is not forged. *A* affirms that it is genuine, *B* that it is forged

A may prove a statement by *B* that the deed is genuine, and *B* may prove a statement by *A* that the deed is forged but *A* cannot prove a statement by himself that the deed is genuine, nor can *B* prove a statement by himself that the deed is forged.

(b) *A*, the captain of a ship, is tried for casting her away

Evidence is given to show that the ship was taken out of her proper course

A produces a book kept by him in the ordinary course of his business showing observations alleged to have been taken by him from day to day, and indicating that the ship was not taken out of her proper course *A* may prove these statements, because they would be admissible between third parties, if he were dead, under section 32, clause 2

(c) *A* is accused of a crime committed by him at Calcutta

He produces a letter written by himself, and dated at Lahore on that day, and bearing the Lahore post mark of that day

The statement in the date of the letter is admissible, because, if *A* were dead, it would be admissible under section 32, clause 2

(d) *A* is accused of receiving stolen goods knowing them to be stolen.

He offers to prove that he refused to sell them below their value *A* may prove these statements, though they are admissions, because they are explanatory of conduct influenced by facts in issue

(e) *A* is accused of fraudulently having in his possession counterfeit coin which he knew to be counterfeit

He offers to prove that he asked a skilful person to examine the coin, as he doubted whether it was counterfeit or not, and that that person did examine it and told him it was genuine

A may prove these facts for the reasons stated in the last preceding illustration

Principle—This section is an affirmation of the well known principle that a party's admissions are only evidence against himself and those claiming through him and not against strangers, and of the rule of law with regard to self regarding evidence, that when in the self serving form, it is not in general receivable, which is itself a branch of the general rule that a man shall not be allowed to make evidence for himself (1) Not only would it be manifestly unsafe to allow a person to make admissions in his own favour which should
 err slight and
 general rule

s 17 (' Admission

s 3 (Relevant)

s 3 (Proof)

s 32 (Statements by persons who cannot be called as a witness)

s. 14 (States of mind or body)

Steph Dig., Art 15 Best Ev., §§ 519—520, Norton Ev., 151

(1) Best Ev. § 519 Norton Ev., 151, and p 247 notes (2) (1) & (4) post

(2) *Ib.*, s. ante, p 215

(3) The reason of the rule is obvious If *A* says 'B owes me money' the mere fact that he says so does not even tend to prove the debt If the statement has any value at all it must be derived from some fact which lies beyond it, for instance, *A*'s recollection of his having lent the money To that fact of course *A* can

testify but his subsequent assertions add nothing to what he has to say It on the other hand *A* had said 'B does not owe me anything' this is a fact of which *B* might make use and which might be decisive of the case Steph. Dig. Introd. 164 165 Norton Ev. 151 See Best Ev. § 519 *Illustr* (a) gives a double example showing how the same statement may be used against but not for the interest of the party making it

COMMENTARY.

As against the person who makes them

"As against the person who makes them" means "as against the person by or on whose behalf they are made" (1). Thus if admissions are made by a referee they would not ordinarily be relevant against him as "the person who makes them," but against the referor on whose behalf and as whose agent they are made. The expression "person who makes them" must, therefore, mean, the person who makes them either personally or through others by whose admission he is bound. With the exceptions mentioned in the notes to the preceding

against the

It is a well-strangers (3),

only (4). And

that he made

ence of a bribe,

an application

ts that the ad-

missions can only be proved as against the party has been already considered, and in accordance with this rule it has been held that where the accounts of a mortgagee who has been in possession are being taken his income tax papers are inadmissible as evidence in his favour, though they may be used against him (6). Notwithstanding the provisions of this section and the thirty second

Road Cess Act, be used

A road cess return,

ant, was filed by the

plaintiff's vendors. It consisted of two parts, in one of which the joint properties of the plaintiff's vendors and the defendant were set out, and in the other the properties belonging to the defendant alone were mentioned. In a suit by the plaintiff for some lands as being the joint property of his vendors and the defendant, the latter put in the road cess return in order to disprove plaintiff's allegation, by showing that the lands were included in the second part. The lower Courts had relied on his return. It was contended in appeal that it was inadmissible under s. 95 of the Road Cess Act, being evidence in favour of the principal defendant. It was, however, held that the road cess return was evidence against the plaintiff claiming through his vendor, and it was none the less evidence merely because by admitting it as evidence against the plaintiff it became evidence in favour of the defendant (8). And in a later case it has been held that a road cess return filed by a temporary lessee is

(1) See Steph Dig Art 15. An oral confession is an admission provable under this section, *Feroz v Emperor* 19 Cr L J 651.

(2) See *In re Whiteley*, L R 1 Ch 558 564 (1891). In this respect a distinction must be drawn between statements under the preceding sections and under s. 32 post. Under this last section the statements there enumerated are admissible against all the world. *Norton v 143 Avudh Beharee v Ram Raj*, 18 W R., 105 (1872).

(3) *Heane v Rogers*, 9 B & C, 577, 586.

(4) Section 115 *supra*, *Powell*, Ev, 247.

(5) *In re Whiteley supra*.

(6) *Shah Glolam v Muszummut Ema*, 9 W R 275 (1868).

(7) *Hem Chunder v Kali Prasunno* 8 C W N 17 (1903) in which also the question of the returns being against pecuniary interest was considered.

(8) *Beni Madhub v Dina Bundhu* 3 C W N 343 (1899). See as to the use of these returns under ss. 21, 32 and other sections of this Act *Hem Chunder Choudry v Kali Prasanna Bhaduri* P C 30 C, 1033 (1903) 30 I A 177, where in a suit for enhancement of the rent of talukdars' tenure road-cess returns though not conclusive were held to be admissible as evidence as a basis on which to ascertain the assets of the taluk and so fix a fair and equitable limit of enhancement.

admissible in favour of a superior landlord(1) and one filed by certain co sharers is admissible against others (2)

No definition has been given of this somewhat vague expression (3) 'Representative in interest' Whatever scope may be given to these words it is apprehended that they will, generally speaking include most of the privies in blood, law, or estate of which mention has been already made in the notes to sections 17—20, ante

Though admissions may be proved against the party making them, it is always open to the maker to show that the statements were mistaken or untrue, except in the single case in which they operate as estoppels (4)

The section proceeds to specify those cases in which an exception is permitted to the general rule, and admissions in a person's own interest are admissible in evidence The first clause is considered under the thirty second section, post, which must be read in conjunction with it *Illusts* (b) and (c) refer to this clause

"The second clause has received no illustration in the Act probably because it has already been sufficiently treated of in the fourteenth section (ante) under the head of facts' showing the existence of any state of bodily feeling and in *illusts* (l), (t) and (m) thereto, which, together with the notes thereon, should be here consulted The fourteenth section merely declared that such facts are relevant The present clause shows that such facts or statements may be proved on behalf of the person making them, notwithstanding the general rule that persons cannot make evidence for themselves by what they choose to say"(5)

The third clause provides that a fact which is relevant under the sixth section, ante, or some one of the sections following it, shall not be rejected simply because it assumes the form of an admission (6) *Illusts* (d) and (e) refer to this clause "Care must likewise be taken not to confound self serving evidence with *res gestæ* The language of a party accompanying an act which is evidence in itself, may form part of the *res gestæ* and be receivable as such (7)

It was held in the undermentioned(8) case, in which the second and the fourth defendants sold a *jote* to the first defendant and subsequently colluded with the plaintiff and denied a partition which had taken place as well as the sale, that the statements previously made by them which went to show that there had been a partition and they had changed their attitude were admissible under the third clause of this section and the second clause of the eleventh section of this Act

In a suit against an insolvent and the Official Assignee for sale of mortgaged property, the onus is on the plaintiff to prove that title deeds in his possession after the insolvency were deposited with him as security before the adjudication Evidence of admissions by him at an earlier date than the adjudication to the effect that the deeds were then in his possession are inadmissible in his favour under this section not being within any of the exceptions to inadmissibility named in this section An erroneous omission to object to such

(1) *Setudeo Narain Singh v Ajodhya Prasad Singh* 39 C 1005 (1912)

(2) *Chalko Singh v Jhero Singh* 39 C 995 (1912) distinguishing *Nusseerim v Gourree Sunkur* 22 W R 192 and following *Hem Chandra Choudry v Ka. Iraranna* (supra)

(3) See remarks in *Islan Chunder v Beni Madhub* 24 C 67 72 (1896) *Unno-poorna Dassee v Nafur Poddar* 21 W R 148 (1874) as to the meaning of the terms representative and legal representative see *Baari Narain v Jai*

Aslam 16 A 483 48 (1894) *Strouls Judicial Dictionary* 64 (1890) *Chakrelan v Govinda Karu* 17 M 146 (1893) and ante notes to ss 1—0 as to execution

(4) See ss 31—115 post

(5) Norton Ev 152

(6) *Id* Field Ev 6th Ed 94 see *Fellowes v Williamson* 11 & M 10 ante ss 8 and 14 and notes thereon

(7) Best Ev § 570

(8) *Bibi Gyanesha v Jassumut Meharakurnessa* 2 C W N 91 (1897)

evidence does not make it admissible (1) Any statement as to rent payable for a holding made by a person in a sale certificate which was obtained by him as purchaser of the holding at a sale in execution of a decree against the former tenant being in the nature of an admission cannot be used as evidence on his behalf as such a statement does not come within the exceptions to this section (2)

Confessions

This section is subject to the special provisions relating to confession enacted in the twenty fourth twenty fifth and twenty sixth sections (3)

When oral admissions as to contents of documents are relevant

22 Oral admissions as to the contents of a document are not relevant, unless and until the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such document under the rules hereinafter contained, or unless the genuineness of a document produced is in question

Principle—The general rule is that the contents of a written instrument which is capable of being produced must be proved by the instrument itself and not by parol evidence (4) An exception to this rule prohibiting the substitution of oral testimony for the document itself exists according to English law in favour of the parol admissions of a party The admissions being primary evidence against a party, and those claiming under him are receivable to prove the contents of documents without notice to produce or accounting for the absence of, the originals (5) The principle upon which such evidence is receivable has been stated to be that what a party himself admits to be true may reasonably be presumed to be so and that therefore such evidence is not open to the same objection which belongs to parol evidence from other sources when the written evidence might have been produced (6) But the correctness of this reasoning and of the decisions founded upon it has been questioned and the dangerous consequences which are liable to follow on the reception of such evidence have been pointed out (7) For though what a party himself admits may fairly be presumed to be true there is no such presumption in favour of the truthfulness of the evidence by which such admission must be proved (8)

- s 17 (Admission)
s 3 (Document)
s 3 (Relevant)
s 58 (Facts admitted)
s 63 (Secondary Evidence)

- ss 65 66 (Rules as to giving of secondary evidence)
s 65 cl (b) (Written admissions as to contents of documents)

(1) *Miller v Babji Madho* 19 A 76 (1896) s c 23 I A 106

(2) *Raans Pershad v Malathi Adaiya* 31 C 380 (1903)

(3) *R v Blair v Clider* 2 C W N 702 (1898)

(4) *Taylor Ev* § 396 ss 59 64 91 post

(5) *Taylor Ev* § 410 and cases there cited *Roscoe N P Ev* 63 *Best Ev*, §§ 525 526 and see *Mittakaruppa Kaundan v Ra & Pilla* 3 Mad H C R., 158 100 (1866)

(6) *Slatterie v Pooley* 6 M & W 669 per Parke B

(7) See observations of Pennycuik C J in *Laless v Qucale* 8 Ir Law R. 385 cited ib § 412 and in *Field Ev* 6th Ed 95 *Cunningham Ev* 136 the views there expressed have been adopted in the present section which alters the law laid

down in *Slatterie v Pooley* supra *Norton Ev* 152

(8) According to *Slatterie v Pooley* what A states as to what B a party has said respecting the contents of a document which B has seen is admissible whilst what A states respecting a document which he himself has seen is not admissible although in the latter case the chance of error is single in the former double per *Reporter in 9 Com B* 501 n c *Darby v Ousley* 1 H & N., 1 as to oral testimony by the party to the same effect see *Farrow v Blomfield* 1 F & F 653 *Henan v Lester* 12 C B., N S 781 as to the application of the rule in criminal cases see *Roscoe Cr Ev* 13th Ed 7 and as to the case first cited see *Chandrar Kinnar v Channu Narpat Singh P C*, (1906) 29 A., 184 L. R. 34 I A. 27, *Heane v Rogers* 9 B & C., 577

Taylor, Ev, §§ 410—414, Roscoe, N P Ev, 63, Field, Ev, 6th Ed, 95, Cunningham, Ev, 135, Roscoe, Cr Ev, 13th Ed, 7, Phipson, Ev, 5th Ed, 219, 510 Powell, Ev, 9th Ed, 444, Norton, Ev, 152, Best, Ev, §§ 525, 526

COMMENTARY.

When the existence, condition, or contents of the original document have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest, such written admission is admissible(1), but oral admissions except in the cases above mentioned, are excluded by the present section. The circumstances under which a party is entitled to give secondary evidence of a document are laid down in sections 65, 66, *post*. "Where the question is not what are the contents of a document, but whether the document itself is genuine, that is, in the handwriting of the party whose writing or signature it is alleged to be, evidence may, of course be given to prove or disprove the forgery. This may be effected in a variety of ways, by the party, sections 21, 70, by an attesting witness, section 68, by the oath of witnesses acquainted with the handwriting by experts, section 45, or by comparison of handwriting section 73, "Or unless the genuineness of a document produced is in question." The effect of the last clause of this section seems to be, that if such a document is produced, the admissions of the parties to it that it is or is not genuine [even though such admissions involve a statement of the contents of a document] may be received"(2). This section does not, it is apprehended exclude admissions which the parties agree to make at the trial, in which case it becomes unnecessary to prove the fact so admitted (3).

23 In Civil cases(4) no admission is relevant if it is made either on an express condition that evidence of it is not to be given(5), or under circumstances from which the Court can infer that the parties agreed together(6) that evidence of it should not be given (7).

Explanation—Nothing in this section shall be taken to exempt any barrister, pleader, attorney, or vakil from giving evidence of any matter of which he may be compelled to give evidence under section 126.(8)

Principle—"Confidential overtures of pacification and any other offers or propositions between litigating parties, expressly or impliedly made without prejudice, (9) are excluded on grounds of public policy. For without this

(1) S 65 cl (b) *post*

(2) Norton Ev 153

(3) S 58 *post* Cunningham Ev 136 of Sheikh Ibrahim v Farata S Bom H C R A C J 163 (1871)

(4) The protection given by this section does not extend to criminal cases see s 29 *post*. As to arbitration see p 105 *at* 1.

(5) *Corv v Bretton* 4 C & P 462

(6) This section as drafted in the original Bill contained infer that it was the intention of the parties that they infer that the parties agreed together that

(7) *Laddock v Forrester* 3 M & G, 901 918 Steph Dig Art 20 adds 'or if it was made under duress' *Stockfleth v De Tastet* 4 Camp 11 *per* Lord

Ellenborough see Taylor, Ev 798 and *post*

(8) Namely the matters mentioned in provisos (1) and (2) to s 126 *post* see notes to that section

(9) In *re River Steamer Co* L R, 6 Ch 877 827 *per* James L J does not without prejudice mean I make you an offer if you do not accept it the letter is not to be used against me 831 832 [Cited in *Madlra v Gula* 23 B 177 180 (1893)] Now if a man says his letter is without prejudice that is tantamount to saying I make you an offer which you may accept or not as you like but if you do not accept it the having made it is to have no effect at all *per* Mellish L J see also *Walker* 23 Q B D. 335 337 *per* L.

protective rule it would often be difficult to take any steps towards an amicable compromise or adjustment, and, as Lord Mansfield has observed, all men must be permitted to buy their peace without prejudice to them should the offer not succeed, such offers being made to stop litigation, without regard to the question whether anything is due or not' (1) It is most important that the door should not be shut against compromises (2) When a man offers to compromise a claim, he does not thereby necessarily admit it, but simply agrees to pay so much to be rid of the action

s. 17 ('Admission.')

s. 3 ('Relevant.')

s. 3 ('Evidence.')

s. 126 ('Professional Communications')

Steph. Dig., Art. 20, Taylor, Ev., §§ 774, 795—797, 798, 799, Roscoe, N. P. Ev., 62, 63, Powell, Ev., 9th Ed., 421, Phillips, Ev., 326, 328 Cordery's Law relating to Solicitors 2nd Ed., 83

COMMENTARY.

Admissions
'without
prejudice'

Admissions either verbal or in writing by way of compromise or during treaty are, if made under the circumstances mentioned in the section, protected Generally, neither letters written without prejudice nor replies to such letters, though not similarly guarded can be used as evidence against the parties writing them (3) Thus a letter marked 'without prejudice' protects subsequent (4) and even previous (5) letters in the same correspondence Such letters however, are only protected if *bona fide* written with a view to a compromise (6) Thus a letter "without prejudice," which contains a threat against the recipient if the offer be not accepted, is admissible to prove such threat (7) So also if the admission be merely of a collateral or indifferent fact, such as the hand writing of a party, which is capable of easy proof by other means and is not connected with the substantial merits of the cause, it will be received, even though made pending negotiations (8), as also will offers without prejudice if the offer has been accepted (9) For if the terms proposed in such a letter are accepted a complete contract is established, and the letter, although written 'without prejudice' operates to alter the old state of things and to establish a new one A contract is constituted in respect of which relief by way of damages or specific performance would be given (10) The mere fact that a document is stated to have been written 'without prejudice' will not exclude it The rule which excludes documents marked 'without prejudice' has no application unless some person is in dispute or negotiation with another, and terms are

(1) Taylor Ev. § 795, and see *ib.*, §§ 774 796 797 and cases there cited Roscoe N. P. Ev. 62 63 Steph. Dig. Art. 20 Powell Ev. 300 Phillips Ev. 326

(2) *Per* Bowen L. J., in *Walker v. Wilsher* *supra*

(3) Roscoe N. P. Ev., 62, *Paddock v. Forrester* 3 M. & G., 903 *Hoghton v. Hoghton* 15 Bea. 278 321 *Walker v. Wilsher* *supra*.

(4) *Paddock v. Forrester*, *supra*, *Re Harris* 44 L. J. Bkcy. 33 It is not necessary to go on putting 'without prejudice' at the head of every letter *ib.* *Walker v. Wilsher*, *supra*, 337

(5) *Peacock v. Harter* 26 W. R. (Eng.), 109 In this case a second letter without prejudice was held to protect a

previous letter not expressed to be without prejudice on the ground that the second letter was to be taken as a post script to the former

(6) *Grace v. Baynton* 21 Sol. Jour. 631 cited in Cordery 83 In the case of *Hicks v. Thompson* Times 19th Jan. 1857 a lawyer's clerk sued for breach of promise of marriage sought to exclude his love letters because he had headed them all without prejudice.

(7) *Auria v. Spence* 58 L. T. 438

(8) *Waldridge v. Kenneson* 1 Esp. 143 see also *per* Lord Kenyon C. J. in *Turner v. Railton* 2 Esp. 474

(9) *Walker v. Wilsher*, *supra* 337, *In re River Steamer Co.* L. R. 6 Ch., 877

(10) *Per* Lindley L. J. in *Walker v. Wilsher* 23 Q. B. D., 335 at p. 337

an admission is made thus in a suit on a bill of exchange, where the defendant stated in a letter to the plaintiff that he had not had notice of the dishonour of the bill, but that if the debt was accepted without costs, he would give the plaintiff a cheque for it, and the plaintiff thereupon discontinued the action on payment of costs, it was held that the plaintiff was, in a second action on the bill, entitled to use the letter as proof of waiver of notice of dishonour. The first action being discontinued before the second was begun the conditional waiver became absolute and the letter admissible in evidence (2). Letters without prejudice cannot, without the consent of both parties, be read on a question of costs to show willingness to settle, although the mere fact and date of such letters or negotiations, as distinguished from their contents, may sometimes be received to explain delay (3). Perhaps, also, an offer of compromise, the essence of which is that the party making it is willing to submit to a sacrifice, or to make a concession (4) will be rejected, though nothing at the time was expressly said respecting its confidential character, if it clearly appears to have been made under the faith of a pending treaty, into which the party has been led by the confidence of an arrangement being effected (5). But in the absence of any express, or strongly implied, restriction as to confidence, an offer of compromise is clearly admissible and may be material as some evidence of liability (6), although it may not be proper to enquire into the terms offered (7) though it must still be borne in mind that such an offer may be made for the sake of purchasing peace and without admitting liability to the extent of the claim (8). Much depends upon the circumstances of the case (9). The rule does not apply to admissions made before an arbitrator, for though in this last case, the proceedings are said to be before a domestic forum, yet the parties are, at the time, contesting their rights as adversely as before any other tribunal (10). It has, however, been held that nothing which passes between the parties to a suit in any attempt at arbitration or compromise should be allowed to effect the slightest prejudice to the merits of their case as it eventually comes to be tried before the Court. No presumption can be raised against a party to a suit from his refusal to withdraw from the determination and submit to arbitration (11). An admission before an arbitrator is admissible in evidence although it is for the Court dealing with the facts to attach whatever weight it thinks proper to such an admission. The rule enunciated in this section does not apply to such admissions (12).

(1) *Madhav Rao v. Gulabhai* 23 B 177, 180 (1898) citing *In re Daintrey* Ex parte Holt (1893) 2 Q B 116.

(2) *Heldsforth v. Dinsdale* 19 W R (Eng) 198.

(3) *Walker v. Hisher* 23 Q B D, 335 see however *Williams v. Thomas* 31 L J Ch 674.

(4) *Thompson v. Austen* 2 D & R 361.

(5) *Woldridge v. Kennison* 1 Esp 144 Taylor Ev § 795.

(6) *Hallace v. Small* 1 M & M 446. *Hallace v. Lauson* ib 447. *Nelson v. Smith* 3 Stark R 129 Taylor Ev § 795.

(7) *Harding v. Jones* 1 F & G 1. see also *Thomas v. Morgan* 1 M & R 496.

(8) *Mearns v. Gar v. A. Mudda* *Mia*

44 L J Q 191. *Letters Patent appeal* per Sanderson C J and Mockerjee J.

(9) Field Ev 6th Ed § 96 see also observations of Lord St Leonards in *Jordan v. Money* 5 H L C 45 when an attorney goes to an adverse party with a view to a compromise or to an action you must always look with very great care at his evidence of what then occurred.

(10) *Doe v. Lloyd* Et al. see also the admissions may be proved by the arbitrator *Gregory* 140 and 3 Esp 113 Taylor Ev § 795-799. see also Ev § 795 as to admitting answers see § 132 post.

(11) *McLachlan Singh v. D. M. Singh*, 1 M & M 15.

(12) *M. M. Singh v. R. M. Singh* 4 F. L. 121 C. 121 C. 121 C. 121 C.

Confession caused by inducement, threat, or promise when irrelevant in criminal proceeding

24. A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat, or promise, having reference to the charge against the accused person, proceeding from a person in authority, and sufficient, in the opinion of the Court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him

Principle.—The ground upon which confessions, like other admissions, are received, is the presumption that no person will voluntarily make a statement which is against his interest unless it be true (1). But the force of the confession depends upon its voluntary character (2). The object of the rule relating to the exclusion of confessions is to exclude all confessions which may have been procured by the prisoner being led to suppose that it will be better for him to admit himself to be guilty of an offence which he really never committed (3). There is a danger that the accused may be led to incriminate himself that, it is under the admission of while seeking to obtain a character for activity and zeal, to harass and oppress prisoners, in the hope of wringing from them a reluctant confession (5).

as 17—22 ('Admission')

as 3 ('Relevant')

as 3 ('Court')

as 28 (Confession after removal of impression caused by inducement)

as 80 (Presumpt on as to document purporting to be a confession)

Steph. Dig, Arts 21—23, Taylor, Ev, §§ 862—906 Best Ev §§ 551—553 3 Russ. Cr., 440—499, Powell Ev, 9th Ed, 104—116 Phipson Ev 5th Ed, 248—259, Wills, Ev, 2nd Ed, 300—307, Norton Ev, 154—164, Cr Pr Code ss 163 343, Roscoe Cr Ev 13th Ed, 30—50 A Treatise on the Admissibility of Confession and Challenge of jurors in criminal cases in England and Ireland by Henry H Joy Wigmore Ev, § 822 *et seq*

COMMENTARY.

In the first place, an important question arises as to the meaning of these words and as to the person on whom the onus rests of showing that the confession was voluntary or involuntary. The use of the word "appears," it has been seen, seems to show that the fact on which the Court is to act is not the fact of the confession.

(1) Taylor Ev § 865 Phillips & Arn, Ev, 401 Best Ev, § 524 *ante*, p 217, note (7), Wills, Ev, 102

(2) Taylor Ev §§ 872 874, *see remarks in R v Thomson* L R. (1893) 2 Q B at p 15

(3) 3 Russ Cr., 442 *per* Littledale J in *R v Court* 7 C. & P. 486, but in *R v Baldry* 2 Den C C 430, Lord Campbell, C J., said The reason is not that the law supposes that the statement will be false but that the prisoner has made the confession under a bias and that therefore

it would be better not to submit it to the jury. But *see also* Lord Campbell's dictum in *R v Scott*, 1 D & B 47 48 and Taylor Ev § 874, *R v Nabarup* Goswami 1 B L R O S 15 22 25 (1868) *R v Thomas* 7 C. & P., 345

(4) Wigmore Ev § 822

(5) Taylor Ev § 874

(6) *R v Barzantia*, 25 B 168 (1900), s c 2 Bom. L. R. 761 765 On this, and what follows *see* the able article by 'Lex' in 2 Bom L R., 157, as also an article by another contributor at p 217

Appears

would be necessary if "proof" had been required. A confession may, it has been argued, appear to the Judge to have been the result of inducement on the face of it and apart from direct proof of that fact or a Court might perhaps in a particular case fairly hesitate to say that, it was proved that the confession had been unlawfully obtained and yet might be in a position to say that such appeared to it to have been the case (1). It is, however, to be observed that if the word "appear" is to be placed in opposition to the term "proof," there may be discrepancy between the terms of this section and the eightieth section in the case of recorded confessions which are presumed to be voluntary until disproved to be so. Perhaps therefore, it would be more correct to say that as under the third section, prudence is to determine whether a fact exists or not the use of the word "appear," while requiring proof, indicates that a less degree of such proof is required in this than in other cases. By whom then must the existence or non existence of the inducement, threat or promise be proved or made to appear? Is the confession to be presumed to be voluntary until the contrary be shown or must the prosecution in all or if not in all in what cases, establish its voluntary character before it can be admitted in evidence? This subject is one of considerable difficulty. In England the case law is not uniform. It has been held that a confession is presumed to be voluntary unless the contrary is shown (2) with the result that it is *prima facie* admissible and can only be excluded when it is proved or made to appear that the confession was not voluntary. On the other hand it has been held that the material question is whether a confession has been obtained by improper inducement and the evidence to this point being in its nature preliminary, addressed to the Judge who will require the prosecutor to show affirmatively to his satisfaction that the statement was *not* made under the influence of an improper inducement, and who in the event of any doubt subsisting on this head, will reject the confession (3). In the Crown case reserved *R v Thompson* (4), the head note of the report states the decision to be that in order that evidence of a confession by prisoner may be admissible, it must be affirmatively proved that such confession was free and voluntary, and this view of the decision has been adopted in *Roscoe on Criminal Evidence* (5). No doubt the Court stated that the test by which the admissibility of a confession may be decided was—had it been proved affirmatively that the confession was free and voluntary (6). But, the proposition in the head note appears when the whole case is considered to be too broadly laid down. In the case it is stated that there was ground for suspicion (7) and Cave, J., who delivered the judgment of the Court, says later on (8) 'I prefer to put my judgment on the ground that it is the duty of the prosecution to prove in case of doubt that the prisoner's statement was free and voluntary.' It has been said that this section was intended merely to reproduce the English law and that the word appears occurs in Art. 22 of Sir James Fitzjames Stephen's Digest of the Law of Evidence as it does in this section (9). However this may be the law of this country is contained in the present section which must be fairly construed according to its language in order to ascertain what that law is.

Firstly as regards judicial confessions the Criminal Procedure Code contains provisions as to the manner in which they should be recorded.

- (1) *R v Bastanta* *supra*.
 (2) *R v Williams* 3 Russ. Cr. 497
 see also *R v Cleaves* 4 C. & P. 221
R v Watkins 4 C. & P. 548 *Roscoe*
Cr. Ev. 53 11th Ed. Field *Ev.* 5th
 Ed. 138
 (3) *R v Barrington* 2 Den. C. C.
 44 n. where Parke B. said to counsel
 for the prosecution 'You are bound to
 satisfy me that the confession which you

sought to use against the prisoner was not
 obtained from him by improper means'
Taylor Ev. § 62

- (4) 1893 Q. B. 1
 (5) 11th Ed. p. 49
 (6) 1893 Q. B. at p. 17
 (7) *Id.* at p. 17
 (8) *Id.* at p. 18
 (9) *Barrington* L. R. 234

Confessions of accused persons recorded by Magistrates are admissible in evidence, subject only to the provisions of sections 164 and 364 of the Criminal Procedure Code. The first of these sections provides that any Magistrate not

Such confessions must be recorded and signed in the manner provided in section 364. The Magistrate referred to in section 164 is a Magistrate other than the Magistrate by whom the case is to be inquired into or tried (1). If the confession is made before a competent Magistrate who is making the preliminary enquiry, it is sufficient if the provisions of section 364 are complied with (2). But a record is unnecessary when a confession is made in Court to the officer trying the case at the time of trial where the accused can be convicted on the plea of guilty (3). It is important that a Magistrate before recording the confession of an accused person then in custody of the police should ascertain how long the accused has been in custody. If there is no record of that fact the

the twenty-fourth point (4). The led has been much d Procedure Code

In cases coming within that section the Court may supplement the defective statement defects, can be confes

sion taken under section 164 admissible where no attempt has been made to conform to the provisions of the latter section (7).

Under section 80 of this Act whenever any document is produced before any Court purporting to be a statement or confession by any prisoner or accused

sion was voluntary) purporting to be made by the person signing it, are true

(1) *R v Jetoo* 23 W R Cr 16 (1875). In the matter of *Behari Hajdi* 5 C L R 238 (1879). *Krishna Monee v R* 6 C L R 289 (1880). *R v Anunt ram Singh* 5 C 954 F B 880 followed in *R v Yakub Khan* 5 A 253 (1883). The provisions of s 164 however have no application to statements taken in the course of a police investigation in the town of Calcutta. *R v Ailmadhub Mitter* 15 C 595 (1888) followed in *R v Fisser Babaji* 21 B 495 (1896). A Deputy Magistrate should not act as Magistrate in a case in which he is himself the prosecutor and take confessions of prisoners before himself. *R v Boidnath Singh* 3 W R Cr 29 (1865).

(2) *Krishna Monee v R* 6 C L R 289 (1880). *R v Anuntran Singh* supra. *Yakub Khan* supra.

(3) In the matter of *Chumman Shah* 3 C 756 (1878).

(4) *R v Narayan* 25 B 543 (1901).

(5) Cr Pr Code s 533. This section applies to confessions and statements recorded under both ss 164 and 364. The

corresponding section of the old Code (s 346 Act of 1872) dealt only with statements and confessions made in the course of a preliminary enquiry and did not apply to confessions recorded under s 122 (164 of present Code). *R v Ratan* 10 B H C R 166 (1873), consequently when a confession taken under s 122 was inadmissible in evidence oral evidence was excluded by s 91 post ib. *R v Shiva* 1 B 219 (1876). *R v Manu Tarolee* 4 C 696 (1879), contra *R v Ra anyissa* 2 M 5 (1878) but irregularly recorded confessions and statements under either s 164 or 476 of the present Act may either be (1) remediable under s 533 or (2) not. In the case of (1) oral evidence is admissible in the case of (2) it is admissible at any rate in the case of an irregular record under s 164 (see next note).

(6) *R v Iman* 9 M 224 (1886). *Jai Narayan v R* 17 C 862 (1890).

(7) *R v Iman* supra. *Jai Narayan Rai v R* supra. latter case dissent from in *R v Fisser Babaji* 21 B 495 (1901) (1896).

and that such evidence, statements or confession was duly taken. This formal certificate is all that the law in strictness requires, and is *prima facie* evidence of the voluntary character of the confession. It is the duty of the Magistrate to satisfy himself that the confession is not excluded by this section (1). It is to be feared, however, that such certificates are often not worth much as evidence of the absence of inducement. Assuming that a prisoner has been induced to confess he will not unlikely assure the recording Magistrate that his confession is quite voluntary, knowing that he will leave the Magistrate's presence in the custody of the police and remain in their charge for many days to come (2). In the case of extra judicial confessions there is no such *prima facie* evidence as that afforded by the certificate. In both cases, however, there is to be considered the effect of the word "appear" in this section. This as already stated does not connote strict "proof". Still, although very probably a confession may be rejected on well-grounded conjecture, there must (unless the *onus* lies upon the prosecution) be something before the Court on which such conjecture can rest (3). In the first place does the *onus* lie upon the prosecution in all cases to prove that a confession is voluntary before it can be used in evidence? If this be the law in England, which is doubtful it has been held that such a rule does not prevail in this country. In the absence of evidence it is not to be presumed that a statement objected to on the ground of its having been induced by illegal pressure is inadmissible (4). To require as the criterion of admissibility affirmative proof that a duly recorded and certified confession was free and voluntary is not consistent with the terms of this Act or with previous decisions or practice (5). Thus a statement in writing by an accused person containing allegations which, whether they are true or not, appear to

(1) *R v Narayan* 25 B 543 (1901) *R v Jadub Das*, 27 C., 295, s c 4 C W N 129 *R v Basuanta*, supra. See Circular of Bombay High Court (*Bombay Government Gazette*, 1900 Part I p 919 2 Bom. L R 157), requiring Magistrates before recording confessions to satisfy themselves by all means in their power including the examination of the bodies of the accused that the confessions are voluntary. See *R v Gunesh Koormee* 4 W R Cr 1 (1865) where the prisoner retracted his statement when read over to him and said that he was compelled to make it and the Sessions Judge without making any inquiry or taking evidence upon the point submitted the prisoner's statement to the jury as a confession, it was held that the Judge was wrong in so doing and that he should rather have charged the jury not to accept the prisoner's statement as a confession. As regards the Sessions Court it has been held that it is not necessary for a Sessions Judge to read out to prisoners confessions made by them before a Magistrate and ask them if they have any objection to the reception of their confession. *R v Usseer Sheikh* 14 W R Cr 9 (1870). But it appears to have been the opinion of Sir Michael Westropp in *R v Kassimath Dinkar* 8 Bom H C R 137 138 that not only the committing Magistrate but also the trying Court ought to make needful enquiries where allegations are made

in a regular and proper manner to the Sessions Court that a confession before a Magistrate was improperly induced a procedure which was followed in the English Courts so far back as the 12th century (Pollock and Maitland History of English Law Book II pp 650 651). See also *R v Narayan* supra s c 3 Bom L R 122.

(2) See remarks of Westropp C J in *R v Kassimath Dinkar* 8 Bom H C R 126.

(3) *R v Basuanta* 2 Bom L R 761 765 (1900).

(4) *R v Balsant Pendharkar* 11 Bom H C R 137 138 (1874) *R v Dada Aia* 15 B 452 480 (1889) *R v Bhairu Singh* 3 A 338 339 (1880). A prisoner alleging that a confession was unduly extorted should offer some proof of his statements to the Court. So an accused retracting a confession alleging that it was caused by ill treatment by the Police has it is held the *onus* of establishing such ill treatment or other inducement. *Emperor v Kabuli Katone* 22 C W N., 809 s c 19 Cr L J 959.

(5) *R v Basuanta* 2 Bom L R 761 765 (1900) s c 5 B 168 disapproving *R v Balva Dadas* 1 Cr R J of 1895 (B H C) in which Parsons J held that a confession to be admitted at all in evidence must be proved to have been made voluntarily and not to have been caused by improper inducement.

indicate that the statement was not made voluntarily, is inadmissible (1) If it, however, "appears" that the confession is not voluntary, it must be excluded Unless this is disclosed by the evidence for the prosecution the *onus* of establishing this fact will be upon the accused—a fact which in a large number of, if not in most cases, the accused will not be in a position to establish It is in this connection that the question of the retraction of confessions becomes of the highest importance If a confession, which has been previously made, whether judicially or extra judicially, is not retracted at the trial, there appears to be little or no reason why it should not be accepted without any proof being given of its voluntary character And it has been held that the law does not require that the confession of an accused person should be corroborated before it is acted upon It is for the Court to say whether the confession is to be believed or not (2) This is, however, not so where, as is frequently the case, the confession is retracted at the trial In a very large percentage of Sessions cases the prisoners will be found to have made elaborate confessions, shortly after coming into the hands of the Police, not infrequently these confessions are adhered to in the committing Magistrate's Court, they are almost invariably retracted when the proceedings have reached a final stage and the prisoner is at the Bar of the Sessions Court "These recurrent phenomena, peculiarly suggestive in themselves, can scarcely fail to attract the anxious notice of Judges who regard the efficient administration of justice as matter in which they are directly and personally implicated, not as a mere routine work mapped out for them in the higher tribunals" (3) The retraction of confessions is, as was said by Straight, J, in *R v Babu Lal* (4), 'an endless source of anxiety and difficulty to those who have to see that justice is properly administered

In *R v Thompson* (5) Cave, J, said, I would add that for my part I always suspect these confessions, as they are supposed to be the offspring of penitence and remorse, and which nevertheless are repudiated by the prisoner at the trial It is remarkable that it is of very rare occurrence for evidence of a confession to be given when the proof of the prisoner's guilt is otherwise clear and satisfactory, but when it is not clear and satisfactory, the prisoner is not infrequently alleged to have been seized with the desire born of penitence and remorse to supplement it with a confession a desire which vanishes as soon as he appears in a Court of Justice Were it not for the presumption raised by section 80 of this Act it is submitted that the rule which should be followed in all cases of retracted confessions, is to throw the *onus* on the prosecution of affirmatively proving the voluntary character of the confession No doubt, abstractedly considered, the mere fact that a confession is retracted raises no inference of improper inducement (6) Such retraction may be due to the fear of punishment for an offence, which has been the subject of a true and voluntary confession Having regard, however, to the notorious fact that confessions are frequently extorted in this country (7), retraction might not improperly be held to cast upon the prosecution the *onus* of showing that the confession was a voluntary one When a prisoner has confessed and afterwards pleads not guilty, the truth and voluntariness of the confession is denied by implication When a prisoner says he has been forced to confess, the Judge is put upon judicial enquiry, and that enquiry, it may well be urged, should prece-

(1) *R v Taranath Roy Chowdry* (1910), 37 C 735

(2) *Emperor v Dhani*, 20 Cr L J., 721, See *Sheoprasad Koeri v Emperor*, 20 Cr L J 562

(3) 2 Bom L R 157

(4) 6 A at p 543 (1884), referred to in *R v Dada Ana* 15 B 452 461 (1889)

(5) L R 1893 2 Q B, 12 18 cited

with approval in the *Deputy Legal Remembrancer v Karuna Easiboti* 22 C., at p 172 (1894)

(6) So in *Sheoprasad Koeri v Emperor*, 20 Cr L J 562 it was held that the fact of retraction would not (necessarily) deprive a confession of its (*prima facie*) voluntary character

(7) See cases cited *post*

the admission of the confession and any examination into its truth (1) is, however, the law now stands, provided confession of a prisoner before a Magistrate is even though the confession be retracted A mere subsequent retraction of a confession, which is duly recorded and certified by a Magistrate, is not enough in all cases to make it appear to have been unlawfully induced (3)

According to some rulings of the Madras High Court a retracted confession must be supported by independent reliable evidence corroborating it in material particulars (4) That Court has, however, more recently held (5) in general conformity with the views expressed by the other High Courts (6), that it cannot be laid down as an absolute rule of law that a confession made and subsequently retracted by a prisoner cannot be accepted as evidence of his guilt without independent corroborative evidence The weight to be given to such a confession must depend upon the circumstances under which the confession was originally given and the circumstances under which it was retracted, including the reasons given by the prisoner for his retraction (7) The credibility of such a confession is in each case a matter to be decided by the Court according to the circumstances of each particular case, and if the Court is of opinion that such a confession is true, the Court is bound to act, so far as the person making it is concerned, upon such belief (8) The use to be made of such a confession is a matter of prudence rather than of law (9) It is unsafe for a Court to rely on and act on a confession which has been retracted, unless after consideration of the whole evidence in the case the Court is in the position to come to the unhesitating conclusion that the confession is true, that is to say, usually unless the confession is corroborated in material particulars by credible independent evidence (10) or unless the character of the confession and the circumstances under which it was taken indicate its truth (11)

A retracted confession is almost always open to suspicion, and the Courts will therefore, in conformity with the abovementioned rulings, generally require corroborative evidence of its truth, even though there be no absolute rule

(1) 2 Bom L R 161 163

(2) *R v Sreemity Mongola* 6 W R C R (1866) *R v Mussamut Jema* 8 W R Cr, 40 (1867) *R v Balvant Pendharkar*, 11 Bom H C R 157 (1874) *R v Pella Gazi* 4 W R Cr 16 (1865) [When prisoners confess in the most circumstantial manner to having committed a murder the finding of the body is not absolutely essential to a conviction *R v Budduruddeen* 11 W R 20 (1869) a Judge held to have exercised a proper discretion in not passing sentence of death in a case in which the dead body was not found *R v Bhuttun Rujman* 12 W R Cr 49 (1869) [The properly attested confession of a prisoner before a Magistrate is sufficient for his conviction without corroborative evidence and notwithstanding a subsequent denial before the Sessions Court] but where there was misconduct of the police it was held that the prisoners could not safely be convicted on their own retracted statements without any corroboration *Sofruddeen v R* 2 C L R 132 (1878) See note & also *Sheo-prasad Kori v Emperor* 20 Cr L J 67 supra

(3) *A v Bastanta* 25 B 168 (1900)

Imperor v Kabili Katone 19 Cr L J, 959

(4) *R v Rang* 10 M 295 (1886) *R v Bharmappa* 12 M 123 (1888) in *R v Rom Lajer* 19 M 482 (1896) the confessions were corroborated

(5) *R v Raman* 21 M 83 88 (1897) As to the necessity of corroboration when it is used as against others than the maker see *Yas v R* 28 C 683 (1901)

(6) *R v Bhuttun Rujman* 12 W R Cr 49 (1869) *R v Gharja* 19 B 728 (1894) *R v Gambia* 23 B 316 (1898) *R v Maiku Lal* 20 A 133 (1897) *R v Keli e* (1907) 29 A 434 post p 186

(7) *R v Raman* 21 M 83 88 (1897)

(8) *R v Maiku Lal* 20 A 133 (1897)

(9) *R v Gharja* 19 B 728 (1894)

(10) *R v Mahabir* 18 A 8 (1895)

See *R v Jadab Das* 4 C W 129 & c 27 C 795

(11) *R v Maiku Lal* 20 A 133 (1897), see also *R v Kashinath Dinkar* 8 Bom H C R Cr Ca 126 138 (1871) *R v Dada Ana* 15 B 452 461 (1892) *R v Labi Lal* 6 A 509 542 (1894) *R v Jigat Pandra* 2 C 50 77 (1894), *Duty Legal Remembrance v Karna* Ba stha 2 C 164 (1894)

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In *R v Thompson* (5) Cave, J., said, I would add that for my part I always suspect these confessions, which are supposed to be the offspring of penitence and remorse, and which nevertheless are repudiated by the prisoner at the trial It is remarkable that it is of very rare occurrence for evidence of a confession to be given when the proof of the prisoner's guilt is otherwise clear and satisfactory, but when it is not clear and satisfactory, the prisoner is not infrequently alleged to have been seized with the desire born of penitence and remorse to supplement it with a confession—a desire which vanishes as soon as he appears in a Court of Justice' Were it not for the presumption raised by section 80 of this Act it is submitted that the rule which should be followed in all cases of retracted confessions, is to throw the *onus* on the prosecution of affirmatively proving the voluntary character of the confession No doubt, abstractedly considered the mere fact that a confession is retracted raises no inference of improper inducement (6) Such retraction may be due to the fear of punishment for an offence, which has been the subject of a true and voluntary confession Having regard, however, to the notorious fact that confessions are frequently extorted in this country (7), retraction might not improperly be held to cast upon the prosecution the *onus* of showing that the confession was a voluntary one When a prisoner has confessed and afterwards pleads not guilty, the truth and voluntariness of the confession is denied by implication When a prisoner says he has been forced to confess, the Judge is put upon judicial enquiry, and that enquiry, it may well be urged, should precede

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the admission of the confession and any examination into its truth (1) is, however, the law now stands, provided it was voluntarily made, the confession of a prisoner before a Magistrate is even though the confession be retracted subsequent retraction of a confession, Magistrate, is not enough in all cases to make it appear to have been unlawfully induced (3)

According to some rulings of the Madras High Court a retracted confession must be supported by independent reliable evidence corroborating it in material particulars (4) That Court has, however, more recently held (5) in general conformity with the views expressed by the other High Courts (6), that it cannot be laid down as an absolute rule of law that a confession made and subsequently retracted by a prisoner cannot be accepted as evidence of his guilt without independent corroborative evidence. The weight to be given to such a confession must depend upon the circumstances under which the confession was originally given and the circumstances under which it was retracted including the reasons given by the prisoner for his retraction (7) The credibility of such a confession is in each case a matter to be decided by the Court according to the circumstances of each particular case and if the Court is of opinion that such a confession is true, the Court is bound to act, so far as the person making it is concerned upon such belief (8) The use to be made of such a confession is a matter of prudence rather than of law (9) It is unsafe for a Court to rely on and act on a confession which has been retracted, unless after consideration of the whole evidence in the case the Court is in the position to come to the unhesitating conclusion that the confession is true, that is to say, usually unless the confession is corroborated in material particulars by credible independent evidence (10) or unless the character of the confession and the circumstances under which it was taken indicate its truth (11)

A retracted confession is almost always open to suspicion, and the Courts will therefore, in conformity with the abovementioned rulings, generally require corroborative evidence of its truth, even though there be no absolute rule

(1) 2 Bom L R 161 163

(2) *R v Sreemany Mongola* 6 W R C R (1866) *R v Mussamat Jema* 8 W R Cr 40 (1867) *R v Balkant Pendiarkar* 11 Bom H C R 157 (1874) *R v Petta Gazi* 4 W R Cr 16 (1865) [When prisoners confess in the most circumstantial manner to having committed a murder the finding of the body is not absolutely essential to a conviction *R v Budduruddeen* 11 W R 20 (1869) a Judge held to have exercised a proper discretion in not passing sentence of death in a case in which the dead body was not found *R v Bhuttun Rujuan* 12 W R Cr 49 (1869) [the properly attested confession of a prisoner before a Magistrate is sufficient for his conviction without corroborative evidence and notwithstanding a subsequent denial before the Sessions Court] but where there was misconduct of the police it was held that the prisoners could not safely be convicted on their own retracted statements without any corroboration *Sofruddeen v R* 2 C L R 13 (1878) See note 5 also *Sho-prasad Kari v Emperor*, 20 Cr L J 562 *supra*

(3) *A v Bastania* 25 B 168 (1900)

Emperor v Kabuli Katone 19 Cr L J, 959

(4) *R v Rang* 10 M 295 (1886) *R v Biarrioppa* 12 M 123 (1888) in *R v Rom Layer* 19 M 482 (1896) the confessions were corroborated

(5) *R v Rairan* 21 M 83 88 (1897) As to the necessity of corroboration when it is used as against others than the maker see *Yasin v R* 28 C 683 (1901)

(6) *R v Bhuttun Rujuan* 12 W R, Cr 49 (1869) *R v Gharya* 19 B. 728 (1894) *R v Ganbia* 23 B 316 (1898), *R v Maiku Lal* 20 A 133 (1897) *R v Kelie* (1907) 29 A 434 *post* p 186

(7) *R v Raman* 21 M 83 88 (1897)

(8) *R v Maiku Lal* 20 A 133 (1897)

(9) *R v Gharya* 19 B 728 (1894)

(10) *R v Mahabir* 18 A 78 (1895) See *R v Jadab Das* 4 C W 129, s c 27 C 295

(11) *R v Maiku Lal* 20 A 133 (1897), see also *R v Kashinath Dinkar* 8 Bom H C R Cr Ca 126 138 (1871), *R v Dada Ana* 15 B 452 461 (1899), *R v Fahu Lal* 6 A 509 542 (1884), *R v Jagat Chandra* 22 C. 50, 77 (1894), *Deputy Legal Remembrancer v Karuna Baistohi* 22 C 164 (1894)

of law requiring corroboration of a retracted confession, the matter is one of prudence and it is prudent as a general rule to require corroboration (1) This procedure will in effect practically achieve the same results as a rule requiring proof of the voluntary character of a retracted confession inasmuch as though these decisions require evidence of the truth of the confession and not of its voluntary character the truth of voluntariness may not unreasonably, though not necessarily, be inferred where the truth of the confession is established. In a recent case, where a friend of the accused had made a statement to a Police-officer (which was taken down in writing) but at the trial had denied having made it and the Presiding Judge had admitted the statement in evidence both to discredit its maker and also as evidence against the accused in that it contained statements made to the Police corroborating confessions made by the accused, it was held by the Full Bench of the Bombay High Court that the said document ought not to have been used in evidence against the accused but that his confessions were not made irrelevant under this section by the addition of the statement (2)

The law, as it at present stands may thus be summarized (a) In the case of judicial confessions recorded in the manner prescribed by the Criminal Procedure Code, the confession is to be held *prima facie* to be voluntary until the contrary is shown (b) Both in the case of judicial and extra judicial confessions the *onus* is upon the accused of showing that under this section a confession he has made is irrelevant (c) While the mere fact of retraction is not in itself sufficient to make it appear to have been unlawfully induced in ordinary cases as a general rule corroborative evidence of the truth of the confession and by implication of its voluntariness is required. Where a Sessions Judge came to the conclusion that the confessions must be taken to be voluntary and true because there was no evidence of ill treatment by the Police and the confessions had been repeated before the committing Magistrate nearly a month after they had been made and recorded the Court said "There is undoubtedly no evidence to show that the confession was retracted it is, in a case of this kind, to be taken as voluntary in the circumstances."

In other cases the Court is not at liberty to act upon mere conjecture and its rejection of a confession must be based upon the nature of the confession the facts disclosed by the evidence for the prosecution or adduced in proof of his plea of not guilty by the accused. If from the evidence given by the prosecution it appears doubtful whether the confession was voluntary the *onus* will of course lie upon the Crown to affirmatively establish that the confession was voluntary and that it is admissible. If in such case this be not established or if it appears, upon the evidence adduced by the prosecution or the accused that the confession was not voluntary it must be rejected under the terms of this section. S. 27 not only qualifies ss. 25, 26 but also this (4)

This and the succeeding sections up to and including the thirtieth section, deal only with the specific form of admission known as a confession. But the preceding sections up to and including the twenty second section deal with admissions generally in both criminal as well as civil cases. The twenty first section therefore makes all confessions admissible except those which are

(1) *R v Lalit Mohan Chuckerbutty*, S. B. (1911) 38 C. 559. *Emperor v Musaz Jauai* 19 Cr. L. J. 275 (the confirmation should be not only as to the general story of the crime but as to the accused's connection with it. In *Moharab Ali v Emperor* 23 C. W. N. 836 the confession was rejected. *Upendra Nath Das v*

Emperor 19 Cr. L. J. 826. *Bladdu v Emperor* 19 Cr. L. J. 861, 46 I. C. 1005.

(2) *R v Narayan Raghunath Patil* (1907) 32 B. 111 (Full Bench).

(3) *R v Durgaya* 3 Bom. L. R. 441 (1901).

(4) *Amiruddin v Emperor* 45 C. 557.

declared to be irrelevant or which are prohibited by this and the following sections. By sections 24—26 the Legislature intended to throw a safeguard around prisoners (1)

It is difficult to lay down any hard and fast rule as to what constitutes an inducement a term which of course includes torture. The question is one for the discretion of the Judge, and its decision will vary in each particular case (1 post). A statement is inadmissible under this section only if the Court considers it to have been made in consequence of "any inducement, threat or promise" (2). The relevancy of the confession is to be determined by the Court that is the Judge or the Magistrate, and not the jury (3). "Section 24, whilst requiring the inducement to be offered by a person in authority, leaves it entirely to the Court to form its own opinion as to whether the inducement threat or promise was sufficient to lead the prisoner to suppose that he would derive some benefit or avoid some evil of a temporal nature by confessing (4). It is immaterial to whom a confession obtained by undue influence, is made. Thus a confession so tainted is irrelevant whether made to the Sessions Judge (5) or Magistrate (6) or any Police officer (7) or any other person *e.g.* the Traffic Manager of a Railway (8) or the Master of a vessel (9). It is also immaterial whether the confession be made to the same person who has used undue influence (10) or whether it be made to a person other than the one who has held out the inducement, threat or promise (11). 'Confessions made some days after arrest may also often be true but such confessions will I believe in almost every instance not have been made voluntarily but have been extorted by maltreatment or induced by witness for the Crown (12). Confessions obtained by undue influence especially by the Police and this fact has been the subject of frequent judicial and public comment (14). 'The reports show that many confessions are induced by improper means, and that innocent

Confession by an accused person

(1) *R v Ra a Birapa* 3 B 12 17 (1878) *per* West J., as to the construction of ss 24—26 see *The Madras Law Journal* Jan and Feb 1890 pp 12—44

(2) *R v Balvant Pendlarkar* 11 Bom H C R 137 138 (1874)

(3) *R v Hannah Moore* 21 L J Mag Ca 199 see *R v Navroji Dadabhai* 9 Bom H C R 358 367 (1872)

(4) *R v Navroji Dadabhai* *supra* at p 36 *per* Sargent C J see also s 28 *post*

(5) *R v Mussamat Luchoo* 5 N W P 86 (1873)

(6) *Id R v Ra a Birapa* 3 B 12 (1878) *R v Asglar Ali* 2 A 260 (1879) *R v Ueer* 10 C 775 (1884)

(7) *R v Mussamat Luchoo* *supra* *R v Ra a Birapa* *supra*

(8) *R v Navroji Dadabhai* *supra*

(9) *R v Hicks* 10 B L R App 1 (1872)

(10) *R v Hicks* *supra* *R v Mussamat Luchoo* *supra* *R v Ra a Birapa* *supra* *R v Asglar Ali* *supra* *R v Ueer* *supra*

(11) *R v Navroji Dadabhai* *supra* *R v Mussamat Luchoo* *supra*

(12) *R v Gobardhan* 9 A 578 566

(1887) *per* Brodhurst J

(13) *Id R v Madar* Weekly Notes (1880) p 59 cited *ib R v Belary Singh* 7 W R Cr 3 (1867) [exposition of a Police-officer's powers of arrest and detention on with the view to the suppression of torture] *R v Sagal Sanba* 21 C 642 660 661 (1893)

(14) See *R v Kohdas Kahar* 5 W R Cr 6 (1866) *R v Behary Singh* 7 W R Cr 3 (1867) *R v Nityo Gopal* 24 W R Cr 80 (1875) *Babu Lal* 6 A 509 542 543 (1884) *R v Gobardhan* 9 A 578 566 (1887) *R v Dada Ana* 15 B 452 461 (1889). It appears to be well known that the Police are in the habit of extorting confessions by illegal and improper means. They find that no enquiry is made of them as to the truth of such charges but they are merely told they must obtain convictions *per* Pethe ram C J *R v Ra anund* All W N (1880) p 221 Stephen Hist of Criminal Law p 442 First Report of Indian Law Commissioners and the Report of the late Police Commission Section 163 Cr P Code expressly forbids any such inducement as is mentioned in this section being offered

people often accuse themselves falsely is known to the reader of any book on Evidence"(1)

When a confession has been received and it afterwards appears from other evidence, that an inducement, threat, or promise was held out the proper course for the Judge is to strike the confession out of the record and to tell the jury to pay no attention to it (2) A Magistrate acts without due discretion when as a prosecutor, he holds out promises to prisoners as an inducement to confess (3) A Police officer acts improperly and illegally in offering any inducement to an accused person to make any disclosure or confession (4) In deter-

this section it is necessary
have exercised undue in-
'), and (b) the nature of

the inducement, threat, or promise [such inducement must (a) have reference to the charge, and (b) be sufficient, etc.] The word accused in sections 24 to 26 includes any person who subsequently becomes accused provided that at the time of making the statement criminal proceedings were in prospect (5)

"Person in
authority

Such a person must be in fact a person in authority. The mere belief of a confessing accused is not enough. But what is such a person (6) No definition or illustration is given of this expression. It is an expression well known to English lawyers on questions of this nature, and although, as all rules of evidence which were in force at the passing of the Act are repealed the English decisions on the subject can scarcely be regarded as authorities, they may still serve as valuable guides" (7) A too restrictive meaning should not be placed on these words (8) The test would seem to be had the person authority to interfere with the matter and any concern or interest in it would appear to be held sufficient to give him that authority, as in *R v Warringham* (9), where Parke, B., held that the wife of one of the prosecutors and concerned in the management of their business was a person in authority and we find the rule so laid down in Archbold's Criminal Practice (10) Accordingly, it was held that a travelling auditor in the service of the G I P Railway Company was a 'person in authority' within the meaning of this section (11) The members of a *panchayat* which sat to consider whether two persons should be excommunicated from caste for having committed a murder were held not to

case the
where a
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cl(14), a

(1) *R v Dada Ana* 15 B 452 461 (1889) per Jyrdine J

(2) *R v Garner* 1 Den C C 329

(3) *R v Paidhon Singh* 1 W R Cr 24 (1864)

(4) *R v Dhurum Dutt* 8 W R Cr, 13 (1867) Cr Pr Code s 163

(5) *Smith v Emperor* 19 Cr L J 189 s c 43 I C 605

(6) *R v Ganesh Chandra* 50 C, 127 (1923)

(7) *R v Narroji Dadabhai* 9 Bom H C R 354 368 (1872) per Sargent, C J

(8) *Nazir Jhamdar v R* 9 C W N 44 (1905)

(9) 2 Den C C 447

(10) *R v Narroji Dadabhai* supra 369 per Sargent C J 'The inducement and authority must all be understood in relation to the prosecution, that is to say,

a person is deemed to be a person in authority within the meaning of this rule only if he stands in certain relations which are considered to imply some power of control or interference in regard to the prosecution. *Wills v 210 Smith v Emperor* 19 Cr L J 189 (the expression has a wider meaning than the actual prosecutor)

(11) *P v Narroji Dadabhai* supra

(12) *R v Mohan Lall* 4 A 46 (1881) And see also *R v Fernand* 4 Bom L R, 785 (1902) where the member of a Panch was held to be a person in authority

(13) *Nazir Jhamdar v R* 9 C W N 474 (1905) followed in *R v Jasha Bera* 11 C W N 904 (1907)

(14) *R v Karia Biraja* 3 B 12 (1878) *R v Fakira Appaja* 40 B, 220 (1916)

collecting and assistant *janclayet*(1) a Police Constable(2), Superintendent of Excise(3), Military Officer(4), a Magistrate(5), and a Sessions Judge are "persons in authority" as are also the master of a vessel(6), the prosecutor(7), or his wife(8) or his attorney(9) the master or mistress of the prisoner, if the offence has been committed against the person or property of either but otherwise not(10), and generally any person engaged in the arrest detention examination or prosecution of the accused(11) It has been held in England not to be necessary that the promise or threat should be actually uttered by the person in authority if it was uttered by some one else in his presence and truth acquiesced in by him, so as to appear to have his confirmation and authority(12) A confession made to, but not induced by, a person in authority is admissible(13) while conversely a confession induced by though not made to such a person will be rejected(14) Confessions procured by inducements proceeding from persons having no authority are admissible(15)

The inducement must (a) have reference to the charge against the accused person that is the charge of an offence in the Criminal Courts(16) The inducement must have reference to the offence the subject of the prisoner's position as he does or does not confess(18) And if the inducement be made as to one charge it will not affect a confession as to a totally different charge(19) An

(1) *R v Ganesh Chandra* 50 C 127 (1973)

(2) *R v Mustamat Lucio* 1 N W P 86 (1873) *R v Steward* 7 C & P 519 *R v Pountney* 7 C & P 307 *R v Laugler* 2 C & K 227 *R v Millen* 3 Cox 507 as to private persons arresting see 3 Russ Cr 464 and note Roscoe Cr Ev 17th Ed 40 the wife of a constable is not a person in authority *R v Hardwick* 1 C & P 98 note (b)

(3) *Ruknialli v Emperor* 27 C W N 451 s c 19 Cr L J 574

(4) *Smith v Emperor* 19 Cr L J 189

(5) *R v Aslgar Ali* 2 A 260 (1879) *R v Ueer* 10 C 77a (1884) *R v Cleaves* 4 C & P 231 *R v Cooper* 5 C & P 535 *R v Parker* L & C 42 *R v Ramdhun Sing* 1 W R Cr 24 (1864) [Honorary Magistrate acting as prosecutor] also it has been held in England the Magistrate's Clerk *R v Dreu* 8 C & P 140 But see *R v Fakira Appaya* 40 B 220 (1916) in which it was questioned whether a statement made before a committing Magistrate is governed by this section or by the Criminal Procedure Code section 287

(6) *R v Hicks* 10 B L R App 1 (182) but see also *R v Moore* 2 Den 526 explaining *R v Parratt* 4 C & P 50

(7) *R v Jenks* R & R 429 *R v Jones* R R 152

(8) *R v Harringham* ante *R v Upchurch* 1 R & M C C 465 *R v Taylor* 8 C & P 733 *R v Moore* 2 Den C C 522 *R v Sleeman Dears* C C 249

(9) *R v Croxson* 2 Cox 67

(10) *R v Moore* 2 Den 572

(11) See *Taylor* Ev §§ 873 84 Roscoe Cr Ev 13th Ed 40 Phipson Ev 3rd Ed 228 ib 5th Ed 250 Wills Ev 210 *R v Moore* 2 Den C C 522 576 ib 2nd Ed 307

(12) *R v Laugler* 2 C & K 225 *R v Taylor* 8 C & P 733 *Quare* whether the section by the use of the words "proceeding from" enacts a different rule It is submitted not but see *Field* Ev 136 ib 6th Ed 96

(13) *R v Gibbons* 1 C & P 97 *R v Tyler* 1 C & P 179

(14) *R v Boswell* 1 Car & M 584 *R v Blackburn* 6 Cox 333

(15) See *Roscoe* Cr Ev 44 *Field* Ev 136 ib 6th Ed 96

(16) See *R v Mohan Lal* 4 A 46 (1881)

(17) In *R v Hicks* 10 B L R App 1 a confession under threat made for purpose other than to extort confession was held to be inadmissible but the correctness of this ruling is doubtful

(18) *R v Garner* 2 C & K 970 Phipson Ev 3rd Ed 229 ib 5th Ed 251 *Taylor* Ev §§ 879—881 3 Russ Cr 42 43 Steph Dg Art 27 Wills Ev 210 ib 2nd Ed 302 the threat must be a threat to prosecute or take some step adverse to the defendant's interests connected therewith i.e. the prosecution and the promise must be a promise to forbear from some such course ib

(19) *R v Warner* 3 Russ Cr 452n unless here two crimes being charged both form parts of the same transaction *R v Hearn* 1 Car & M 109

inducement relating to some *collateral* matter unconnected with the charge will not exclude a confession (1). Thus a promise to give the prisoner a glass of spirits (2), or to strike off his handcuff (3) or let him see his wife (4), will not be a bar to the admissibility of the confession. The inducement need not be expressed, but may be implied from the conduct of the person in authority, the declarations of the prisoner, or the circumstances of the case (5), nor need it be made *directly to the prisoner*, it is sufficient if it may reasonably be presumed to have come to his knowledge, providing of course, it appears to have induced the confession (6).

The advantage to be gained or the evil to be avoided

Secondly—The inducement must (b) in the opinion of the Court be sufficient (see next paragraph) and the advantage to be gained, or the evil to be avoided, must (a) be of a *temporal* nature, therefore any inducement having reference to a future state of reward or punishment does not affect the admissibility of a confession, thus a confession will not be excluded which has been obtained from the accused by moral or religious exhortation, however urgent whether by a chaplain (7), or others (8), e.g., Be sure to tell the truth (9) "I hope you will tell because Mrs G can ill afford to lose the money (10), you", kneel down and tell me the truth if you have committed a fault do not don't run your soul into more sin, evil must (b) have reference to the confession for instance, that by confessing he will happen to him (17), that steps will be taken to get him off (18), that he will be pardoned (19), that he

(1) Taylor Ev, § 880
(2) R v Sexton cited in Joy on Confession 17—19 is not law Taylor Ev § 880 3 Russ Cr 443 Roscoe Cr Ev, 42 12th Ed 38

(3) R v Green 6 C & P 653

(4) R v Lloyd ib 393

(5) Phipson Ev 5th Ed 251 R v Gillis 17 Ir C I 534 cited

(6) Ib Taylor Ev § 883 but a promise of threat to one prisoner will not exclude a confession made by another who was present and heard the inducement R v Jacobs 4 Cox 54 and see R v Bate 11 Cox 686 where a confession by a prisoner was received although an inducement had been held out to an accomplice which might have been communicated to the prisoner but see R v Harding 1 Arm M & O 340

(7) R v Gilham 1 Moo C C 186 (in this case the gaol chaplain told a prisoner that, as the minister of God he ought to warn him not to add sin to sin by attempting to dissemble with God and that it would be important for him to confess his sins before God and to repair, as far as he could any injury he had done the prisoner after this made two confessions to the gaoler and mayor which were held to be admissible)

(8) R v Jarvis L R 1 C C R, 96 R v Reete ib 367

(9) R v Court 7 C & P 486 R v Helles 1 Cox 247 'as a universal rule

an exhortation to speak the truth ought not to exclude confession per Erle J in R v Moore 2 Den C C 522 523

(10) R v Lloyd 6 C & P 393

(11) R v Reete L R 1 C C R, 962

(12) R v Wild R & M 452

(13) R v Jarvis L R 1 C C R 96

(14) R v Sleeman Dears 269

(15) Thus in R v Mohan Lal 4 A, 46 supra the evil threatened (excommunication for life) had no reference to the criminal proceedings against the prisoners. The case of R v Hick 10 B L R App 1 supra is also open to the objection that it is not in accord with this portion of the section

(16) R v Vatroji Dadabai 9 Pcm H C R 258 (18 2)

(17) R v Mussunat Lucloo 5 V W P 86 (1873)

(18) R v Raia Birapa 3 B 12 (1878), or that if he confessed to the Magistrate he would get off R v Ramdhan Singh 1 W R Cr (1864)

(19) R v Asghar Ali 2 A 260 (18 9) R v Radhanath Dasadh 8 W R, Cr., 53 (1867) Bish Manjee v R 9 W R. Cr. 16 (1868) [promises of immunity by the police] R v Jagat Chandra 22 C, 50 73 (1894) see Roscoe Cr Ev 45 Abdul Karim v R 1 All L J 110 (1904) a confession however made under promise of pardon may be admissible under s 339 Cr Pr Code R v Asghar Ali see supra. R v Hanmantia 1 B 610 (1877)

would be let off if he disclosed everything(1) or the like. A promise or threat as to some purely collateral matter will not exclude the confession (*v ante*)

As the admission or rejection of a confession rests wholly in the discretion of the Judge, it is difficult to lay down particular rules *a priori*, for the government of that discretion, and the more so, because much must necessarily depend on the age, experience, intelligence, and character of the prisoner, and on the circumstances under which the confession was made. Language sufficient to overcome the mind of one, may have no effect upon that of another, a consideration which may serve to reconcile some contradictory decisions where the principal facts appear similar in the Reports, but the lesser circumstances, though often very material in such preliminary enquiries, are omitted (2). The reported cases in which statements by prisoners have been held inadmissible are very numerous. Various expressions have been held to amount to an inducement. But the principle has been thus broadly stated. It does not turn upon what may have been the precise words used, but in each case, whatever the words used may be, it is for the Judge to consider before he admits or rejects the evidence, whether the words used were such as to convey to the mind of the person addressed an intimation *that it will be better for him to confess that he committed the crime, or worse for him if he does not* (3). It is not because the law is afraid of having the truth elicited that these confessions are excluded, but it is because the law is jealous of not having the truth (4). The following are given as examples of confessions which have been admitted or rejected. It has been already mentioned that confessions induced by mere moral or religious exhortation are admissible. At one time almost any invitation to make a disclosure was held to imply some threat or promise, but a sounder practice has since prevailed and the words used are construed in their natural sense, so that many of the older decisions are no longer safe guides (5). Such expressions, therefore as 'what you say u ' or for or against you ' will not exclude imports a mere caution (7). Nor does the about it, amount to a threat (8). There is, however, one form of inducement, namely, 'you had better tell the truth' and equivalent expressions which are regarded as having acquired a fixed meaning in this connection as if a technical term and are always held to import a threat or promise (9). Thus, 'you had better pay the money than go to jail' constitute an inducement (10). The terms of the inducement constantly involve both threat and promise, a threat of prosecution if disclosure is not made, a promise of forgiveness if it is. The following for instance, have been

'Sufficient to give the accused grounds'

(1) *R v Ganesh Chandra* 50 C 127 (1923)

(2) *Roscoe Cr Ev* 40 *see* cases there collected.

(3) *R v Garner* 2 C & L 920 975 *per Erle J*

(4) *R v Mansfield* 14 Cox C C 938 640 *per Williams J*

(5) *Wills Ev* 212 *ib* 2nd Ed 303. *See* judgment of Parke B in *R v Baldry* 2 Den at p 445

(6) *R v Baldry* 2 Den 430 *over* ruling several earlier cases

(7) *R v Jarvis L R* 1 C C R 96 *Rights case* 1 Law 48 and *see R v Long* 6 C & P 179 *Phipson Ev* 5th Ed 255

(8) *R v Reason* 12 Cox 278

(9) *Wills Ev* 212 *ib* 2nd Ed 303

The words 'you had better' seem to have acquired a sort of technical meaning *per Kelly C B* in *R v Jarvis* *supra* *see also per Field J* in *R v Usher* 10 C 775 776 (1884) and *per Sargent C J* in *R v Navrojs Dadabhai* 9 Bom H C R 358 (1872) *R v Fennell* 7 Q B D 147 *R v Hatts* 49 L T 780 *R v Walkley* 6 C & P 175 but this construction will not prevail if such a statement is accompanied by other words which indicate that it was not intended in this sense as if 'you had better as good boys tell the truth' *R v Reeve L R* 1 C C R 362 I dare say you had a hand in it you say as well tell me all about it is an inducement *R v Croxson* 2 Cox 67

(10) *R v Navrojs Dadabhai*, 9 Bom H C R 358 (1872)

inducement relating to some *collateral* matter unconnected with the charge will not exclude a confession (1). Thus a promise to give the prisoner a glass of spirits (2), or to strike off his handcuffs (3), or let him see his wife (4), will not be a bar to the admissibility of the confession. The inducement need not be *expressed* but may be implied from the conduct of the person in authority, the declarations of the prisoner, or the circumstances of the case (5), nor need it be made *directly to the prisoner*, it is sufficient if it may reasonably be presumed to have come to his knowledge, providing of course, it appears to have induced the confession (6).

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(1) Taylor Ev, § 880

(2) *R v Sexton* cited in Joy on Confession 17—19 is not law Taylor Ev § 880 3 Russ Cr 445 Roscoe Cr Ev, 42 12th Ed 38

(3) *R v Green* 6 C & P 655

(4) *R v Lloyd* ib 393

(5) Phipson Ev 5th Ed 251 *R v Gillis* 17 Ir C I 534 cited

(6) *Ib* Taylor Ev § 885 but a promise of threat to one prisoner will not exclude a confession made by another who was present and heard the inducement *R v Jacobs* 4 Cox 54 and see *R v Bate* 11 Cox 686 where a confession by a prisoner was received although an inducement had been held out to an accomplice which might have been communicated to the prisoner but see *R v Harding* 1 Arm M & O 340

(7) *R v Gilham* 1 Moo C C 186 (in this case the gaol chaplain told a prisoner that as the minister of God he ought to warn him not to add sin to sin by attempting to dissemble with God and that it would be important for him to confess his sins before God and to repair as far as he could any injury he had done the prisoner after this made two confessions to the gaoler and mayor which were held to be admissible)

(8) *R v Jarvis* L. R. 1 C. C. R 96 *R v Reece* ib 367

(9) *R v Court* 7 C & P 486, *R v Helles* 1 Cox 247, as a universal rule

an exhortation to speak the truth ought not to exclude confession per Erle J, in *R v Moore* 2 Den C C 522 523

(10) *R v Lloyd* 6 C & P 393

(11) *R v Recte* L. R. 1 C C R 367

(12) *R v Wild* R & M 452

(13) *R v Jarrs* L. R. 1 C C R 96

(14) *R v Sleean* Denr 269

(15) Thus in *R v Mohan Lal* 4 A 46 *supra* the evil threatened (excommunication for life) had no reference to the criminal proceedings against the prisoners. The case of *R v Hick* 10 B L R App 1 *supra* is also open to the objection that it is not in accord with this portion of the section

(16) *R v Nazroji Dadabhai* 9 Bom H C R 258 (1872)

(17) *R v Mussumat Lalloo* 5 V W P 86 (1873)

(18) *R v Rama Biraja* 3 B 12 (1878) or that if he confessed to the Magistrate he would get off *R v Ramdhan Singh* 1 W R Cr (1864)

(19) *R v Asghar Ali* 2 A 260 (1879) *R v Radhanath Dasadh* 8 W R Cr 53 (1867) *Bish Manjee* v *R* 9 W R Cr 16 (1868) [promises of immunity by the police] *R v Jagat Chandra* 22 C, 50 73 (1894) see Roscoe Cr Ev 45 *Abdul Karim v R* 1 All L J 110 (1904) a confession however made under promise of pardon may be admissible under s 339 Cr Pr Code *R v Asghar Ali* see *supra*, *R v Hanmantha* 1 B 610 (1877)

would be let off if he disclosed everything (1) or the like. A promise or threat as to some purely collateral matter will not exclude the confession (*v ante*)

As the admission or rejection of a confession rests wholly in the discretion of the Judge, it is difficult to lay down particular rules, *a priori*, for the admission or rejection of a confession, because a much must necessarily be said of the facts and character of the prisoner, and the language used.

"Sufficient to give the accused grounds"

Language sufficient to overcome the mind of one, may have no effect upon that of another, a consideration which may serve to reconcile some contradictory decisions where the principal facts appear similar in the Reports, but the lesser circumstances, though often very material in such preliminary enquiries, are omitted (2). The reported cases in which statements by prisoners have been held inadmissible are very numerous. Various expressions have been held to amount to an inducement. But the principle has been thus broadly stated: 'It does not turn upon what may have been the precise words used, but in each case, whatever the words used may be, it is for the Judge to consider, before he admits or rejects the evidence, whether the words used were such as to convey to the mind of the person addressed an intimation that it will be better for him to confess that he committed the crime or worse for him if he does not' (3). It is not because the law is afraid of having the truth elicited that these confessions are excluded, but it is because the law is jealous of not having the truth (4). The following are given as examples of confessions which have been admitted or rejected. It has been already mentioned that confessions induced by mere moral or religious exhortation are admissible. At one time almost any invitation to make a disclosure was held to imply some threat or promise, but a sounder practice has since prevailed and the words used are construed in their natural sense, so that many of the older decisions are no longer safe guides (5). Such expressions therefore as 'what you say will be used as evidence against you, or for or against you' will not exclude a confession (6), for such language imports a mere caution (7). Nor does the expression, 'I must know more about it' amount to a threat (8). There is, however, one form of inducement, namely 'you had better tell the truth' and equivalent expressions which are regarded as having acquired a fixed meaning in this connection as if a technical term and are always held to import a threat or promise (9). Thus 'you had better pay the money than go to jail' constitute an inducement (10). The terms of the inducement constantly involve both threat and promise, a threat of prosecution if disclosure is not made, a promise of forgiveness if it is. The following for instance have been

(1) *R v Ganesh Chandra* 50 C 127 (1923)

(2) *Roscoe Cr Ev* 40 see cases there collected

(3) *R v Garner* 2 C & K 970 925 per Erie J

(4) *R v Mansfield* 14 Cox C C 938 640 per Williams J

(5) *Wills Ev* 212 ib 2nd Ed 303 See judgment of Parke B in *R v Baldry* 2 Den at p 445

(6) *R v Baldry* 2 Den 430 overruling several earlier cases

(7) *R v Jarvis* L R 1 C C R 96 *Wright's case* 1 Law 48 and see *R v Long* 6 C & P 179 *Phip on Ev* 2nd Ed 255

(8) *R v Reason* 12 Cox 228

(9) *Wills Ev* 212 ib 2nd Ed 303

The words 'you had better' seem to have acquired a sort of technical meaning per Kelly C B in *R v Jarvis* supra see also per Field J in *R v Usher* 10 C 715 76 (1884) and per Sargent C J in *R v Navroji Dadabhai* 9 Bom H C R 358 (1872) *R v Fennell* 7 Q B D 147 *R v Hatts* 49 L T 780 *R v Walkley* 6 C & P 175 but this construction will not prevail if such a statement is accompanied by other words which indicate that it was not intended in this sense as if 'you had better as good boys tell the truth' *R v Reeve* L R 1 C C R 362 'I dare say you had a hand in it you may as well tell me all about it' is an inducement *R v Croxson* 2 Cox 67

(10) *R v Navroji Dadabhai*, 9 Bom H C R 358 (1872)

held to be such statements when made by persons in authority, "If you don't tell the truth, I will send for the constable to take you" (1), "if you tell me where my goods are, I will be favourable to you" (2), "if you confess the truth nothing will happen to you" (3), "if you don't tell me, I will give you in charge of the police till you do tell me" (4), "if you are guilty, do confess, it will perhaps save your neck, you will have to go to prison, pray tell me if you did it" (5), "I only want my money, if you give me that you may go to the devil" (6), "unless you give me a more satisfactory account, I will take you before a Magistrate" (7), "the watch has been found, and if you do not tell me who your partner was, I will commit you to prison" (8), "if I tell the truth shall I be hung?" "No, nonsense, you will not be hung" (9), "tell me what really happened, and I will take steps to get you off" (10), "if you confess to the Magistrate, you will get off" (11), "it is no use to deny it, for there are the man and boy who will swear they saw you do it" (12), "I shall be obliged if you would tell me what you know about it, if you will not, of course, we can do nothing for you" (13), "I will get you released if you speak the truth" (14), "you had better split and not suffer for all of them" (15). A confession made under a promise of pardon is inadmissible (16). The threat or promise need not be in express terms, if the intention is still clear, as in the case of the following statements: "If you (the person in authority) forgive me, I (the prisoner) will tell you the truth" Reply "Anne, did you do it?" (17) "If you don't tell me, you may get yourself into trouble, and it will be the worse for you" (18). But a promise or threat must be imported. Thus the following statements have been held not to exclude the confession "I must know more about it" (19), "now is the time for you to take it [the stolen property] back to the prosecutrix" (20).

25 No confession made to a Police officer (21), shall be proved as against a person accused of any offence (22).

Principle.—The powers of the police are often abused for purposes of extortion and oppression (23), and confessions obtained by the police through

(1) *R v Hearn*, 1 Car & M 109
Wills Ex 212 1b 2nd Ed 303 *R v Richards* 5 C & P 318

(2) *f v Cass* 1 Lea 293 note

(3) *R v Mussanah Luchoo* 5 N W P, 86 (1873)

(4) *R v Luckhurst Dears* C C 245

(5) *R v Upchurch* 1 Moo C C 465

(6) *R v Jones* R & R 152

(7) *R v Thompson* 1 Lea 291

(8) *R v Parratt* 4 C & P 570

(9) *R v Windsor*, 4 F & F 366

(10) *R v Rama Barapa* 3 B 12 (1878)

(11) *R v Ramdhan Sing* 1 W R., Cr, 24 (1864)

(12) *R v Mills* 6 C & P 146

(13) *R v Partridge* 7 C & P., 551

(14) *R v Dhurum Dutt* 8 W R Cr 13 (1867) *Emperor v Dinanath Jundary* 45 B 1086 (1921) s c 23 Bom L R. 338 see *Zeeta v Emperor* 37, I C, 814, where the statement was held admissible

(15) *R v Thomas* 6 C & P, 353

(16) *R v Asghar Ali* 2 A 260 (1879) *R v Radhanath Dosadh* 8 W R Cr 53 (1867) and as to confession induced by knowledge that reward and pardon had been offered see *R v Blackburn* 6 Cox 333 *R v Dossell* 1 Car & M 584, R

v Dinghy 1 C & K 637, *Emperor v Anant Kumar Banerji* 32 C L J. 204

(17) *P v Mansfield* 14 Cox 639, Wills Ex 12 1b 2nd Ed 303

(18) *R v Golej* 10 Cox 536

(19) *R v Reason* 12 Cox 228, *Phipson* Ev 3rd Ed 233

(20) *P v Jones* 12 Cox 241

(21) In Upper Burma after the word "Police officer" the words "who is not a Magistrate" are to be inserted see Act XIII of 1898

(22) The above section was taken from s 148 Act XXV of 1861 (Cr Pr Code) see *R v Babu Lal*, 6 A 507 512 (1834) As to statements made to a Police-officer investigating a case and as to the use of police reports and diaries and statements made before the police. See Cr Pr Code, and *v Salt v R* (1909), 36 C. 560 *Sikandar v Emperor* 20 Cr L J 83

(23) See Extract from *The First Report of the Indian Law Commissioners* cited in Field Ev., 140 142, and remarks of Straight J., in *R v Babu Lal* 6 A., 507 542 (1834), and Mahmood J ib., 523, but see also remarks of Duthoit J ib., 550

Confession made to a Police officer not to be proved

undue influence have been the subject of frequent judicial comment (1) "The object of this section is to prevent confessions obtained from accused persons through any undue influence being received as evidence against them." (2) If a confession be "made to a Police-officer, the law says that such a confession shall be absolutely excluded from evidence, because the person to whom it was made is not to be relied on for proving such a confession, and he is moreover suspected of employing coercion to obtain the confession" "The broad ground for not admitting confessions made to a Police-officer is to avoid the danger of admitting false confessions" (3)

s. 26 (Confession while in custody of police) s. 27 (Facts discovered in consequence of information)

COMMENTARY.

The rule enacted by this section is without limitation or qualification, and a confession made to a Police-officer is inadmissible in evidence, except so far as is provided by the twenty seventh section, *post* (4) It is better in construing a section such as the 25th which was intended as a wholesome protection to the accused, to construe it in its widest and most popular signification. The enactment in this section is one to which the Court should give the fullest effect" (5) The terms of the section are imperative and a confession made to a Police-officer *under any circumstances* is inadmissible in evidence against the accused. The next section does not qualify the present one, but

Construction of section

other hand, the twenty sixth section cannot be treated as an exception or proviso to the twenty fifth section. The two sections lay down two clear and definite rules. In this section the criterion for excluding a confession is the answer to the question—*to whom* was the confession made? If the answer is, that it was made to a Police officer, it is excluded. On the other hand, the criterion adopted in the twenty sixth section for excluding a confession is the answer to the question—*under what circumstances* was the confession made? If the answer is, that it was made whilst the accused was in the custody of a Police officer, the confession is excluded, 'unless it was made in the immediate presence of a Magistrate' (7) Therefore a confession to a Police officer, even though made in the presence of a Magistrate, is inadmissible (8) The provisions

(1) *v ante* notes to s 25

(2) *Per Garth C J in R v Hurribole Chunder* 1 C 207 215 (1876) 25 W R Cr 36 *see also* in the matter of *Hiran Miya* 1 C L R. 21 (1877) *R v Panoram* 4 A 198 204 (1882) Sections 25 26 27 differ widely from the law of England and were inserted in the Act of 1861 (from which they have been taken) in order to prevent the practice of torture by the police for the purpose of extracting confessions. *Steph Introd* 165

(3) *R v Babu Lal* 6 A 509 532 (1884) *per* Mahmood J and *ib* 544 *per* Straight J *ib* 513 *per* Oldfield J

(4) In the matter of *Hiran Miya* 1 C L R. 21 (1877) *R v Babu Lal* 6 A 509 (1884) *See* *E. peror v Hira Gobatt* 21 Bom. L R 724 cited under s 8 *ante* *See* as to construction of this section the *Madras Law Journal* Jan and Feb 1895 pp 31—36

(5) *Per Garth C J, in R v Hurribole Chunder* 1 C 215 216 (1876) 25 W R Cr 36 but *see* dictum of Stuart C J in *R v Panoram* 4 A 198 203 (1882) in which however Straight J seems not to have concurred and which was dissented from by the Calcutta Court in *Adu Shikdar v R* 11 C 365 641 (1885) the prohibition in this section must be strictly applied *R v Panoram* 4 A 204 *per* Straight J

(6) *R v Hurribole Chunder* *supra* 215 in the matter of *Hiran Miya* *supra* *R v Babu Lal* 6 A 509 532 (1884)

(7) *R v Babu Lal* 6 A 59 532 (1884) *per* Mahmood J and *ib* 544 545 *per* Straight J

(8) *Ib R v Domun Kahar* 12 W R, Cr 82 (1869) *R v Mon Mohan* 24 W R Cr 33 (1875) in this case the confession was made to the Magistrate but the report shows that had it been made

of the section are unqualified and it is therefore immaterial whether the confessing party was, at the time of making the confession, accused or not, or whether he was in police custody or not, and whether the confession was made to a Police officer in the presence of a Magistrate or not. When a Police-officer has evidence before him sufficient to justify the arrest of an accused, he should not, preliminary to the arrest, examine him and record his statement. The evidence of the Police-officer in regard to such statement cannot be regarded except as a confession to a Police officer and is inadmissible under this section and is also inadmissible against the co accused (1).

Police-officers "

In construing this section the term "Police officer" should be read not in any strict technical sense but according to its more comprehensive and popular meaning (2). A confession, therefore, made to the Deputy Commissioner of Police in Calcutta was held to be inadmissible (3). The provisions of this section apply to every Police officer and are not to be restricted to officers of the regular police force (4). The following persons are "Police officers" within the meaning of this section: a sub-inspector of a police head constable (7), police stable (10), chowkidar (10), and an assistant magistrate of Madras (1). Munsiffs in the Presidency of Madras (1) include the Police-officers of Native States as well as those of British India (14). It is immaterial whether such Police officer be the officer investigating the case, the fact that such person is a Police-officer invalidates a confession (15). A confession made to a Police officer in the presence and hearing of a private person is not to be considered as made to the latter, and is therefore excluded by the section (16). But a policeman who overhears a conversation may be in the position of an ordinary witness and competent to depose to what he heard. It was, therefore, held that the evidence of a policeman who overheard a prisoner's statement made in another room, and in ignorance of the policeman's vicinity and uninfluenced by it, was admissible the statement not being made to a Police officer, nor to others whilst in his custody (17). A confession is not taken without the scope of this section by the fact that it was made to a person, not in his capacity of a Police officer, but as an Acting Magistrate, and Justice of the Peace (18). In this last cited case, Pontifex J., while agreeing that the

to the police it would have been held to be inadmissible *Muthukumaraswami Pillai v King Emperor* 35 M 397 (1912) (Abdur Rahim and Miller JJ dissenting)

(1) *R v Jadab Das* 4 C W N 129 (1899) as to incriminating statements of one accused against another to Police officer see *Zeala v Emperor*, 37 I A 114 s c 10 Bur L T 270

(2) *R v Hurribole Chunder* 1 C 207, 215 (1876) per Garth C J. In the matter of *Hiran Miya* 1 C L R 21 (1877), *R v Bhima* 17 B 485 486 (1892) per Jardine J. *R v Saleemuddin Sleikh* 26 C 570 (1899) *R v Nagla Kala* 22 B 235 (1896)

(3) *R v Hurribole Chunder*, supra
(4) *R v Saleemuddin Sheikh* 26 C 569 (1899)

(5) *R v Bhima* supra, *R v Kamalia* 10 B 595 (1886)

(6) *R v Pancham* 4 A 198 (1882)

(7) In the matter of *Hiran Miya* 1 C L R 21 supra

(8) *A v Pagaree Shaha* 19 W R Cr., 51 (1873), *Adu Sikdar v R* 11 C., 635

(1885)

(9) *R v Macdonald* 10 B L R App. 2 (1872) *R v Pitambur Jina* 2 B 61

(1877) *R v Pandharinath* 6 B., 34

(1881) *R v Babu Lal* 6 A 509 (1884)

(10) *R v Mussamat Luchoo*, 5 N W P 86 (1873)

(11) *R v Saleemuddin Sleikh* 26 C., 569 (1899) See *Na ir Jhamdar v R* 9 C W N 474 (1905)

(12) *R v Son a Papi* 7 M 287 (1883). see *R v Bhi a* 17 B 485 486 (1892)

(13) *Emperor v Wazir Singh* 3 P R., Cr (1918) s c 19 Cr L J 364 *Abd Foong v Emperor* 22 C W N 834 s c 28 C L J 105

(14) *R v Nagla Kala* 22 B., 235 (1896)

(15) In the matter of *Hiran Miya* 1 C L R 21 supra

(16) *R v Pancham* 4 A 198 201 supra

(17) *R v Sageena* 7 W R Cr 56 (1867)

(18) *R v Hurribole Chunder*, 1 C., 207 supra

confession there in question was inadmissible added that he did so "without going so far as to say that this section of the Evidence Act renders inadmissible a confession made to any person connected with the police for there are cases

as such informant cannot be used as evidence against him on his trial (2) A statement made to a Police-officer by an accused person while in the custody of the police if it is an admission of an incriminating circumstance, cannot be used in evidence under this and the following section (3) (v post)

This section only provides that no confession made to a Police officer shall be proved as against a person accused of any offence. It may however be proved for other purposes. It does not preclude one accused person from proving a confession made to a Police-officer by another accused person tried jointly with him. But under such circumstances it would be the duty of the Judge to instruct the jury that such confession is not to be received or treated as evidence against the person making it but simply as evidence to be considered on behalf of the other (4). So again it has been held that statements made by accused persons as to the ownership of the property in an inquiry under section 523 Act VI of 1882 (5). In this case West J observed that a confession in this section of the Indian Evidence Act (I of 1872) means as in the twenty fourth section, a confession made by an accused person which it is proposed to prove against him to establish an offence. For such a purpose a confession might be inadmissible which yet for other purposes would be admissible as an admission under the eighteenth section against the person who made it (the twenty first section) in his character of one setting up an interest in property the object of litigation or judicial enquiry and disposal (6).

Against

An admission made by an accused person to a Police officer may be proved if it does not amount to a confession (7) that is if it is not a statement by him that he committed the crime with which he is charged or a statement suggesting the inference that he did so. So where the prosecutors watch chain and a sum of money had been stolen from him as he was travelling by rail to Calcutta and evidence was tendered of a statement made by the prisoner to the constable who arrested him to the effect that the watch and Rs 1000 had been given to him by his sister and that he had bought the chain Phear J admitted this evidence observing that there is a distinction in the Act between Admissions and Confessions (8). This statement was clearly not a confession of the theft or dishonestly receiving stolen property with which he was charged as it was not a statement that he had stolen the goods or come by them dishonestly, nor does the statement suggest any inference that he was guilty of the offences

Admission made to Police-officers

- (1) *Ib* at p 218
 (2) *Moler Shekh v R* 21 C 392 (1893)
 (3) *R v Jazecha a* 19 B 363 (1894)
R v Busl o Anent 3 W R Cr 21 (1865)
 (4) *R v P tan ber J na* 2 B 61 (1876)
 (5) *R v Tr bhova; Manekchand* 9 B 131 (1884)
 (6) *Ib* 134
 (7) *R v Macdonald* 10 B L R App 2 (1872) followed in *R v Dabee Pershad* 6 C 530 (1881) 7 C L R 541 *Legal Remembrancer v Lalit Mohan Singh Ray*

- 49 C 167 (1922) see also *R v Kangal Mal* 41 C 601 (1905) ref to n *Ran p t v Emperor* 20 All L J 178
R v Nabad v p Gosua 1 B L R O S C 15 (1868) 15 W R Cr 71 in which it was held that the answer did not amount to a confession of guilt but was a statement of facts which if true showed that the prisoner was innocent and v *Bar nd a Kumar Glose v R* (1909) 37 C 91 and *Emperor v Kangan Mal* 41 C, 601 (1914) foll n *Legal Remembrancer v Lalit Mohan Singh Ray* 49 C 167 (1922)
 (8) *R v Macdonald supra*.

26 No confession made by any person whilst he is in the custody of a Police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person

Confession by accused while in custody of police not to be proved against him

Explanation—In this section 'Magistrate' does not include the head of a village discharging magisterial functions in the Presidency of Fort St George or in Burma or elsewhere, unless such headman is a Magistrate exercising the powers of a Magistrate under the Code of Criminal Procedure, 1882 (1)

Principle.—The object of this section (as of the last) is to prevent the abuse of their powers by the police (2) The last section excludes confession to a Police-officer under any circumstances The present section excludes confessions to *any one else* while the person making it is in a position to be influenced by a Police officer, unless the free and voluntary nature of the confession is secured by its being made in the immediate presence of the Magistrate in which case the confessing person has an opportunity of making a statement uncontrolled by any fear of the police (3)

s 25 (Confession to a Police-officer)

s 27 (Facts discovered in consequence of information)

COMMENTARY.

The law is imperative in excluding what comes from an accused person in custody of the police if it incriminates him (4) The prohibition in this section must be strictly applied (5) This section does not qualify the preceding one (6) but this section as well as the last is qualified by the following one (7) The twenty fifth section applies to all confessions to Police officers, the present section to all confessions to any person other than a Police officer made by persons whilst in police custody These last-mentioned confessions are inadmissible unless made in the immediate presence of a Magistrate (8) But a confession inadmissible under this section *against* the confessing party, might, however be admissible in favour of a co accused (9) The word Police officer in this section includes the Police officers of Native States as well as those of British India (10) As to the meaning of these words see Commentary to the preceding section

Construction

As this section relates to confessions made to persons other than Police officers whilst the accused is in the custody of the police a confession made to such third person by an accused whilst the latter is *not* in such custody is not excluded by the section Where, therefore, a woman who was not in the custody of the police at the time made a confession to a Village Munsif, whom the

Police-custody

(1) The above section was taken from s 149 Act XXV of 1861 (Cr Pr Code) see *R v Robu Lal* 6 A 509 512 (1884) The explanation to this section was added by s 3 Act III of 1891 It alters the law as laid down by the Madras High Court in *R v Ramaraj* 133 A 2 M 5 (1878) See *R v Nagla Kala* 22 B 237 (1896) See now the Code of Criminal Procedure (Act V of 1898)

(2) *R v Mon Molun* 24 W R Cr 33 36 (1875) per Birch J

(3) In the matter of *Hiran Mija* 1 C L R 21 (1877) per Ainslie J *R v Hurrbole Chunder*, 1 C 207, 215 (1876)

(4) *R v Mathew* 10 C 1022 1023 (1884) per Field J See as to the construction of this section the Madras Law Journal Jan and Feb 1890 pp 36-44

(5) *R v Panchar* 4 A 198 204 (1882) per Straight J

(6) *R v Domun Kahar* 12 W R, Cr, 87 (1869) *R v Babu Lal* 6 A 509 532 v ante p 265

(7) *R v Babu Lal* 6 A 509 (1884), see note to s 27 post

(8) v ante

(9) *R v Pitamber Jina* 2 B, 61 (1876)

(10) *R v Nagla Kala* 22 B, 235 (1896)

Court held not to be a Police-officer within the meaning of the preceding section, it was held that the confession could not be excluded under this section (1) Some sort of custody appears to be sufficient. So where the prisoners were among certain persons who had been 'collected' by a police *patel* on suspicion and the police *patel* had himself accused them of complicity in the offence, the prisoners were deemed to be in the custody of the police (2) In the under mentioned case (3) a person under arrest on a charge of murder was taken in a *tor ga*, from the friend drove the course of as committed, to Godhra. A policeman rode in front. In *longa* and went to a neighbour meanwhile proceeding slowly. In the absence of the police friend with reference to the alleged offence. At the trial it was proposed to ask what the prisoner had said, on the ground that she was not then in custody, and that this section did not

Native State, who is not a Police officer, does not become that of a Police officer, merely because his subordinates, the warders of the jail are members of the police force of that State. In the absence of any suggestion of a close custody inside the jail, such as may possibly occur when an accused person is watched and guarded by a Police officer investigating an offence this section does not exclude such a jailor from giving evidence of what the accused told him while in jail. In the case cited (5) an accused, an under trial prisoner, was sent up by the Magistrate in whose lock up he was, in the custody of two policemen, to a hospital for treatment. The policemen made him over to the doctor and waited in the verandah to take him back. While with the doctor in his room, the accused made a confession of his guilt. At the trial, the confession was allowed to be proved. A question having arisen whether the confession was properly let in, it was held that the confession was excluded by this section, because the accused who was in police-custody up to his arrival at the hospital remained in that custody while the policemen were standing outside on the verandah.

In the immediate presence of a Magistrate

If the confession be made to a third person the presence of a Magistrate is necessary in order to render the confession admissible under this section. But a confession made to the Magistrate himself conforms to the requirement of the section and is admissible even though the confessing party be at the time in the custody of the police (6). In the case decided under section 149 of Act XXV of 1861 (Criminal Procedure Code) from which the present section of this Act has been taken it was held that, in order to give weight to confessions of prisoners recorded under section 149, there should be a judicial record of the special circumstances under which such confessions were received by the Magistrate, showing in whose custody the prisoners were and how far they were quite free agents (7). In another case decided under the same section it was held that the words 'a Magistrate' mean 'any Magistrate' and not merely 'the Magistrate having jurisdiction' (8). The word 'Magistrate' in this section includes Magistrates of Native States as well as those of British India. And so a confession made by a prisoner while in police-custody, to a First-class

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| (1) <i>R v Sama Papi</i> 7 M. 287 (1886) | 33 (1875) <i>R v Almadhab Mitter</i> 15 C. |
| (2) <i>R v Kamaliar</i> , 10 B. 595 596 (1886) | 595 (1888) |
| (3) <i>R v Lester</i> , 20 B. 165 (1894) | (7) <i>R v Aadasi Aahar</i> , 5 W. R., Cr. 6 (1886) see Criminal Procedure Code |
| (4) <i>R v Taleya</i> 20 B. 795 (1895) | as 164 364 533 |
| (5) <i>Emperor v Mallangowda</i> 42 B., 1 | (8) <i>R v Vakals Jetha</i> 7 Bom. H. C. |
| (6) <i>R v Man Mohun</i> 24 W. R., Cr. | R. C. C. 56 (1870) |

Magistrate of the Native State of Muli in Kathiawar, and duly recorded by such Magistrate in the manner required by the Code of Criminal Procedure, was held to be admissible in evidence (1)

27. Provided that, when any fact is deposed(2) to as discovered(3) in consequence of information received from a person accused of any offence(4), in the custody of a Police-officer(5), so much of such information whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved (6)

How much of information received from accused may be proved

Principle—The broad ground for not admitting confessions made under inducement, or to a Police officer, or by persons whilst in custody is the danger of admitting false confessions (7) But the necessity for the exclusion disappears in a case provided for by this section when the truth of the confession is guaranteed by the discovery of facts in consequence of the information given It is this guarantee, afforded by the discovery of the property, for the correctness of the accused's statement, which is the ground of the admission of the exception to the general rule The fact discovered shows that so much of confession as immediately relates to it is true (8)

s. 24 (Confession caused by inducement)

s. 26 (Confession by accused while in

s. 25 (Confession to a Police officer)

police-custody)

Steph Dig., Art 22, Taylor, Ev., §§ 902, 903, Phipson Ev. 5th Ed., 254 Wills, Ev., 214, 1b, 2nd Ed., 303, Roscoe Cr. Ev., 49, 3 Russ. Cr., 482—485 (9)

COMMENTARY.

The submission of a person to the custody of a Police officer within the terms of section 46(1) of the Criminal Procedure Code is custody within the meaning of this section (10) Though the words 'in the custody of a Police-officer' might seem to indicate that this section was intended to be a proviso to the preceding section only and that it is inapplicable when the information relating to the fact discovered thereby constitutes a confession "made to a Police officer," it has, however, been held that this section

Construction of section

(1) *R v Nagla Kala* 22 B 235 (1896)

(2) S 150 of Act XXV of 1861 (Cr Pr Code) ran thus—Deposed to by a police officer etc. [see *Bishoo Manjee v R* 9 W R Cr., 16 17 (1868)] The words in italics were omitted in the amended section substituted by Act VIII of 1869 and the omission has been here retained As the section now stands the fact may be deposed to by any one Field Ev. 45 But it must be deposed to *Legal Remembrancer v Lalit Mohan Singh Ray* 49 C 167 (1922)

(3) S 150 of Act XXV of 1861 ran thus—Discovered by him which italicised words were omitted in the amended section substituted by Act VIII of 1869 *post*

(4) S 150 of Act XXV of 1861 ran thus—*or* in the custody etc *v post*

(5) This word has the same meaning as in ss 25 and 26 *ante* see *R v Nagla Kala* 22 B 235 238 (1896)

(6) This section replaces s 150 of Act

XXV of 1861 (Cr Pr Code) as amended by Act VIII of 1869 see *R v Babu Lal* 6 A 512 516 (1884)

(7) See cases cited in the notes to ss 24 25 26 *ante*

(8) *R v Babu Lal* 6 A 509 513 517 546 (1884) *R v Nana* 14 B 260 264 (1889) 3 Russ Cr 483 Taylor Ev §§ 902 903 But not only are confessions excluded when obtained by means of improper inducements but also the acts of the prisoner done under the influence of such inducements unless confirmed by the finding of the property for the same influence which might produce a groundless confession might produce groundless conduct 3 Russ Cr 485

(9) As to the English authorities see *R v Nana* 14 B 260 265 (1889) *R v Rana Birapa* 3 B 12 17 (1878) *R v Babu Lal* 6 A 509 517 547 (1884)

(10) *Legal Remembrancer v Lalit Mohan Singh Ray* 49 C, 167 (1922)

is a proviso not only to the preceding section but also to the twenty fifth section, and that, therefore, so much of the information given by an accused to a Police-officer, whether amounting to a confession or not as distinctly relates to the facts thereby discovered, may be proved (1) It qualifies also section 24, ante (2) But the present section only qualifies the twenty fifth section when the *accused* person is in the *custody* of the police, therefore, confessions to Police-officers by persons who are accused but not in custody, or are in custody, but not accused, or are neither accused nor in custody, do not fall within the present section (3) This section also qualifies the twenty fourth section (4) Therefore, whatever the inducement that may have been applied, or made use of towards the accused, there is nothing in the law which forbids policemen or others from, at any rate going so far as to say "In consequence of what the prisoner told me, I went to such and such a place and found such and such a thing" Moreover they may repeat the words in which the information was couched whether they amount to a confession or not, provided they relate distinctly to the facts thereby discovered (5) This section does not apply to information generally within the

as discovered in consequence of such confession so much thereof as relates distinctly to the fact thereby discovered may be proved under this section But though the present section qualifies the twenty fourth section, it will not be applicable in every case that falls within the scope of that section which enacts that confessions unduly obtained are irrelevant whether the confessing party was in custody or not But the present section refers to confessions made by accused persons in custody Therefore confessions made by persons when accused but not in custody, or in custody but not accused or neither accused nor in custody, will not be rendered admissible by the present section even if there is discovery (6) This section as a qualification of the imperative rules contained in sections 24—26, should be strictly construed and applied (7)

(1) Field Ev 145 ib 6th Ed 105 *P v Pogorec Stala* 19 W R Cr 51 (1873) and see under the old law *R v Pella Gazi* 4 W R Cr 19 (1865) *R v Jora Hasji* 11 Bom H C R 242 (1874) *R v Rana Birapa* 3 B 12 (1878) *R v Panclam* 4 A 198 (1887) *R v Babu Lal* 6 A 509 F B (1884) *Adu Shikdar v R* 11 C 635 (1885) *R v Kaalia* 10 B 595 (1886) *R v Nana* 14 B 260 (1889) *Surendranath Mukerjee v Emperor* 16 A L J 478 s c 19 Cr L J 935 See generally as to the construction of this section the Madras Law Journal *supra* p 74 et seq March 1895 123 et seq April 1895

(2) *Amiruddin v Emperor* 45 C 557

(3) *R v Babu Lal* 6 A 509 513 533 534 F B (1884) *per* Oldfield and Mahmood JJ *in post*

(4) *R v Misri* (1909) 31 A 592

(5) *R v Babu Lal* 6 A 509 545 *per* Straight C J *ib per* Brodhurst J citing Taylor Ev § 907 [contra *per* Mahmood J ib 535 and *l v Anarpala* Weekly Notes (1882) 225 see also to the same effect *viz.* that s 27 does not qualify s 24 *R v Mussunat Luchoo* 5 N W 1 86 (1873) *R v Rama Birapa* 3 B, 12 16 (1878) *per* West J — It is not pretended that any discovery of facts

through information derived from *R* occurred after that statement was made Its defect as made under undue influence therefore was not and could not be counteracted in the only possible way This qualification of the rule enacted in s 24 by that enacted in the present section is in accordance with the English law upon the subject see Taylor Ev § 902 The question does not appear to have been discussed by the Calcutta and Madras Courts in any reported case But under the corresponding section of Act XXV of 1861 (s 150) it was held by the former Court that where a Police officer had offered an inducement to make a confession no part of his evidence as to the discovery of facts in consequence of such confession was admissible *R v Dhurum Dutt* 8 W R Cr 13 (1867) see also *Bishoo Manjee v R* 9 W R Cr 16 17 (1868)

(6) See *R v Babu Lal* 6 A 509 (1884)

(7) *R v Panclam* 4 A 198 (1887) See *Adu Shikdar v R* 11 C 635 642 (1885) In *R v Ram Charan* 24 W R Cr 36 (1875) Jackson J commented upon a prevailing tendency to disregard the provisions of s 26 of the Evidence Act which has occurred in this case as well as in others recurred to had although not

The words "any fact" are qualified by the word "discovered" as used in the section: under the present section, it is not every statement made by a person accused of any offence while in the custody of a Police officer, connected with the production or finding of property, which is admissible. Whatever be the nature of the fact discovered, that fact must, in all cases, be itself *relevant* to the case, and the connection between it and the statements made must have been such that that statement constituted the information through which the discovery was made, in order to render the statement admissible. Other statements connected with the one thus made evidence, and thus mediately, but not necessarily or directly, connected with the fact discovered, are not admissible (1) "No judicial officer [dealing with the provisions of this section] should allow one word more to be deposed to by a Police officer, detailing a statement made to him by an accused, in consequence of which he discovered a fact, than is absolutely necessary to show how the fact that was discovered is connected with the accused, so as in itself to be a relevant fact against him. The twenty seventh section was not intended to let in a confession generally, but only such particular part of it as set the person, to whom it was made, in motion, and led to his ascertaining the fact or facts of which he gives evidence" (2) The test of the admissibility under this section of information received from an accused person in the custody of a Police officer, whether amounting to a confession or not is — "Was the fact discovered by reason of the information and how much of the information was the immediate cause of the fact discovered, and as such a relevant fact?" (3)

The discovery referred to in this section is that made to or by a Police-officer and the section applies in such a case though the facts are already known to persons other than Police officers (4). The word "discovery" may either be known before or after hearing some thing, unknown till

Discovered "

then. It is in the latter sense that the word is used in this section, that is, in the sense of a finding upon a search or inquiry, of articles connected with the crime or other material fact, the reason being that it is only this kind of discovery which proves that the information, in consequence of which the discovery was made, is true and not fabricated. The statements admitted by the section are *statements preceding finding upon search or inquiry* (5). It is not now necessary that the discovery should be by the deponent (6), if the latter be a Police officer investigating a case, he will not be allowed to prove an information received from a person accused of an offence in the custody of a police officer, on the ground that a material fact was thereby discovered

justified by facts to the proviso contained in s 27. *Tara Singh v Crown* 50 P R 11 Cr J 23 (1915)

(1) *R v Jora Hasji* 11 Bom H C R 242 (1874)

(2) *R v Babu Lal* 6 A 509 546 (1884) *per* Straight C J cited and adopted by Norris J in *Adu Shikdar v R* 11 C 635 641 (1885)

(3) *R v Commer Shabib* 12 M 153 (1888) in which it was also said that the reasonable construction of s 27 is that in addition to the fact discovered so much of the information as was the immediate cause of the discovery is legal evidence

(4) *Legal Remembrancer v Lalit Mohan Singh Raj* 49 C 167 (1922)

(5) See The Madras Law Journal

supra March 1895 pp 80 85 *R v Jora Hasji* 11 Bom H C R 242 (1874) *R v Rama Birapa* 3 B 12 (1878) *R v Nana* 14 B 260 (1889) in all the cases under this section where the statements were held to be admissible the discovery was of articles or other material facts. The section as thus understood enacts the same rule as is given in Taylor's §§ 902 903 (*R v Rama Birapa supra*, 17 *R v Nana supra* 265) for an example of an admission subsequent to discovery see *R v Kamal Fukeer* 17 W R Cr 50 (1872)

(6) Under s 150 Act XXV of 1861 the words were discovered by him the italicised words have been omitted in the present section

by him when that fact was already known to another Police officer (1) When the Police succeed in discovering property in consequence of information received from an accused, it is not competent to the police to replace the property in the place whence it is discovered and to ask the other accused to produce the property because there is no further discovery under this section as against the other accused (2) While statements preceding finding upon search or inquiry are admissible under this section on the other hand, mere statements, which lead to no physical discovery after they are made, are inadmissible (3) In the case of statements made while pointing out the scene of the crime, the general rule is that if a prisoner points out or shows the scene of the offence and objects around as connected therewith, and makes contemporaneous statements in reference thereto as amounting to "conduct" relevant under accompanying statements are not admissible being no such "discovery" as is required by it, nor do they fall within the first Explanation to the eighth section and are therefore wholly excluded (4) So where the prisoner, besides the formal recorded confession, made a confession to the Police officers before and during his pointing out particular places and particular articles said to have been connected with the murder of which he was charged, West, J., observed 'A confession of murder made to a police constable is not at all confirmed by the prisoner's saying, 'this is the place where I killed the deceased' and when starting from the pointing to a ditch or a tree, a long narrative of transactions, some of them altogether remote from any connection with the spot indicated is allowed to be deposed to as a confession by the prisoner, the intent of the Evidence Act is not fulfilled but defeated' (5) From the statement 'This is the place where I killed the deceased,' there is no 'discovery' within the meaning of this section, and therefore no guarantee of the truth of the statement, and further, the prosecution had not, in the particular case, shown that any act done by the accused under

contemporaneously makes declarations as regards them the act of production or delivery itself may be proved as 'conduct' under the eighth section, *ante* but as there is no "discovery," the accompanying statements are not admissible under the present section nor under the first Explanation to the eighth section, *ante* (7) So where a Police officer deposed that the accused told

(1) *Adu Siskdar v R* 11 C 635 642 (1885)

(2) *R v Beshya* 2 Bom L R 1089 (1900)

(3) *R v Pama B rafa* 3 B 12 (1878), see the *Malras Law Journal supra* 81

(4) *Ib*, 82 *R v Jora Hasji* 11 Bom H C R 242 246 (1874) *R v Rana B rafa* 3 B 12 16 17 (1878) that is assuming the accompanying statements to amount to confessions the rule however as to such statements when more particularly stated appears to be that if such statements are really explanatory of the acts they accompany they may be proved (*R v Jora Hasji supra* 245 246 *R v Kama B rafa supra*, 17) subject however to the further proviso that s 8 so far as it admits a statement as included in the word conduct cannot admit a statement as evidence which would be shut out

by ss 25 26 *R v Rana* 14 B 260 263 (1889)

(5) *R v Rama B rafa supra*, 16 17

(6) *Tara Singh v Crown* 50 P R, 11 Cr J 23 (1915)

(7) *R v Jora Hasji* 11 Bom H C R, 242 (1874) in this case the first prisoner produced a bill hook and knife from the field and the second prisoner a stick and each made a certain incriminatory statement which the Court held to be inadmissible both under this section since there was no discovery and under s 8 Explanation (1) it however held that the acts of the prisoners could be proved *R v Panchara* 4 A., 198 (1882) see *R v Kamalia* 10 B 595 597 (1886) *Adu Siskdar v R* 11 C., 635 640 661 (1885) as to accompanying statement see *Taylor, E. § 903 J Russ., Cr., 484*

by him when that fact was already known to another Police officer (1) When the Police succeed in discovering property in consequence of information received from an accused, it is not competent to the police to replace the property in the place whence it is discovered and to ask the other accused to produce the property because there is no further discovery under this section as against the other accused (2) While statements preceding finding upon search or inquiry are admissible under this section on the other hand, mere statements, which lead to no physical discovery after they are made, are inadmissible (3) In the case of *statements made while pointing out the scene of the crime*, the general rule is that if a prisoner points out or shows the scene of the offence and objects around as connected therewith, and makes contemporaneous statements in reference thereto his acts may be given in evidence, as amounting to "conduct" relevant under the eighth section *ante*, but the accompanying statements are not admissible under the present section, there being no such "discovery" as is required by it, nor do they fall within the first Explanation to the eighth section and are therefore wholly excluded (4) So where the prisoner, besides the formal recorded confession, made a confession to the Police-officers before and during his pointing out particular places and particular articles said to have been connected with the murder of which he was charged, West, J., observed "A confession of murder made to a police constable is not at all confirmed by the prisoner's saying, 'this is the place where I killed the deceased' and when starting from the pointing to a ditch or a tree, a long narrative of transactions, some of them altogether remote from any connection with the spot indicated is allowed to be deposed to as a confession by the prisoner, the intent of the Evidence Act is not fulfilled but defeated" (5) From the statement 'This is the place where I killed the deceased,' there is no "discovery" within the meaning of this section, and therefore no guarantee of the truth of the statement, and further, the prosecution had not, in the particular case, shown that any act done by the accused had been so explained by his statements as to make the latter admissible under the first Explanation of the eighth section (6) Similarly, in the case of *statement accompanying production of articles* the general rule is that if the prisoner himself produces or delivers articles said to be connected with the offence, and contemporaneously makes declarations as regards them the act of production or delivery itself may be proved as 'conduct' under the eighth section, *ante* but as there is no "discovery" the accompanying statements are not admissible under the present section nor under the first Explanation to the eighth section, *ante* (7) So where a Police officer deposed that the accused told

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by ss 25 26 *R v Nana* 14 B 260 263 (1889)

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From an
accused
person in
custody

Section 150 of Act XXV of 1861, as amended by Act VIII of 1869, was re-embodied in the twenty-seventh section of the Evidence Act with slight alterations of language. The only alteration on which any stress can be laid is the omission of the word "or" (1) This shows that the operation of the proviso is restricted to information from an accused person in custody of the police, and does not apply to information from accused persons not in custody of the police (2) It would appear, therefore, that in order to bring a case of discovery within the scope of this section, it is necessary that the party making the statement should be both *accused* and in *custody* at such time and that (a) a confession obtained by inducement under the circumstances mentioned in the twenty-fourth section, or (b) a confession made to a Police officer (3), will not be affected by the operation of the twenty-seventh section when the person confessing is at the time (a) neither accused nor in custody, (b) in custody but not accused, (c) accused but not in custody,—notwithstanding any discovery in consequence thereof, (d) a confession made to any person other than a Police officer by a person who was at the time in the latter's custody, but not accused, is inadmissible even though it may lead to discovery, unless indeed it was made in the immediate presence of a Magistrate.

Where a fact is discovered in consequence of information received from one of several persons charged with an offence, and when others give like information, the fact should not be treated as discovered from the information of them all. It should be deposed that a particular fact has been discovered from the information of AB, and this will let in so much of the information as relates distinctly to the fact thereby discovered (4). In the case of *R v Babu Lal* (5) Straight, J., observed as follows: "I have more than once pointed out that it is not a proper course, where two persons are being tried, to allow a witness to state 'they said this' or 'they said that' or 'the prisoners then said.' It is certainly not at all likely that both the persons should speak at once and it is the right of each of them to have the witness required to depose as nearly as possible to the exact words he individually used. And, I may add, where a statement is being detailed by a constable as having been made by an accused, in consequence of which he discovered a certain fact, or certain facts, the strictest precision should be enjoined on the witness, so that there may be no room for mistake in his statement. In dealing with statements of this kind, which are in the absence of things that what each stated. If the witness was not clear upon this point, and the witness refused to be more explicit, the Judge should have paid no attention to it." And in a recent case it was held that where two prisoners gave information which led to the arrest of another person it was necessary that the information of each should be precisely and separately stated (6).

How much
of such in-
formation
may be
proved

Upon this question there is little or no difference in the views of the several High Courts (7). Assistance in the construction of the words "as relates distinctly to the fact thereby discovered" (8) may be derived from a consideration

(1) S. 150 ran "accused of any offence or in the custody of a police-officer."

(2) *R v Babu Lal* 6 A., 509, 513 (1884) per Oldfield J. see *The Madras Law Journal* *supra* pp 128 129, April 1895.

(3) *R v Babu Lal*, 6 A., 509, 533 (1884). A confession made to a Police officer by a person who is not in the custody of the police even though such confession led to discovery, would not be admissible in evidence because it could not fall under the proviso of s. 27, which

is restricted to persons "in the custody of a Police officer" per Mahmood J. and see per Oldfield J. at p. 513 *supra*.

(4) *R v Ram Churn* 24 W. R., Cr., 36 (1875).

(5) 6 A. 509 (1884) at pp 549 550.
(6) *Ram Singh v Crown* 50 P. R., 7 Cr. J. 12 (1915).

(7) Per Sargent C. J. in *R v Nana* 14 B. 260 263 (1889), and see *R v Commer Sahib* 12 M., 153 154 (1889).

(8) See *Legal Remembrancer v Lal Mohan Singh Ray* 49 C., 167 (1922).

of the principle upon which the enactment contained in this section is founded. Statements admissible under this section are so admissible because the discovery rebuts the presumption of falsity arising from the fact of their being made under inducement, or to the police, or to others while in police custody. The discovery proves not that the whole, but that *some* portion of the information given is true namely, so much of the information as led directly and immediately to or was the proximate cause of, the discovery only such portion of the information is guaranteed by the discovery, and hence only such portion of the information is admissible. A prisoner's statement as to his knowledge of the place where a particular article is to be found, is confirmed by the discovery of that article and is thus shown to be true. But any explanation as to how he came by the article, or how it came to be where it is found, is not confirmed by the discovery, and as the presumption of falsity as to these other statements is not rebutted therefore proof of them is prohibited. In the words of West J. It is not all statements connected with the production or finding of property which are admissible those only which lead immediately to the discovery of property and so far as they do lead to such discovery are properly admissible.

Other statements connected with the one thus made evidence and so *mediately*(1) but not necessarily or directly, connected with the fact discovered are not to be admitted, as this would rather be an evasion than a fulfilment of the law, which is designed to guard prisoners accused of offences against unfair practices on the part of the police. For instance, a man says 'You will find a stick at such and such a place. I killed Rama with it.' A policeman, in such a case, may be allowed to say he went to the place indicated, and found the stick, but any statement as to the confession of murder would be inadmissible. If instead of 'you will find,' the prisoner has said, 'I placed a sword or knife in such a spot,' where it was found, that, too, though it involves an admission of a particular act on the prisoner's part, is admissible, because it is the information which has directly led to the discovery, and is thus distinctly, and independently of any other statement connected with it. But if, besides this, the prisoner has said what induced him to put the knife or sword where it has been found, that part of his statement, as it has not furthered, much less caused, the discovery, is not admissible. The words in the twenty seventh section of the Evidence Act 'whether it amounts to a confession or not' are to be read as qualifying the word 'information' in the immediately preceding context, not the words 'so much', and the effect is that, although ordinarily a confession of an accused while in custody would

where also the narrative of antecedent events was held admissible as admissions not amounting to confessions.

(1) The relevancy of mediate connection appears to be the *ratio decidendi* of the case of *R v Pagaree Shaha* 19 W R Cr 71 (1873) in which a wider construction was put on the words as relates distinctly so as to admit not only so much of the information as leads directly and immediately to the discovery of the fact but also the portion which leads *mediately* by way of explanation. Though Brodhurst J. in referring to this case in *R v Babu Lal* 6 A 509 at p 518 (1884), says that no difference is noticeable in the rulings of *R v Pagaree Shaha* supra *R v Jora Hasji* post, *R v Pancham* 4 A, 198 (1882) as to the extent to which statements or confessions of accused persons can be proved by a Police-officer under s 27 it is however submitted that the

ruling in *R v Pagaree Shaha* supra is not reconcilable with the principle laid down in *R v Jora Hasji* 11 Bom H C R 242 (1874), *R v Rama Birappa* 3 B 12 17 (1878), *R v Babu Lal* 6 A 509 (1884) *Adu Shikdar v R* 11 C 635 (1885), *P v Commer Sabib* 12 M 153 (1888) *R v Nana* 14 B 260 (1887) and is indeed virtually overruled by *Adu Shikdar v R*, supra referred to in *Legal Remembrancer v Chema Nashya* 25 C. 413 (1897) see *The Madras Law Journal* supra April 1895 p 129 *et seq* and Field E., 146. In the last cited case it was said *per Banerjee J.* The view I take is in no way inconsistent with that taken by the Court in *Adu Shikdar v R* as the part of the information or statement that is here used as evidence against the accused under s 27 relates distinctly to the fact thereby discovered and does not go beyond it,' p 416.

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Where a fact is discovered in consequence of information received from one of several persons charged with an offence and when others give like information the fact should not be treated as discovered from the information of them all. It should be deposited that a particular fact has been discovered from the information of *1B* and this will let in so much of the information as relates distinctly to the fact thereby discovered (4). In the case of *R v Bibu Lal* (5) Straight J. observed as follows: "I have more than once pointed out that it is not a proper course where two persons are being tried to allow a witness to state they said this or they said that or the prisoners then said. It is certainly not at all likely that both the persons should speak at once and it is the right of each of them to have the witness required to depose as nearly as possible to the exact words he individually used. And I may add where a statement is being detailed by a constable as having been made by an accused in consequence of which he discovered a certain fact or certain facts the strictest precision should be enjoined on the witness so that there may be no room for statements of this kind which are sense of things that what each stated. If the witness was not clear upon this point and the witness refused to be more explicit the Judge should have paid no attention to it. And in a recent case it was held that where two prisoners gave information which led to the arrest of another person it was necessary that the information of each should be precisely and separately stated (6)."
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(8) See *Legal Remembrancer v Lal Mohan Singh Ray* 49 C. 167 (1922).

of the principle upon which the enactment contained in this section is founded. Statements admissible under this section are so admissible because the discovery rebuts the presumption of falsity arising from the fact of their being made under inducement, or to the police, or to others while in police-custody. The discovery proves not that the whole, but that some portion of the information given is true, namely, so much of the information as led directly and immediately to, or was the proximate cause of, the discovery. Only such portion of the information is guaranteed by the discovery, and hence only such portion of the information is admissible. A prisoner's statement as to his knowledge of the place where a particular article is to be found, is confirmed by the discovery of that article and is thus shown to be true. But any explanation as to how he came by the article, or how it came to be where it is found is not confirmed by the discovery, and as the presumption of falsity as to these other statements is not rebutted therefore proof of them is prohibited. In the words of West J. It is not all statements connected with the production or finding of property which are admissible—those only which lead immediately to the discovery of property and so far as they do lead to such discovery are properly admissible.

Other statements connected with the one thus made evidence and so mediately (1) but not necessarily or directly, connected with the fact discovered are not to be admitted, as this would rather be an evasion than a fulfilment of the law, which is designed to guard prisoners accused of offences against unfair practices on the part of the police. For instance, a man says 'You will find a stick at such and such a place. I killed Ramu with it.' A policeman, in such a case, may be allowed to say he went to the place indicated, and found the stick, but any statement as to the confession of murder would be inadmissible. If instead of 'you will find' the prisoner has said, 'I placed a sword or knife in such a spot where it was found that too, though it involves an admission of a particular act on the prisoner's part, is admissible, because it is the information which has directly led to the discovery, and is thus distinctly, and independently of any other statement connected with it. But if, besides this, the prisoner has said what induced him to put the knife or sword where it has been found, that part of his statement, as it has not furthered, much less caused, the discovery, is not admissible. The words in the twenty seventh section of the Evidence Act 'whether it amounts to a confession or not' are to be read as qualifying the word 'information' in the immediately preceding context, not the words 'so much', and the effect is that, although ordinarily a confession of an accused while in custody would

where also the narrative of antecedent events was held admissible as admissions not amounting to confessions.

(1) The relevancy of mediate connection appears to be the *ratio decidendi* of the case of *R v Pagaree Shaha* 19 W R Cr 71 (1873) in which a wider construction was put on the words as relates distinctly so as to admit not only so much of the information as leads directly and immediately to the discovery of the fact but also the portion which leads mediately by way of explanation. Though Brodburst J in referring to this case in *R v Babu Lal* 6 A 509 at p 518 (1884) says that no difference is noticeable in the rulings of *R v Pagaree Shaha* supra *R v Jora Haspi* post *R v Panchan* 4 A 198 (1882) as to the extent to which statements or confessions of accused persons can be proved by a Police officer under s 27 it is however submitted that the

ruling in *R v Pagaree Shaha* supra is not reconcilable with the principle laid down in *R v Jora Haspi* 11 Bom H C R 242 (1874) *R v Ra a Birapa* 3 B 12 17 (1878) *R v Babu Lal* 6 A 509 (1884) *Adu Shikdar v R* 11 C 635 (1885) *R v Comner Sabib* 12 M 153 (1888) *R v Nana* 14 B 260 (1887) and is indeed virtually overruled by *Adu Shikdar v R* supra referred to in *Legal Remembrancer v Chena Nashya* 25 C 413 (1897) see The Madras Law Journal supra April 1895 p 129 *et seq* and Field Ev 146. In the last cited case it was said per Banerjee J. The view I take is in no way inconsistent with that taken by the Court in *Adu Shikdar v R* as the part of the information or statement that is here used as evidence against the accused under s 27 relates distinctly to the fact thereby discovered and does not go beyond it p 416.

be wholly excluded, yet if, in the course of such a confession, information leading to the discovery of a relevant fact has been given, so much of the information as distinctly led to this result may be deposed to, though, as a whole, the statement would constitute a confession which the preceding sections are intended to exclude"(1) So where two persons *B* and *R*, accused of offences under section 414 of the Penal Code, gave information to the police which led to the discovery of the stolen property (this information being to the effect that the accused had stolen a cow and a calf, and sold them to a particular person at a particular place) the Appellate Court observed that, "If he (the Sessions Judge) had applied, as he should have done, the rule thereby (section 27) laid down, he ought to have held that that portion of *H*'s (the police witness) statement in which he deposed 'they said they got' (I suppose this was intended to mean stole) 'the cow from *LT*,' 'they said that they had stolen a cow and a calf,' 'they have stolen it from *S G*, of Jaitpur,' 'they had stolen a goat in Belupur and sold it,' was inadmissible. The only fact about the cow and calf which was admissible as distinctly relating to the discovery of those animals at *A R J*'s was that they sold it at Madanpur to him. As to the goat, there is nothing to show from the constable's deposition, that it was in consequence of what the accused told him that he found the goat in Chelganj '(2) So also where the prisoner told the police that certain cloths had been left by him with some of the prosecution witnesses, and the Sessions Judge was of opinion that the

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evidence

The statement made by the prisoner in this case, viz, that he had deposited the cloths produced with the witnesses, who delivered them up on demand, was the proximate cause of their discovery and was admissible in evidence. If he had proceeded further and stated that they were cloths which he stole on the day mentioned in the charge from the complainant, that statement would not be evidence, for it would be only introductory to a further act on his part, viz, that of leaving the cloths with the witnesses, and on that ground it would not be evidence. In the case cited (3) viz, the fact discovered by the fact discovered, and the fact discovered, and

as such a relevant fact? '(3) Again, an accused was charged under section 411 of the Penal Code, with dishonestly receiving stolen property. In the course of the police investigation, the accused was asked by the police where the property was. He replied that he had kept it, and would show. He said he had buried the property in the fields. He then took the police to the spot where the property was concealed, and with his own hands disinterred the earthen pot in which the property was kept. The Court held that the statement by the accused that he had buried the property in the fields, distinctly set the police in motion, and led to the discovery of the property. But the statement that "he had kept" the property was not necessarily connected with the fact discovered and was therefore not admissible (4) In the case cited (5) it was held legitimate

(1) *R v Jora Hasji*, 11 Bom H C R, 242, 244 245 (1874), and see *R v Rama Birappa* 3 B 12, 17 (1878)

(2) *R v Babu Lal* 6 A 509, 549, 550, per Straight, J (1884) and *ib* 514 per Oldfield J, and 518 per Brodhurst J. The explanation of Straight J as to the meaning of s 27 (at p 546) was followed by the Calcutta High Court in *Adu Shikdar v R*, 11 C, 635, 641 (1885), as to the confessional statements in which

case *v ante*

(3) *R v Commer Sabib*, 12 M, 153 (1888). The Court added. This appears to us substantially the principle on which the cases reported in *Adu Shikdar v R*, *R v Pancham* and *R v Jora Hasji* were decided, *ib*, at p 154. *Sankappa Rai v R* (1908) 31 M, 127

(4) *R v Nana* 14 B, 260, 265 (1889)

(5) *Gurdit Singh v Emperor*, 19 Cr L J 439, s c, 44 I C, 967.

1 "I will point but it was not will point out certain property which I obtained as my share of the booty in the dacoity' In another case(1) the accused made a statement during investigation by the police as to his having thrown a *darra* and a *gandasa* into the canal. In consequence of the statement the police recovered the *darra* and the *gandasa* from the fact that the *darra* and by the accused. It was held statement and the discovery e. When a confession as a whole is excluded whether by reason of sections 26 or 25 or 24 so much of the information given by the person making the confession when the accused was in custody as distinctly relates to the relevant fact thereby discovered is admissible. Under section 27 only so much of the information whether amounting to a confession or not as relates distinctly to the fact thereby discovered may be proved. Even if a single statement contains more information than what is contemplated in section 27 the statement is not to go in as a whole nor is it to go in as a statement at all, but what is admissible is the particular information given by the statement which leads to the discovery (2)

28 If such a confession as is referred to in section 24 is made after the impression caused by any such inducement, threat, or promise, has, in the opinion of the Court, been fully removed, it is relevant

Confession made after removal of impression caused by inducement threat or promise relevant

Principle—If a confession has been obtained from the prisoner by undue means, any statement afterwards made by him under the influence of that confession cannot be admitted as evidence (3). But the confession in the case mentioned in this section is deemed to be voluntary and is received as the result of reflection and free determination unaffected and uninduced by the original threat or promise (4)

s 24 (Confession caused by inducement) s 3 (Relevant)
s 3 (Court)

Steph. Dig. Art 27. Poscoe Cr Ev 12th Ed 41 43 1b 13th Ed 41-44 Taylor Ev 878 3 Puss Cr 458-463 Plapson Ev 5th Ed 252 257 Wallis Ev 2nd Ed 300 Field, Ev 6th Ed 107

COMMENTARY.

This section forms an exception to the law provided by the twenty fourth section(5) and as a qualification of that section should be read together with it. The impression caused by the inducement may have been removed by mere lapse of time, or by an intervening act such as a caution given by some persons of superior authority(6), to the person holding out the inducement. An inducement may continue to operate on a man's mind for a considerable time after

Confession unaffected by original inducement.

(1) *Kapur Singh v Emperor* 20 Cr L J 305 s c 50 I C 481

(2) *Amiruddin Ahmed v Emperor* 45 C 557 s c 22 C W N 203

(3) 3 Russ Cr 458

(4) See notes post and Introduction ante as also s 24 ante Steph Dig Art 22

(5) *R v Pancham* 4 A 198 201 (1888)

(6) *R v Lingate*, 1 Phillips Ev 414,

Roscoe 12th Ed 41 [the prisoner on being taken into custody had been told by a person who came to assist the constable that it would be better for him to confess but on his being examined before the committing Magistrate on the following day he was frequently cautioned by the Magistrate to say nothing against himself a confession under these circumstances before the Magistrate was held to be clearly admissible] *R v Date* 11 Cox 686

it was uttered(1), but, on the other hand, it may be altogether removed by subsequent statements which precede the confession, and which clearly inform the defendant that he must expect no temporal advantage from making one (2) Thus where a Magistrate had told a prisoner that if the latter would confess he would use his influence to obtain a pardon for him, and had afterwards received a letter from the Secretary of State refusing the pardon, which letter the Magistrate communicated to the prisoner, a confession subsequently made was held to be admissible (3) It is for the Court to decide under all the circumstances of the particular case whether the improper influence was totally done away with before the confession was made In this, as well as other respects, the admissibility of the confession is a question for the Judge (4) Where the latter is satisfied that the influence has really ceased, the confession will be admitted (5) But there ought to be strong evidence that the influence has ceased In *R v Sherrington* (6), Patteson, J., rejected a second confession saying "there ought to be strong evidence to show that the impression under which the first confession was made, was afterwards removed, before the second confession can be received I am of opinion in this case that the prisoner must be considered to have made the second confession, under the same influence as he made the first, the interval of time being too short to allow of the supposition that it was the result of reflection and voluntary determination"

Confession otherwise relevant not to become irrelevant because of promise of secrecy, etc

29 If such a confession is otherwise relevant, it does not become irrelevant merely because it was made under a promise of secrecy, or in consequence of a deception practised on the accused person for the purpose of obtaining it, or when he was drunk, or because it was made in answer to questions which he need not have answered, whatever may have been the form of those questions, or because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him

Principle.—In order that a confession should be invalidated, there must be an inducement operating to influence the mind of the accused either by

R v Roster 1 Phillips Ev 414 Roscoe Cr Ev 12th Ed 41 *R v Hous* 6 C & P 404 see Phipson Ev 3rd Ed 236 ib 5th Ed 252 Field Ev 149 ib 6th Ed 107 Norton Ev 166 167 as to the statutory form of warning see 11 & 12 Vic c. 42 s 18

(1) Wills Ev 213 ib 2nd Ed, 303, *R v Heutt* 1 C & M 534 *R v Ganesh Chandra* 50 C 127 (1923)

(2) *Ib* *R v Cleus* 4 C & P, 221

(3) *R v Cleus* supra see also *R v Hous* 6 C & P 404

(4) 3 Russ Cr 458 Field, Ev, 149, ib 6th Ed 107

(5) For cases where the inducement has been held to have ceased see Roscoe, Cr Ev 12th Ed 41 Phipson Ev, 5th Ed 252 and where held not to have ceased Roscoe Cr Ev 12th Ed, 42, Phipson Ev ib and *R v Mussumat Luchoo* 5 N.W. P 86 88 (1873) [where a confession had been made upon the inducement held out by the police that nothing would happen if the prisoner con-

fessed and the prisoner made two different confessions the one before the Magistrate and the other before the Sessions Judge who accepted both confessions but did not record any opinion on the point the Appeal Court held that it was not prepared to say that the confession made before the Sessions Judge was made after the impression caused by the promise had been fully removed] *Reg v Navroji Hadabhai* 9 Bom H C R 358 370 (1872) [where an inducement was held out to the prisoner in his house and he was immediately after taken to the Traffic Manager of a Rail way in whose presence he signed a receipt for a certain sum of money Sargent C J said it would be impossible to hold that the impression was removed in the short interval which elapsed between the inducement and the signing of the receipt] *R v Sherrington* post, *R v Ganesh Chandra* 50 C 127 (1923)

(6) 2 Lewin C C 123 cited in Roscoe Cr Ev 47, 48 3 Russ Cr 458

hope of escape or through fear of punishment connected with the charge. Such inducement must *relate to the charge* and reasonably imply that the position of the accused with reference to it will be rendered better or worse according as he does or does not confess. If the confession be obtained by any other influence, it will not be invalidated (though its weight may be affected(1), however much it would have been more proper not to have exerted such influence, and however much the statement itself may become liable to suspicion, its origins of a confession relating to the charge, held and do not affect the testi-

monial trustworthiness of the confession

- s 21 (Proof of admissions against persons making them.)

s 3 ("Relevant")
- s 3 ("Evidence")

s 123 (Criminating answers)

Steph. Dig., Art 24, Taylor, Ev §§ 881, 882, Roscoe Cr Ev, 13th Ed, 44, Phipson, Ev, 5th Ed., 251, Wills, Ev, 2nd Ed, 304, Phillips and Arnold, Ev, 420, 421, Norton, Ev, 167, Best, Ev, § 529, Cr Pr Code (Act 1 of 1893) ss 163, 343, Wigmore, Ev, § 823, Joy's Confessions, 50

COMMENTARY.

The principle of testimonial untrustworthiness being the foundation of exclusions, the confessions should be taken into account unless their cause was such that the accused was likely to have been induced to untruly confess (3) The non invalidating origins of a confession, which are mentioned in this section are.—(a) promise of secrecy, (b) deception, (c) drunkenness, (d) interrogation, (e) want of warning. But there may be others. So what the accused has been *overheard* muttering to himself or saying to his wife or to any other person in confidence will be receivable in evidence (4)

This does not make the confession inadmissible, though a confidence is thus created in the mind of the prisoner and he is thrown off his guard. The true question seems to be—does such confidence render it probable that the prisoner should be thus induced untruly to confess himself guilty of a crime of which he was innocent (5). Thus A was in custody on a charge of murder, B, a fellow prisoner, said to him, "I wish you would tell me how you murdered the boy—pray split." A replied, "Will you be upon your oath not to mention what I tell you?" B went upon his oath that he would not tell. A then made a statement,—held that this was not such an inducement to confess as would render the statement inadmissible (6)

Where a prisoner in jail on a charge of felony, asked the turnkey of the jail to put a letter into the post for him, and after his promising to do so, the id the turnkey, instead of was held that the contents of the letter was a confession, notwithstanding the manner in which it was obtained (7). In another case,

- (1) R v Spilsbury 7 C & P, 187, v post, Best Ev § 529

(2) Norton Ev 167, see s 246 ante Taylor, Ev, § 881, Best Ev § 529 see notes to R v Gavin 15 Cox 656 and R v Brackenbury 17 Cox 628 (1893)

(3) Wigmore Ev § 823 thus a confession is not excluded because of any breach of confidence or deception. The question in all cases is was the inducement such as by possibility to elicit an untrue acknowledgment of guilt? See § 824
- (4) R v Simons 6 C & P 540 R v Sageena, 7 W R., Cr 56 (1867) but not what he has been heard to say in his sleep

(5) Joy on Confessions 50

(6) R v Shaw 6 C & P 373 R v Nababdur Goswami 1 B L R Cr 15 23 (1868) and when a witness promised that what the prisoner said should go no further, the confession was received R v Thomas 7 C & P 345

(7) R v Derrington 2 C & P 418 R v Nababdur Goswami, supra, 23

artifice was used to induce a prisoner to suppose that some of his accomplices were in custody, under which mistaken supposition he made a confession and it was admitted in evidence (1)

Drunken-
ness

Whether the prisoner be made drunk for the purpose or with the motive of getting a confession, or made the confession while he had made himself drunk, it is equally receivable (2)

Interroga-
tion

Much less will a confession be rejected merely because it has been elicited

irrelevant as a confession, though the fact that it was so elicited might be material to the question whether such statement was voluntary (5) And a confession elicited by questions put by a Magistrate has been held admissible in England (6) In India the law expressly provides for the examination of the accused person by the Court (7) When the confession is contained in an answer given by a witness to a question put to him in the witness box, the provisions contained in section 132, *post*, must be borne in mind

Want of
warning

A voluntary confession, too is admissible though it does not appear that the prisoner was warned, and even though it appears on the contrary that it was not so warned (8) It is no part of the duty of a Magistrate to tell an accused person that anything he may say will go as evidence against him (9) The Criminal Procedure Code (10) enacts that no Police officer or other person shall prevent, by any caution or otherwise, any person from making in the course of any investigation under Chapter XIV, any statement which he may be disposed to make of his own free will

Considera-
tion of prov-
ed confes-
sion affect-
ing person
making it
and others
jointly un-
der trial
for same
offence

30 When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession

(1) *R v Burley* 1 Phillips & Arn 420 see also *R v Rann Churn* 20 W R Cr 33 (1873) in which the deception practised consisted of a statement made by the Police officer to the prisoner that the latter's brother in law had given out that he was guilty

(2) *R v Spilsbury* 7 C & P 167 in which case Coleridge, J said This [the fact that the prisoner was drunk] is matter of observation for me upon the weight that ought to attach to this statement when it is considered by the jury See Best Ev § 529

(3) As to the English rule in regard to admissions obtained by questions by the police see *R v Brackenbury* 17 Cox 678 *R v Best* C C A (1909) 1 K B 692, (overruling *R v Gavin* 15 Cox 656), *Roger v Hawkins* (1898) 67 L J A B 576 *R v M'Har* (1895) 18 Cox 54 *R v Goddard* (1896) 60 L P., 491 *R*

v. Histed (1889) 19 Cox 16 *R v Mal* (1893) 17 Cox 689 Taylor Ev § 881 Roscoe Cr Ev 13th Ed 44 As to answers given to the police not amounting to a confession on of guilt see *R v Nabadur* *Cosua* 1 B L R Cr 15 20 (1868)

(4) Taylor Ev § 881
(5) *Barindra Kumar Ghose v P* (1909) 37 C 91

(6) *R v Rees* 7 C & P 569 *R v Ellis* 1 Ry & M 432 cited in *R v Nabadur* *Cosua* supra 25

(7) Field Ev 150 1b 6th Ed 103 Cr Pr Code s 342

(8) Taylor Ev §§ 881 882 see Field Ev 6th Ed 108 *R v Nabadur* *Cosua* 1 B L R Cr 15 (1868) the decision in which on this point has been followed by the present section

(9) *R v Uzzell* 10 C 775 777 (1844)
(10) S 163 (Act V of 1898)

Explanation.—"Offence," as used in this section, includes the abetment of, or attempt to commit, the offence (1)

Illustrations

(a) A and B are jointly tried for the murder of C. It is proved that A said—"B and I murdered C." The Court may consider the effect of this confession as against B.

(b) A is on his trial for murder of C. There is evidence to show that C was murdered by A and B, and that B said—"A and I murdered C."

This statement may not be taken into consideration by the Court against A, as B is not being jointly tried.

Principle.—When a person makes a confession, which affects both himself and another, the fact of self implication takes the place, as it were, of the sanction of an oath, or, is rather supposed to serve as some guarantee for the truth of the accusation against the other (2). For when a person admits his guilt and exposes himself to the pains and penalties provided therefor, there is a guarantee for his truth (3). The guarantee, however, is a very weak one, for if the fact of self inculpation is not in all cases a guarantee of the truth of a statement even as against the person making it, much less is it so as against another. Further, a confession may be true so far as it implicates the maker but may be false and concocted through malice and revenge so far as it affects others. While such a confession deserves ordinarily very little reliance, it is
r pretend
relieving

s. 3 (Court')

s. 3 (Provel')

Norton, Fr., 169, Cunningham, Ev., 26, 27 148 Field Ev., 156-159 ib., 6th Ed 113-115

COMMENTARY

The general rule of English law (3) and the rule which prevailed in India prior to the passing of this Act (6) is and was, that the confession of an accused person is only evidence against himself and cannot be used against others. This section forms an exception to this rule. The grounds upon which it has been enacted have been adverted to, but the weakness of the guarantee afforded by self implication and the dangerous and exceptional character of the evidence require that this section should be construed very strictly (7) and accordingly, such a construction has been applied to each of its terms. Thus it has been held that a person who pleads guilty is not being "tried jointly", that

Construction

(1) This explanation was inserted in this section by Act III of 1871 s. 4 and alters the law in this respect as laid down in *R v Jaffer Ali* 19 W R Cr 57 (1873) *Badli v R* 7 M 579 (1884) *P v Alagappa Bali Weir* 3rd Ed 499a (1886).

(2) *R v Belat Ali* 19 W R Cr 67 (1873) *per* Phear J *R v Jagrup* 7 A 646 648 (1885) *per* Straight J. The object sought by the rule of law is a safe guard for sincerity and for information. *R v Nur Mohamed* 8 B 223 227 (1883) *per* West J.

(3) *R v Daji Narsu* 6 B 288 291 (1882) *per* West J.

(4) See remarks on this section in Cunningham s Ev 26 27 148

(5) *Roscoe Cr Ev* 49 50 Taylor Ev §§ 104 871 Phipson Ev 5th Ed 253 Powell Ev 9th Ed 113 521

(6) *R v Kally Churn Lohar* 6 W R Cr 84 (1866) *R v Busraddi* 8 W R Cr 35 (1867) *R v Durbaroo Dass* 13 W R Cr 14 (1870) *R v Sadhu Mundul* 21 W R Cr 69 71 (1874) *per* Phear J. The provision contained in the section is a new one, there being no similar rule either in Act II of 1855 or in the Criminal Procedure Codes of 1861 1872.

(7) *R v Jaffer Ali* 19 W R Cr 57 64 (1873) *per* Glover J *R v Molappa Bin* 14 Ind Jur N S 19 (1890), see *R v Sadhu Mundul* supra Field, Ev 156 ib 6th Ed 115, Norton, Ev, 169

the prisoners must be legally tried jointly, and at the same time, that the words "same offence" excluded abetments and attempts, that the term "proved" is to be interpreted strictly, and that no weight is to be given to the confession as against any person other than the party making it, unless it is corroborated by independent testimony (*v post*) This section must be read together with, and subject to, the provisions contained in sections 24-27, *ante* (*v post*)

And it has been held by the Madras High Court that under section 27 and this section a confession made by one accused can only be taken into consideration against another accused when such confession is the immediate cause of the discovery of some fact relevant as against the other accused and a direction to the jury to take such a confession into consideration when it is not the immediate cause of such a discovery is a misdirection (1)

It is not sufficient that the co accused should be tried jointly in fact, they must be *legally* tried jointly (2) The section applies only to cases in which the confession is made by a prisoner tried *at the same time* with the accused person against whom the confession is used (3) Upon the question whether if one of several prisoners *pleads guilty*, such person can be held to be "tried jointly" with the rest so as to let in his confession against the others who have claimed a trial (i) it is clearly established that a prisoner who pleads guilty at the trial and is thereupon convicted and sentenced cannot be said to be jointly

tried with the others

led into the Court

For it is

(ii) When

a co accused has pleaded guilty and the Court has accepted the plea against the remaining against them under this

subt is, where none of

these courses has been explicitly adopted, but the accused who has pleaded guilty is left in the dock merely to see what the evidence will show as against him, though the Court intends ultimately to convict him on the plea of guilty In such a case it would not be fair to allow his confession to be considered as

to comply with the forms of

mere fact that a prisoner, who

and sentenced, but is kept in

the dock with the prisoners who are being tried, until the close of their trial, will not render his confession admissible, for immediate conviction and sentence are not necessary to exclude a confession by a co prisoner who has pleaded guilty (9) So where the Judge kept the prisoner in the dock, unconvicted and

(1) *Sankappa Rai v R* (1908) 31 M 127

(2) *R v Jagat Chandra* 22 C 50 72 (1894)

(3) *R v Sheikh Buxoo* 21 W R Cr 65 (1874)

(4) *R v Kaku Patil* 11 Bom H C R 143 (1874), *Venkatasami v R* 7 M 102 (1883) Weir 3rd Ed 491, *R v Chand Valad* 14 Ind Jur N S 125 (1890), *R v Purbhu* 17 A. 524 (1895) s c. W N (1895), 111, it is not quite clear whether in the three last mentioned cases the prisoners were immediately convicted and sentenced on pleading guilty but it seems so *R v Chinna Patuchi* 23 M 151 154 (1899)

(5) Confirmation case No 22 of 1893

cted in *R v Pahuji* supra 198 *R v Chinna Patuchi* 23 M 151 (1899)

(6) *R v Chinna Patuchi* 23 M 151 (1899) dissenting from *R v Lakshmayya*

Padara 22 M 491 (1899)

(7) *R v Kerasat Sirdar* (1911) 35 C 446

(8) *R v Chinna Patuchi* 23 M 151 154 (1899) *R v Paliwa* 23 A., 53 (1900)

P v Aleoraj (1908) 30 A 340 and as to English rule on this point see *R v Gould* (1908) C C. C Sess Pa v 149

p 366 at p 433

(9) *R v Pahuji* 19 B 195 197 (1894) See *Subramania Ayyar v R* 25 M., 69 (1901) [when an accused person pleads

guilty nothing remains to be tried as between him and the Crown but see *R v*

Tried jointly

not sentenced, merely because it was possible that the evidence elicited at the trial might enable the Court to determine whether to pass a sentence of death or transportation it was held that his confession could not be considered as against his co accused, as there was in fact under such circumstances after the plea of guilty, no joint trial (1) In a case in the Madras High Court a distinction was drawn between a trial before a Sessions Court, where a prisoner who pleads guilty at the outset and is convicted on his plea cannot be tried jointly with others against whom the trial proceeds, and a trial before a Magistrate In this case all the accused were tried jointly and some confessed the crime and implicated their co accused in statements under section 347 of the Criminal Procedure Code (Act V of 1898) and after their statements had been recorded and the evidence for the prosecution closed pleaded guilty under section 250 (1) of that Code and it was held that these statements were admissible under this section (2) A confession made by a co accused with B in a dacoity case is not admissible under this section against B in a proceeding under section 110 Criminal Procedure Code though admissible against him as well as against the confessor in the dacoity case (3) A statement by an accused person which suggests an inference of guilt may amount to a confession though the person making the statement may directly repudiate his participation in the crime Such a statement may be taken into consideration against the person who

however,
accessory
against the

co-accused if sufficient corroboration is forthcoming (4)

not), and either to read out his confession made previously, or to allow a person to give an account of what the prisoner had told him (8) or to take a statement which he makes (9)

for the Court
and either to
s a witness (6),
see what the
convicted or

The meaning of this expression (10), or the same offence (12) But when two definitions arising out of a single transaction the confession of the one may be

the same legal
same specific
of the same
same offence

Kalu Patil supra 148 *R v Ra : Saran*
8 A 304 309 (1886)

(1) *Ib*

(2) *Bati Redds (in re)* 38 M 302 (1915) *per* Ayling J distinguishing *R v Pahuji* 19 B 195 (1894) and *R v Pirbhu* 17 A 524 (1895) as relating to trials before Sessions Courts and *R v Laksh Nayya* 22 M 491 (1899) as based on them

(3) *Mafizuddin v King Emperor* 33 C L J 70 (1921) and see *Amir Allah Pramanick v Emperor* 22 C W N 408

(4) *Jasoda v Emperor* 53 I C 691

(5) *R v Kalu Patil* supra 148 *R v Chhinna Pavulci* supra

(6) *Venkataram v R* supra 104 *R v Pahuji* supra 198 *R v Chhinna Pavulci* supra *Quare* whether co accused can be examined as a witness after conviction and before sentence see *R v Annaya* 3 Bom L R 437 (1901) Where two prisoners are tried together for differ

ent offences committed in the same transaction it is improper and illegal to examine one prisoner as a witness against the other In the matter of *A David* 5 C L R 574 (1880) referred to in *Bishnu Banuar v R* 1 C W N 35 (1896)

(7) *R v Pahuji* supra 197 *R v Chhinna Pavulci* 23 M 151 154 (1899) but see *R v Kalu Patil* *R v Ram Saran* supra *loc cit*

(8) *Venkataram v R* supra 103

(9) *R v Pirbhu* 17 A 524 (1895) s c W N (1895) 111

(10) *R v Malappa Bin* 14 Ind Jur N S 19 0 (1890) *R v Nur Mahomed* 8 B 3 76 (1883)

(11) *R v Alagappan Bal Weir* 3rd Ed 499 (1886) see also *Deputy Legal Reporter v Karu a Bastobi* 22 C, 164 173 (1894)

(12) *Badi v R* 7 M 579 (1884) sub non *Malomed Salib Weir* 3rd Ed 495, *R Malappa Bin* supra.

used against the other, though it inculcates himself through acts separable from those ascribed to his accomplice, and capable therefore, of constituting a separate offence from that of the accomplice (1) Prior to the insertion of the *Explanation* to this section, the commission of an offence and the commission of its abetment were held to be different offences. Thus it was held that, upon the trial of *A* for murder and *B* for abetment thereof, a confession by *A* implicating *B* could not be taken into consideration against *B* under this section (2) Act III of 1891 has however, by the insertion of the *Explanation* to this section, altered the law in this respect. But this *Explanation* applies only to cases where one person is charged with an offence and another is actually charged with, and tried for abetment of it (3) Where there is a joint trial of accused persons under entirely different sections of the Penal Code, the confession of a co accused cannot be taken into consideration against the other (4) But if a joint trial has commenced in which the prisoners are charged under different sections and afterwards the charge is altered so that all the prisoners are then tried under the same section their confessions may be admissible against each other. Thus where *A* and *B* were being jointly tried before a Court of Sessions the first for murder and the second for abetment of murder, a confession made by *A* that he himself had committed the murder, at the instigation of *B* was put in as evidence against *A*

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commencement, and that no objection having been taken by *B*, who was represented by a Vakil, to the admissibility of *A*'s confession against him when the charge against *A* was altered the Sessions Judge was justified in using the confession against *B* also (5)

* Confes
-ion

The word must be construed as meaning the same in this section as in the twenty fourth, twenty fifth and twenty sixth sections (6) The subject of incriminatory statements which fall short of full admissions of guilt has been already dealt with. A mere admission from which no inference of guilt follows, is not within this section though it implicates others and is evidence, therefore, only against the maker. Before a statement can be taken into account to a "confession" on which all are charged (7) the other evidence might well

(1) *R v Nur Maloned* 8 B 223 (1883)

(2) *Badji v R* 7 M 59 (1884) and see *R v Jaffir Ali* 19 W R Cr 57 (1873) *R v Alagappan Bali Weir* 3rd Ed 499a (1886) *R v Amrita Govinda* 10 Bom H C R 497 499 (1873)

(3) *Deputy Legal Remembrancer v Karuna Bastobis* 22 C 164 173 (1894) (4) *R v Bala Patel* 5 B 63 (1880) *R v Amrita Govinda* 10 Bom H C R 497 499 (1873) *Deputy Legal Remembrancer v Karuna Bastobis* supra loc cit *R v Alagappan Bali Weir* 3rd Ed 499a (1886) *R v Malappa Bin* 14 Ind Jur N S 19 (1890)

(5) *R v Goind Babli* 11 Bom H C R 278 (1874)

(6) *R v Jagrup* 7 A 646 648 (1885)

(7) *R v Mohesh Bwas* 19 W R

Cr 16 (1873) *R v Jaffir Ali* 19 W R

Cr 57 (1873) *R v Belat Ali* 19 W R

Cr 67 (1873) *R v Amrita Govinda*

10 Bom H C R 497 500 501 (1873)

R v Kukree Ooran 21 W R Cr 43

(1874) *R v Banuaree Lall* 21 W R

Cr 53 (1874) *R v Naga* 23 W R

Cr 24 (1875) *R v Kesulub Boon* 25

W R Cr 8 (1876) *R v Ba joo*

Clo dher 25 W R Cr 43 (1876) *R*

v Gairaj 2 A 444 (1879) *R v Mulu*

2 A 646 (1880) *R v Daji Narsu* 6 B

288 (1882) *Voor Dur v R* 6 C 29

(1880) *Bishan Dutt v R* 2 All L J

53 (1904) *Sital Singh v Emperor* 46 C

700 cited under s 10 *Quare*—As to the

correctness of the decision of *R v Bakur*

Khan 5 W P 213 (1873) the state-

ment in which case it is submitted did

not amount to a confession *Shahab Ma*

v Emperor 18 C. L. J 590 (1913)

tatement is to be used
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Where the inherent quality of the statement by the prisoner is not a confession, it cannot be used against the other accused (1) "This Court has already had occasion in more than one case to point out that confessions, which are made use of under the thirtieth section of the Evidence Act, in the first place, can only be used so far as they make the confession for which all are being tried, and second evidence of an accomplice" (2) "The test intended should be applied to a statement of one prisoner proposed to be used in evidence as against another, is to see whether it is sufficient by itself to justify the conviction of the prisoner jointly tried with the other" In fact to use a popular and must tar himself and the per same brush' (3)

To render the statement of one person jointly tried with another for the same offence liable to consideration against that other, it is necessary that it should amount to a distinct confession of the offence charged (4) In one case (5), it appears to have been held that the word 'confession' is limited to confessions of actual guilt, but it would seem that this is not so and that the term will include statements which amount either to a direct admission of constructive guilt, or statements short of such admission, but from which the inference of Constructive guilt follows (6)

From a consideration of the principle upon which this kind of evidence is admitted, it is plain that a statement which entirely exonerates the maker and inculcates his fellow prisoner is not within the section (7) inasmuch as it does not amount to a confession of the maker's own individual guilt of the offence for which he and the others are jointly tried, nor is such a statement which affects himself and others but the latter only Such a statement can afford no guarantee whatever of its own truth, being made without either the sanction of an oath, or of that substitute for that sanction which consists in the self inculpation of the maker, any test of truth whatever (8) The rule be confession must affect the maker thereof namely — "That

before a confession of a person jointly tried with the prisoner can be taken into consideration against him it must appear that that confession implicates the confessing person substantially to the same extent as it implicates the person against whom it is to be used, in the commission of the offence for which the

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(1) *R v Amrita Govinda* 10 Bom H C R 97 500 501 (1873) the passage in quotation marks as per West J

(2) *R v Naga* 21 W R Cr 24 (1875) per Phear J

(3) *R v Ganraj* 2 A 444 446 (1879) per Straight J the same argument was offered but not accepted in *R v Bakur Khan* 5 N W P 213 (1873)

(4) *R v Daji Narsu* 6 B 288 (1887) and see *Sankappa Rai v R* (1908) 31 M 127

(5) *R v Bajor Choudhry* 25 W R Cr 13 (1876)

(6) See *R v Amrita Govinda* 10 Bom H C R 497 (1874) *R v Ganraj* 2 A 444 (1879) *R v Mohesh Biswas* 19 W R Cr 16 (1873) *R v Jaffir Ali* 19 W

R Cr 57 (1873) See Indian Penal Code ss 114 149

(7) *R v Keshub Bona* 25 W R Cr 8 (1876) *R v Belat Ali* 19 W R Cr 67 (1873) *R v Banwaree Lall* 21 W R Cr 53 (1874) *R v Ganraj* 2 A 444 (1879) *R v Mulu* 2 A 646 (1880) *R v Daji Narsu* 6 B 288 (1887) *Noor Bur v R* 6 Cr 279 (1880) *Bshan Dalt v R* 2 All L J 53 (1904) see also *R v Mohesh Biswas* 19 W R Cr 16 (1873) *R v Amrita Govinda* 10 Bom H C R Cr 497 (1873) *R v Khukree Oora* 21 W R Cr 48 (1874), *R v Baijoo Choudhry* 25 W R Cr 43 (1876)

(8) *R v Belat Ali* 19 W R Cr 67 (1873) per Phear J

prisoners are being jointly tried" (1) It is this self implication which is supposed to afford a guarantee for the truth of the statement. Again "this section must be interpreted to mean that the statement of fact made by the prisoner, which amounts to a confession of guilt on his part, may be taken into consideration, so far, and so far only as that particular statement of fact itself extends against the other prisoners, who are being tried as well as himself for the offence which is thus confessed. I think the two illustrations which are given to this section bear out this view. If this be so we must be careful not to apply statements made by *R I D*, before the Magistrate against other prisoners than himself further than those same statements amount in themselves to a confession of guilt on his part" (2). Neither can the statement of

prisoner under section 30 of *in pari delicto*, when, that is the confessing prisoner implicates himself to the full as much as his co prisoner whom he is criminating' (3). The *ratio decidendi* of the above cases is that statements which inculpate the maker more than, or equally with, others alone can afford any satisfactory guarantee of their truth. Less weight is to be asser degree than others, esser degree) implicates the statement will be

excluded, according to the rulings of the Calcutta and Allahabad High Courts. Very little, if any, blame on others who makes it, and High Courts (4). Lastly, no guarantee whatever is afforded by a statement which entirely exonerates the maker, and such a statement is therefore in all cases inadmissible.

Made. The confessions may have been made at any time before or at the trial (5). This section is not to be read as if the words at the trial were inserted after

(1) *R v Belat Ali* 19 W R Cr 67 10 B L R 453 (1873) per Phear J followed in *R v Ganraj* 2 A 444 (1879) *R v Mulu* 2 A 646 (1880) *R v Babajibin Sathu* 14 Ind Jur N S 175 (1890) see *R v Mohesh Biswas* 19 W R Cr 16 (1873)

(2) *R v Mohesh Biswas* 19 W R Cr 16 23 per Phear J 10 B L R 455n. But see for statement before Magistrate under section 347 of the Criminal Procedure Code *Bai Reddi* (in re) 38 M 302 (1915)

(3) *R v Bayoo Choudhry* 25 W R Cr 43 (1876) per Glover J that is only when the confess on makes both equally guilty of the offence. The rule is laid down more broadly in *R v Belat Ali* supra and the cases which follow it. *A fortiori* a statement which implicates the confessing prisoner more than his co-prisoners would appear to come within this section [see *R v Belat Ali* supra in which Phear J seems to have thought admissible a statement by a prisoner which made certain of his fellows accessories before the fact and not actual actors in the transaction which constituted the foundation of the charge]. But the decisions of the Calcutta and Allahabad High Courts will exclude a confession which

implicates the maker in a lesser degree than his co accused unless the self implication and the implication of others is substantially the same. See however as to this *R v Nur Mahomed* 8 B 223 277 (1883) in which the confession tended to reduce the guilt of the maker to that of a subordinate agent of another as principal cf also *R v Govind Babli* 11 Bom H C R 278 (1874)

(4) *R v Taranath Roy Choudhry* (1910) 37 C 375

(5) In *R v Ashoolash Chuckerbutty* 4 C 483 488 (1878) Garth C J appears to have been of opinion that a confession under s 30 must not be one made at the trial for he says (at p 488) The word proved in s 30 must refer to a confession made beforehand. But see *R v Tanya talad* post and in no reported case has it ever been objected to the admissibility of a confession that it was made at the trial. In *R v Chandra Vall* 7 C 65 (1881) and *R v Lakshman Bala* 6 B 124 (1882) the objection to the admissibility of the confessions taken and recorded by the Sessions Judge at the trial was not to the fact of their having been made at the trial but to the fact not having been proved *in post*

the word "made," and the word "recorded" substituted for the word "proved" Therefore, a confession duly made any time by one of several accused persons who are under trial jointly for the same offence can be taken into consideration under section 30 as against the other accused persons (1) It is not necessary that the confession, to be taken into consideration, should have been made in the presence of the co prisoners against whom it is offered in evidence (2)

But though this section allows a confession to be used against another prisoner although made in his absence, it yet requires that such confession should be "proved" as against the prisoner to whose prejudice it is to be used. Therefore, where two accused persons were jointly tried before the Sessions Judge on a charge of murder and the Judge examined each of the accused in the absence of the other, making the latter withdraw from the Court during the examination of the former, though without objection from the pleaders of the accused persons, it was held that the examination of each accused could be used only against himself and not against his fellow accused (3) Provided a confession is only proved afterward it is immaterial whether or not the co prisoners were present at the time of making it. When a confession is used for the purposes of this section, the person to be affected by it has a right to demand that it be strictly proved and shown to have been, in all essential respects, taken and recorded as prescribed by law (4) When a confession of one prisoner is taken in the absence of the other prisoners and the latter have had no opportunity of denying or even of knowing what their fellow prisoner has said, such a confession cannot be said to have been "proved", it is only after proper proof is given that it may be taken into consideration (5)

"Proved"

The word "Court" in section 30 of the Evidence Act means not only the "Court" Judge, in a trial by a Judge with a jury, but includes both Judge and jury (6)

By this section the Legislature has only bestowed a discretion upon the Court to take into consideration such confession (7) While under section 21 admissions (which include confessions) are relevant and may be used against the persons making them, the present section merely provides that the Court may take them into consideration against other persons, and this distinction is significant and shows that under this section the Court can only treat a confession as lending assurance to other evidence against a co accused (8) When more persons than one are jointly tried for the same offence, the confession made by one of them, if admissible in evidence at all, should be taken into consideration against all the accused, and not against the person alone who made it (9) The law which prevailed before the passing of this Act required a conviction to be

May take into consideration"

(1) *R v Tanja talad* 14 Ind Jur S 516 (1890)

(2) H C Proceedings 31st July 1885 Weir 3rd Ed 499 *R v Lakshman Bala* 6 B, 124 125 (1882) see *R v Bepin Biswas* 10 C 970 974 (1884) In *R v Bepin Biswas* 10 C 970 974 (1884) it was held that in that particular case the confessions of two of several accused persons made in the absence of the others were of no weight against the latter

(3) *R v Lakshman Bala* 6 B 124 (1882) following *R v Chandra Nath* 7 C 65 (1878) in these cases the confessions were objected to not merely because they were made during the absence of the co prisoners but because they were not

afterwards proved in any way nor opportunity given to them to know what had been said against them

(4) *R v Chander Bhattacharjee* 24 W R Cr 42 (1875) [Cr Pr Code] 1872 s 122 (s 164 of Act V of 1898) see in the manner provided by ss 345 346 (ss 342 364 of Act V of 1898)

(5) *R v Lakshman Bala* supra *R v Chandra Nath* supra

(6) *R v Ashootosh Chuckerbutty* 4 C 483 F B (1868)

(7) *R v Sadin Mundul* 21 W R Cr 69 71 (1874) per Phear J

(8) *R v Lalit Mohan Chuckerbutty*, S B (1911) 38 C 559

(9) *R v Ra i Biraja* 3 B., 12 (1878)

based on evidence, excluding from that term statements of the character mentioned in this section (1) And in so far as a statement by a witness only is "evidence" according to the definition given of that term when used in this Act, a confession by an accused person affecting himself and his co accused is not "evidence" in that special sense (2) These words do not mean that the confession is to have the force of sworn evidence (3) But such a confession is nevertheless evidence in the sense that it is matter which the Court, before whom it is made, may take into consideration in order to determine whether the issue of guilt is proved or not (4) The wording however, of this section (which is an exception) shows that such a confession is merely to be an element in the consideration (5) of all the facts of the case, while allowing it to be so considered, it does not do away with the necessity of other evidence (6) For even when regarded as evidence and taken at its highest value, it is of too weak a character to found a conviction upon it alone and hence corroboration should be required in all cases if instead of being the statement of a fellow prisoner would not in general testimony of

an accomplice given before the Court under the sanction of an oath and a process of careful examination and capable of being tested by cross examination, is yet by its nature such that as against an accused, it must be received with caution, still more so must be the confession of a fellow prisoner, which is only the bare statement of an accomplice, limited to just so much as the confessing person chose to say and guaranteed by nothing except the peril

(1) *v ante* construction

(2) *v ante* s 3 and see Proceedings 24th January 1873 7 Mad H C R App 15 [a conviction founded on such confession alone is a case of *no evidence* and bad in law] *R v Kalyappa Gounden* (1893) Weir 3rd Ed 494 [although confessional statements may be considered they cannot be accepted as evidence of any fact necessary to constitute the offence] *R v Bayaji Kom* 14 Ind Jur N S 384 (1886) [the statement of a co accused is not technically evidence within the definition given in s 3 *v post*] *R v Khandia* 15 B 66 (1890) [referred to in *R v Nirmal Das* 22 A 445 447 (1900) [conviction held to be bad as though a confession could be taken into consideration it was not evidence within the definition given by s 3 and could not therefore alone form the basis of a conviction], *R v Naga* 23 W R 24 (1875) *R v Chunder Bhattacharjee* 24 W R 42 (1875) *R v Narain Tel* mentioned in *R v Ashootosh Chuckerbutty* (*v post*) [the Legislature avoids saying that confessions of this sort are evidence and may be used as evidence it says merely the Court 'may take into consideration' such confession] *R v Dip Narain* 37 A 247 (1915)

(3) *R v Nirmal Das* 22 A 445 (1900)

(4) *R v Ashootosh Chuckerbutty* 4 C 481 F B (1878) *Emperor v Babar Ali* 47 C 782 (1915), *v ante* s 3, see next note

(5) Proceedings 24th January 1873 7 Mad H C R App 15 With respect to the words taken into consideration' see *R v Chunder Bhattacharjee* 24 W R Cr 42 (1875) *R v Nagar* 23 W R Cr 24 (1875) and see note (3) p 181 In *R v Bayaji Kom Andu* 14 Ind Jur N S 384 (1886) followed in *R v Khandia* 15 B 66 (1890) it was held that the words taken into consideration in s 30 of the Evidence Act mean 'taken into consideration' for the purpose of arriving at a conclusion of fact and though a co accused's statement is not technically evidence within the definition given in s 3 it may still be used *quantum valcat* for the basis of a reasonable inference and if a jury think it sufficiently supported by a partial or qualified admission of guilt on the part of the accused himself and by admitted physical facts pointing to his connection with the crime imputed to him they are not precluded by law any more than by reason from a finding of guilty thus sustained

(6) *Ciddigadu v R* (1909) 33 N 46

(7) *R v Mahesh Birsas* 19 W R Cr 16 25 (1873) *R v Sadhu Mundul* 21 W R 69 71 (1874) *R v Malappa Bin* 11 Bom H C R 196 198 (1874) *R v Naga* 23 W R Cr 24 (1875) *R v Ashootosh Chuckerbutty* 4 C 483 (1878), *Emperor v Sabit Khan* 43 B 739 s 21 Bom L R 448 20 Cr L J 497 see ss 133 114 *post* What corroboration is necessary depends on the facts of each case

ib

do not stand upon the same but on a lower footing than the testimony of an accomplice (3). And although the instance of corroboration which is appended to *Illust (b)* of section 114 is corroboration to be found in accounts of an occurrence given by accomplices, there is no indication that the Legislature intended in this passage by the term "accounts given by the accomplices" anything other than accounts given in due course of examination as witnesses. Therefore the mere confessions of prisoners do not come within the scope of this legislative declaration (4), and there is no express provision in the Act to limit, in any case, the operation of the rule that confessions of co-prisoners, standing alone, are legally insufficient for conviction.

Having regard to the foregoing considerations, the Courts have established the following rules with regard to this species of evidence —

(1) *If there is (a) absolutely no other evidence in the case (5), or (b) the other evidence is inadmissible (6) such a confession alone will not sustain a conviction.*

Thus (a) a conviction of a person who is being tried together with other persons for the same offence cannot proceed merely on an uncorroborated statement in the confession of one of such other persons (7). So where two prisoners were convicted under sections 312 and 203 of the Penal Code and there was not, as the Court observed, a particle of evidence against the second prisoner except the confession of the co prisoner, it was held that the case was one of no evidence, and that the conviction was bad in law and should be set aside (8). If a prisoner were convicted upon such evidence, whether by a jury or otherwise, and were to appeal to the High Court, the conviction ought to be set aside, further, any Sessions Judge trying such a case before a jury ought to direct them to acquit the prisoner (9). (b) Where the only evidence against the second prisoner was a confession made by the first prisoner, and a statement made by the second prisoner to a police constable, it was held that the latter statement was inadmissible and that the second prisoner could not be convicted solely on the confession of the first (10).

(1) *R v Sadhu Mundul* 21 W R Cr 69 71 (1874) *per* Phear J and see *R v Naga* 23 W R 24 (1875) *R v Bhatani* 1 A 664 (1878) *R v Ashootosh Chuckerbutty* 4 C 483 (1878) *R v Bepin Biswas* 10 C 970 (1884) *R v Dosa Jiva* 10 B 231 (1885) *R v Krishnabhat* ib 319 (1885) *R v Ram Saran* 8 A 306 (1885) *R v Alagappan Bali Weir* 3rd Ed 499a (1886) *R v Babaji bin* 14 Ind Jur N S 175 (1888) *R v Ganapabhat* 14 Ind Jur N S 20 (1889) [the corroborative evidence must be more cogent and should be more strictly examined by the Court than when an accomplice gives evidence as a witness] *Emperor v Babar Ali Gazi* 42 C 789 (1915) *Muthukumerastami Pillai v Emperor* 35 M 397 (1912) and see *post* commentary on section 133

(2) S 133 *post*

(3) *R v Ashootosh Chuckerbutty* 4 C 483 404 496 (1878) *per* Jackson and Ainslie JJ *R v Babaji bin* 14 Ind Jur N S 175 (1888) [confessions made by accused persons at a joint trial cannot be

treated as the evidence of accomplices against one other] *R v Lakshmya Pandaram* 22 M 491 493 (1899) *Giddigadu v R* (1909) 33 M 46

(4) *R v Sadhu Mundul* 21 W R Cr 69 71 (1874) *per* Phear J *R v Ashootosh Chuckerbutty* 4 C 483 494 496 (1878) *per* Jackson and Ainslie JJ

(5) *Proceedings* 24th January 1873 7 Mad H C R App 15 followed in *R v Ambigara Hulagu* 1 M 163 (1876) *R v Bhatani* 1 A 664 (1878) *R v Ram Chand* ib 675 (1878) *R v Ashootosh Chuckerbutty* 4 C 483 F B (1878) *R v Dosa Jiva* 10 B 231 (1885) *R v Khandia* 15 B 66 (1890)

(6) *R v Ambigara Hulagu* 1 M 163 (1876)

(7) See cases cited in note (3) *ante*

(8) *Proceedings* 24th January 1873 7 Mad H C R App 15 followed in *R v Ambigara Hulagu* 1 M 163 (1876)

(9) *R v Ashootosh Chuckerbutty* 4 C 483 490 (1878) *per* Garth C J

(10) *R v Ambigara Hulagu* *supra*

(2) (a) *The confession of co prisoners, to be rendered trustworthy must be ident evidence, and not by the testimony of all the persons*

(a) It is clear, for the reasons above mentioned, that though admissible under section 30 and capable of being taken into consideration, no weight can be attached to the confession unless it is in the first place corroborated. The confessions of persons tried jointly for the same offence may be "considered" as against other parties then on their trial with them but such confessions, when used as evidence against others stand in need of corroboration (4) When confessions of one co prisoner are admissible against another co prisoner, the utmost value that can be claimed for them is that if there is other untainted evidence against the accused they may be "considered" together with such evidence (5) The corroborative evidence must be more cogent and should be more strictly examined by the Court than when an accomplice gives evidence as a witness for a confession cannot be treated as of the same value as the evidence of an accomplice (6) Verification proceedings do not add any value to an approver's evidence or to a confession and cannot be regarded as corroboration (7) (b) In the next place the corroboration must be by independent evidence and not by the testimony of accomplices or approvers. For, if

of one accomplice is not sufficient corroboration of another. And further, in so far as a confession does not stand as high as the testimony of an accomplice there is a greater necessity for independent corroboration (8) (c) Thirdly, not only must there be corroboration as to the *corpus delicti*, but also as to the identity of all the persons concerned. This is no technical rule but one founded

(1) *R v Jaffir Ali* 19 W R Cr 57 (1873) *R v Koonjo Leth* 20 W R Cr 13 (1873) *post* *R v Sadhu Mundul* 21 W R Cr 69 (1874) *R v Naga* 23 W R Cr 34 (1885) *R v Ashootosh Chuckerbutty* 4 C 483 (1878) *R v Dosa Jita* 10 B 231 (1885) *R v Ram Saran* 8 A 306 (1885) *R v Alagappan Bali* Weir 3rd Ed 499a (1886) *R v Ganapabhat* 14 Ind Jur N S 20 (1889)

(2) *R v Jaffir Ali* supra *R v Molesh Biswas* 19 W R Cr 16 (1873) *R v Koonjo Leth* supra 3 [The confession of A. L. of course could not have been legally used against the others at all excepting to such an extent as it was substantially corroborated by unimpeachable evidence *aliunde* per Phear J] *R v Sadhu Mundul* supra *R v Malapa bin* 11 Bom H C R 196 *R v Baijoo Choudry* 25 W R Cr 43 (1876) *R v Dosa Jita* 10 B 231 (1885) *R v Ram Saran* 8 A 306 (1885) *R v Alagappan Bali* Weir 3rd Ed 499a (1886)

(3) *R v Molesh Biswas* supra 21 *R v Sadhu Mundul* supra *R v Budhu Nanku* 1 B 475 (1876) *R v Kalappa Gound* Weir 3rd Ed 494 (1883) *R*

v Dosa Jita supra *R v Ram Saran* supra

(4) *R v Jaffir Ali* supra

(5) *R v Alagappan Bali* supra

(6) *R v Ganapabhat* 14 Ind Jur N S 20 (1889)

(7) *R v Lohi Molai Chuckerbutty* S B (1911) 38 C 559

(8) *R v Molesh Biswas* 19 W R Cr 19 25 (1873) *R v Jaffir Ali* 19 W R Cr 57 58 [Tainted evidence is not made better by being double in quantity as it would be where the only corroboration is accomplice testimony] *R v Ram Saran* supra [a second accomplice does not improve the position of the first] *R v Koonjo Leth* supra 3 *ante* *R v Sadhu Mundul* supra *R v Malapa bin* *Kapala* supra and cases cited *ante* One confession does not corroborate another *Takanah v R* 10 C W N xvi (1905) It may be generally stated that where there are two sets of evidence neither of which can alone be accepted without corroboration they cannot each in its turn be taken to corroborate the other and joined together so as to justify any Court in acting on such evidence *R v Jadab Das* 4 C W N 129 (1889) s c 27 C. 295

on long judicial experience (1) The question is not whether the story is generally true, but whether it is true in the particular points which affect the persons who are accused by him, because it is just at those points that the reason for suspicion and uncertainty comes into force (2) The accomplice (and, therefore, *a fortiori*, a confessing prisoner) must be corroborated not only as to one but as to all of the persons affected by the evidence, and corroboration of his evidence as to one prisoner does not entitle his evidence against another to be accepted without corroboration (3)

(3) The confessions of prisoners are not sufficient corroboration of the testimony of an accomplice, either as to the corpus delicti or the identity of the person affected (4) For the corroboration which is needed of an accomplice's testimony is evidence which is independent of accomplices But a confession of a

more trustworthy by a tainted confession (*v ante*)

Upon the question as to what independent evidence is legally sufficient corroboration of the confession, it is necessary to bear in mind that being evidence of a very defective character, the confession requires especially careful scrutiny before it can be safely relied on (5) The corroborative evidence must

be examined by the Court than when there is no doubt as to the sufficiency of independent and credible evidence witnesses, or of a confession made by the accused (7) in addition to the confession by his co prisoner implicating him, but doubt may arise in cases where the evidence is circumstantial (8) The rulings on this point are not uniform In one case it seems to have been thought that if the other evidence

(1) *R v Lalit Mohan Chuckerbutty* S B (1911) 38 C 559

(2) *R v Mohesh Biswas* supra at p 21 and see *R v Budhu Nanku* 1 B 47 (1876), and *R v Chatur Purushotam* cited in note to same *R v Sadhu Mundul*, supra *R v Kaliappa Gounden* Weir 3rd Ed 494 (1883) *R v Dosa Jita* 10 B 231 233 (1885) [In this case the prisoner was released as the confession was not corroborated by any independent evidence to show that the appellant was one of the house-breakers] *R v Ram Saran* 8 A 306 (1885) see p 184 note ante

(3) *R v Ram Saran* supra

(4) *R v Jaffir Ali* 19 W R Cr 57 (1873) *R v Mohesh Biswas* 19 W R Cr 16 21 25 (1873) *R v Malappa bin* 11 Bom H C R, 196 (1874) *R v Iresha bhai* 10 B 319 (1885) *R v Sadhu Mundul* 21 W R Cr 69 (1874) *R v Naga* 23 W R Cr, 24 (1875) *R v Ra* 1 Saran 8 A 306 (1885) *R v Bajoo Choudhry* 25 W R Cr 43 (1876) *R v Budhu Nanku* 1 B 475 (1876) *R v Bepin Biswas* 10 C 970 (1884) *R v Alagappan Bali* Weir 3rd Ed 499a (1886) *R v Cland zaid Ibra* 14 Ind Jur N S 125 (1888)

(5) *R v Sadhu Mundul* 21 W R Cr 69 (1874) *R v Naga* 23 W R Cr 24 (1875)

(6) *R v Ganapabhat* 14 Ind Jur N S 20 (1839) see also *R v Sadhu Mundul* supra

(7) See *R v Jaffir Ali* 19 W R Cr 39 60 (1873) *R v Bajoo Choudhry* 25 W R 44 (1876) *R v Ewajji A* 14 Ind Jur 384 (1886) see *R v Barnaayer* 19 M 482 (1896) where under the circumstances of that case the corroborating evidence was held to be sufficient

(8) See (1) as to possession or discovery of property (a) on charge of theft dacoity dishonestly receiving *R v Jaffir Ali* supra *R v Naga* supra *R v Ra Saran* *R v Koonjo Leth* supra *R v Chunder Bhattacharjee* supra *R v Kaliappa Gounden* supra *R v Hardeja* 5 N W P 217 (1873) *R v Krishnabhat* supra *R v Dosa Jita* supra (b) on a charge of murder or injury to the body *R v Ram Saran* supra (2) as to other circumstantial evidence (a) absence from home *R v Jaffir Ali* supra *R v Bepin Biswas* supra (b) sudden disappearance *R v Bajoo Choudhry* supra (c) presence in company of other accused *R v Kaliappa Gounden* supra *R v Ram Saran* supra (d) medical evidence *R v Sadhu Mundul* supra (e) all feeling *R v Bajoo Choudhry* supra (f) finding of instrument of crime *R v Mohesh Biswas* supra

'tends' to conviction it would be sufficient (1) Where, in another prosecution, the circumstantial evidence constituted a very strong *prima facie* case, it was held to be sufficiently corroborative (2) Again, it has been held that corroboration by circumstantial evidence is not sufficient "unless the circumstances constituting corroboration would if believed to exist, themselves support a conviction (3) Lastly it has been said that "how far any corroborative evidence would be sufficient coupled with the confession to convict a prisoner, must depend upon the circumstances of each particular case" (4)

Upon the manner in which the confessions are to be taken into consideration and upon the relation in which the confessions stand towards the other evidence in the case, the rulings are also not uniform. In some it has been laid down that they cannot be used as the basis of a case but only as corroborative of other independent evidence because they are not 'evidence' (5) or if they are 'evidence they are evidence of a very weak character' (6) In other cases they have been treated as the basis of a case requiring only corroboration. The matter however is of no practical importance as whether they be treated in either of the above modes the issue of guilt will (if the confessions be sufficiently corroborated) be determined upon a consideration of the whole of the evidence including therein the confessions and the other independent evidence, both of these are elements in the case which, when combined, offer the material for the Court's decision whichever of the two be regarded as the prior element or basis (7)

In the undermentioned case it was held by the Calcutta High Court that a retracted confession should carry practically no weight as against a person other than the maker because it is not made on oath, it is not tested by cross examination and its truth is denied by the maker himself, who has thus lied on one or other of the occasions, and that the very fullest corroboration would be necessary in such a case far more than would be demanded for the sworn testimony of an accomplice on oath (8) In another case it has been held by the Allahabad High Court that a retracted confession may be taken into consideration (that is used as evidence) against not only the person making it but persons tried jointly with the confessing accused for the same offence and that, as regards the person making it such a confession may even without any corroborative evidence form the basis of a conviction, and that, as regards other co accused, although corroborative evidence may be necessary, it is not necessary that such evidence should by itself be sufficient to support a conviction and *semble* that a conviction based on the unsupported evidence afforded by the confession of a co accused would not be unlawful (9) In another case it has been held by the Calcutta High Court that a retracted confession cannot ordinarily take the place of legal proof, and that under this section only a confession in the true sense of the word may be taken into consideration and that it would be unsafe to place any reliance on a retracted confession as against a co accused (10) In a case in the Bombay High Court it was said that

(1) *P v Chunder Bhattacharjee* 24 W R Cr 42 (1875) *per* Jackson J A similar view seems to be indicated in *R v Bayaji Kani* 14 Ind Jur 384 (1886)

(2) *P v Naga* 23 W R Cr 24 25 (1875) *per* Phear J

(3) *R v Ashootosh Chuckerbutty* 4 C. 481 *per* Jackson and MacDonnell JJ

(4) *Id* 490 *per* Garth C J

(5) *R v Chunder Bhattacharjee* 24 W R Cr 42 (1875)

(6) *R v Ashootosh Chuckerbutty* 4 C 483 *per* Jackson MacDonnell and Broughton JJ

(7) This seems to be the view of Garth C J in *R v Ashootosh Chuckerbutty* *supra* As a matter of convenience however it may be desirable to make the confession on the starting point or basis and then to consider how far the independent evidence direct or circumstantial supports it

(8) *Jain v R.* 28 C 689 (1901)

(9) *R v Aghri* (1907) 29 A. 434

(10) *A v Lalit Mohan Chuckerbutty* S B (1911) 38 C. 559 and *R v Tara Nath Roy Choudhry* (1910) 37 C. 375 and *Jain v R.* (1901) 28 C. 689

"confession" in this section cannot be restricted to one that has not been retracted and that once a confession has been proved it may be taken into consideration (1) In this case eleven men were charged with dacoity and there was no direct evidence, but seven of them confessed each his own guilt and implicated all the others. It was held that while there is nothing in this section which would prevent a Court from convicting after taking the confessions of the co accused into consideration, the Indian High Courts have adopted a rule of practice according to which a conviction founded only on the confessions of a co accused prisoner cannot be sustained.

This section must be read subject to the provisions contained in those which precede it. Therefore a confession by one of several persons, which is inadmissible under sections 24—26, and when there is no "discovery" under section 27, will be inadmissible under this section as against both the maker of it and the person implicated thereby. If it is not inadmissible, under sections 24—26, against the maker, it is admissible under this section, provided that it satisfies its terms, as well against the maker as against the other whom it affects. If, however, it is excluded by sections 24—26, but there is discovery under section 27, then so much of the whole, as leads immediately to the discovery being made admissible thereunder is also admissible under section 30 against both, if it is a "confession" on the part of the maker and 'affects himself and some other' co accused, but not otherwise. A confession partly (2) admissible against the maker under section 27 is admissible under section 30 against his fellow-prisoner, only when the admissible part is a 'confession' of the maker's guilt, and "affects" himself and the co accused as against whom it is considered. If the admissible part is a "confession," and "affects" both persons, it cannot be first rejected as against co-prisoner B on the ground that the whole confession was unduly obtained, and then that very part admitted as against the maker A, on the ground of discovery, but should be admitted under section 30 against both (3), though on taking it into consideration no weight would be attached to it, as against B, unless it was sufficiently corroborated, and the mere discovery, though it might be sufficient for the conviction of A, would not generally, of itself apart from other evidence to show B's complicity, corroborate A sufficiently as to B's being concerned in the offence. But a statement made in Court by one accused, incriminating a co accused but exculpating himself, is not a "confession" and cannot legally be taken into consideration as against the co accused. A statement made to the Police by an accused person to the effect that if certain other persons were sent for, he would see that some other property was traced out, is not evidence to prove that the accused had been guilty of abetment of theft (4).

As against such other person as well as against the person who makes such confession

31. Admissions are not conclusive proof of the matters admitted, but they may operate as estoppels under the provisions hereinafter contained

Admission not conclusive proof but may estop

Principle.—The policy of the law favours the investigation of truth by all expedient methods. The doctrine of estoppels, by which further investigation is precluded, being an exception only for the sake of general convenience not be extended beyond the reasons on

sions, whether written or oral, which do not operate by way of estoppel,

(1) *Emperor v Gangappa Kardappa* 38 B 156 (1914), per McCleod, J. See *R v Khanda bin Pandia* 15 B 66 (1890)

(2) See *R v Rama Biraja*, 3 B, 12 (1878)

(3) *Ib*

(4) *Bisham Dutt v R*, 2 A L J, 53, 2 Cr L J 22 and for definition of 'confession,' see *Hakiman v R*, 2 Cr L J, 230

constitute only *prima facie* and rebuttable evidence against their makers and those claiming under them, as between them and others (1)

s 17 ('Admission' defined)

s 115 (Estoppel)

s 4 ('Conclusive proof')

Taylor, Ev, §§ 817—819, 851—861, Norton Ev, 151, Phipson, Lr, 5th Ed, §17, Roscoe, N P Ev, 62, Powell, Ev, 9th Ed, 422, Best Ev, §§ 529 530

COMMENTARY

Effect of admissions

This section deals with the effect, in respect of conclusiveness, of admission, when proved. Every admission is evidence against the person by whom it is made, but it is always for the Court to consider what weight, if any, is to be given to an admission, or any other evidence, it is not conclusive merely because it is legally admissible (2). It is only so in certain cases, for instance, where it has been acted upon by the party to whom it was made (3). 'A statement made by a party is not, *ipso facto*, conclusive against him, though

ments were mistaken or untrue, except in the case in which they operate as estoppels (5). The subject was clearly illustrated in the case of *Heane v Rogers* (6), in which Bayley, J, observed 'There is no doubt but that the express admissions of a party to the suit, or admissions implied from his conduct, are evidence, and strong evidence against him but we think that he is at liberty to prove that such admissions were mistaken or were untrue, and is not estopped or concluded by them, unless another person has been induced by them to alter his condition, in such a case, the party is estopped from disputing their truth with respect to that person (and those claiming under him), and that transaction, but as to third persons he is not bound. It is a well-established rule of law, that estoppels bind only parties and privies and not strangers' (7). The

(1) Powell Ev 422. Thus a receipt endorsed on a bill and generally all parcel receipts are only *prima facie* evidence of payment. *ib* 289. In general a person's conduct and language have not the effect of operating against him by way of estoppel per Chamlre J in *Smith v Taylor*, 1 N R 210.

(2) *Euilley v Bulley* L R 9 Ch App 739 747, *Ayetun v Ram Sebuk* 12 W R 156 (1869).

(3) *Janan Choudhry v Doolar Choudhry*, 18 W R 347 (1872). *Brojendra Coomar v The Chairman Dacca Municipality* 20 W R, 223 (1873). *Istant Puttu v Radhabhai* 14 B 312 (1889). An admission made by a party in other cases may be taken as evidence against him but cannot operate against him as an estoppel in a case in which his opponents are persons to whom the admission was not made and who are not proved to have heard of it or to have been in any way misled by it or to have acted in reliance upon it. *Chunder Kant v Pearce Mohan* 5 W R 209 (1866) see *Mussumat Oodey v Mussumat Ladoo* 13 Moo I A, 583, 600 (1870).

(4) *Ayetun v Ram Sebuk* supra. Though written statements may be accepted from accused as is the practice in Courts under the Calcutta High Court they cannot take the plea of evidence nor of examination contemplated by section 347 of the Criminal Procedure Code. *Amrita Lal Ha ra v R* 42 C 957 (1915) dissenting from *P v Ausmija A W N*, 1 (1903).

(5) See s 115 *post* and notes thereto as to admissions which have been held to operate or not as estoppels.

(6) 9 B & C 577 586 587.

(7) See *Janan Choudhry v Doolar Choudhry* 18 W R 347 (1872), *Ayetun v Ram Sebuk* 12 W R 156 (1869), *Ram Saran v Pran Peary* 13 Moo I A 551 (1870), *Soojan Bibee v Achmut Al* 14 B L R App 3 (1874), *Sreenath Roy v Bindoo Bashinee* 20 W R 112 (1873), *Brojendra Coomar v Chairman Dacca Municipality* 20 W R 223 (1873), *Sreenmully Debia v Billa Soondarce* 21 W R 422 (1874), *Mussumat Oodey v Mussumat Ladoo* 13 Moo I A 583 599 600 (1870), *Mussumat Lutefoosunsa v Goor Surun* 18 W R, 483 493 494.

doctrine propounded in this case, that a party is always at liberty to prove that his admissions were founded on mistake, unless his opponent has been induced by them to alter his condition, is as applicable to mistakes in respect of legal liability, as to those in respect of matters of facts (1) Where a defendant seeks to make use of statements which have been put in evidence, and to treat them as admissions by the plaintiff who put them in, it is competent for the plaintiff to show the real nature of the transaction to which they relate and to get rid of the effect of the apparent admissions (2) Even if an admission was made with a fraudulent purpose, the party making it may show what was the real state of facts (3) So where a trader, intending to defraud his creditors delivered his goods to a friend, and made out an invoice to him and a receipt for the fictitious price, it was held open to him, when these documents were put in evidence, in an action brought by him to recover the goods from the pretended purchaser, to shew that they were untrue (4) And a party claiming under another who has made admissions as to a transaction to which that other was a party, is at liberty to allege and prove that the admissions were made with a fraudulent purpose, and were not true, and to show the real nature of the transaction (5)

But though a mere admission is not legally conclusive, the circumstances under, or the occasion upon which, it was made, or its formal and deliberate character, may entitle it to the greatest weight and may require very strong and clear evidence to rebut the inferences which may be drawn from it (6) Although it may be shown that the facts were different from what on a former occasion they were stated to be, and though it may be shown (if it were so) that a former statement is false, strong evidence may, under the particular circumstances, be required to prove that what the parties had deliberately asserted was altogether untrue (7) Moreover, an admission, if of a sufficiently

(1872) [where a defendant seeks to make use of statements which have been put in evidence and to treat them as admissions by the plaintiff who put them in it is competent for the plaintiff to show the real nature of the transaction to which they relate and to get rid of the effect of the apparent admissions] See also *Mussumat Ushrufoonezza v Baboo Gridharee* 19 W R 118 (1873) in which the Privy Council held that the fact of a party having admitted the execution of a deed in a former suit did not prevent her from contesting the validity of the transactions evidenced thereby and showing that it was colourable and not real and see generally as to the ordinarily inconclusive character of admissions *Sreenath Nag v Men Mohinee* 6 W R 35 (1866) *Gordon Stuart v Bheoj Gobind* 8 W R 291 (1867) *Grish Chunder v Issur Chander* 12 W R 226 (1829) *Mahomed Haneef v Mo-hur Ali* 15 W R 280 (1871) *Shaikh Kon uroodeen v Shaikh Manse* 16 W R 220 (1871) *Mussumat Ushrufoonezza v Baboo Gridharee* 19 W R 118 (1873) *Bodh Singh v Ganesh chander Sen* 19 W R 356 (1873)

(1) *Neaton v Liddiard* 12 Q B 925 927 such a mistaken impression however will not exclude his admission though it will impair its weight as evidence against him *Neaton v Belcher* 1 R B 921,

Taylor Ev § 819 *Roscoe N P Ev* 62 1 *Phillips & Arn* 354 see *Gopi Lal v Chundrassee Bhoojee* 19 W R 13 (1873) as to admissions involving erroneous conclusions of law

(2) *Mussumat Foolbibi v Goor Surun* 18 W R 485 (1872)

(3) *Ram Surun v Mussumat Pranbeary* 13 Moo I A 551 (1870) *Sreenath Roy v Bindoo Bashnee* 20 W R 112 (1873) *Brojendra Coomar v Chairman Dacca Municipality* 20 W R 223 224 (1873) *Sreenutty Debia v Bumala Soondaree* 21 W R 432 (1874)

(4) *Bowes v Foster* 27 L J Ex 262

(5) *Sreenath Roy v Bindoo Bashnee* 20 W R 112 (1873)

(6) *Soojan Bibee v Achmut Ali* 14 B L R App 3 (1874) 21 W R 414 *Hansa Koor v Sheo Gobind* 24 W R 431 432 (1875) *Mahomed Haneef v Mo-hur Ali* 15 W R 280 (1871) the value of an admission depends upon the circumstances under which it was made *Roscoe N P Ev* 62 R v *Simmons* 1 C & K 164 166 where it is a mere inference drawn from facts the admission goes no further than the facts proved *Bulley v Bulley* L R 9 Ch 739 and generally as to the weight to be attached to admissions v ante

(7) *Soojan Bibee v Achmut Ali* supra see last note and post

grave character, may have the effect of shifting the *onus* of proof (1) "As the weight of an admission depends on the circumstances under which it was made these circumstances may always be proved to impeach or enhance its credibility. Thus the admission (unless amounting to an estoppel) may be shown by the party against whom it is tendered to be untrue or to have been made under a mistake of law or fact, or to have been uttered in ignorance, levity or an abnormal condition of mind. On the other hand, the weight of the admission increases with the knowledge and deliberation of the speaker or the solemnity of the occasion on which it was made" (2) As to admissions made "without prejudice, and admissions obtained under compulsion" *ante*, s. 23

(1) <i>Forbes v Mir Mahomed</i> 5 B L R	148 L R	34 I A	27
529 540 (1870) 14 W R (P C) 28	(2) <i>Phipson</i> Ev	5th Ed	217 Best
13 Moo 1 A 438 <i>Chandra Kistiar v</i>	Ev §§	529 530	Taylor Ev §§ 854—
<i>Chandri Narpat Sing</i> P C (1906) 29 A	861 N P	Ev	62

STATEMENTS BY PERSONS WHO CANNOT BE CALLED AS WITNESSES

The provisions in the following section constitute further exceptions to Section 32 the rule which excludes hearsay (1) As a general rule, oral evidence must be direct (2) The eight paragraphs of the following section may be regarded as exceptions to that general rule The purpose and reason of the hearsay rule is the key to the exceptions to it, which are mainly based on two considerations a necessity for the evidence and a circumstantial guarantee of trustworthiness (3) It may be impossible, or it may cause unreasonable expense or delay to procure the attendance of a witness who if present before the Court, could give direct evidence on the matter in question and it may also be that this witness has made a statement either written or verbal with reference to such matter under such circumstances that the truth of this statement may reasonably be presumed In such a case the law as enacted by section 32 dispenses with direct oral evidence of the fact and with the safeguard for truth provided by cross examination and the sanction of an oath, the probability of the statement being true depending upon other safeguards which are mentioned in the following paragraphs (4) The truth of the declarations are deemed to be *prima facie* guaranteed by the special conditions of admissibility imposed An important difference between the law in India and in England is that in the latter country this class of evidence can only be received where the author of the statement is *dead* (5) The ground for its admissibility being the absence of any better evidence the other conditions mentioned in the section under which, in India, such evidence is receivable are consonant with reason and general convenience These conditions of admissibility apply to all the eight classes of evidence which it comprises It is for the Judge in his discretion to say whether the alleged expense and delay is such as justifies the admission of the evidence without insisting on the attendance of the author of the statement (6) The statement referred to in all the eight paragraphs of section 32 are evidence against all the world unlike statements receivable under the sections relating to admissions, which may only be proved as against the person who makes them or his representative in interest (7) But an admission may be proved by or on behalf of the person making it when it is of such a nature that, if the person making it were dead it would be relevant as between third persons under the thirty second section (8)

The nature of the evidence in the case of depositions in former trials, and the grounds upon which such evidence is receivable is considered in the Notes to section 33 *post* Section 33

The general ground of admissibility of the evidence mentioned in both sections 32 and 33 is that in the cases there in question no better evidence is to be had (9)

(1) See *Sturla v Freccia* L R 5 App Cas 639 *per* Lord Blackburn

(2) S 60 *post*

(3) Wigmore Lv § 1420

(4) Field Ev 169 170 *ib* 6th Ed 123 124

(5) Steph Dig Art 25

(6) Norton Ev 174 175

(7) *ib* 143 Field Ev 6th Ed, 132, 133

(8) S 21 cl (1) *ante* *ib* *ills* (b)

(c) as to cess returns *see* Cess Act IV

(B C) of 1880

(9) Steph Introd, 165

Statements
is to cause
of death
(s. 32, cl
1).

The ground of admissibility of "dying declarations," as they are called is said to rest, *firstly* on necessity(1), the injured person, who is generally the

instance known a statement made by a person, who did not expect to live many hours, turn out to be wholly and utterly untrue (4) According to English law it is the *impression* of impending death, and not the rapid succession of death in point of fact, which renders the testimony admissible, but it is still doubtful what is meant by "impending" From the English cases the true principle would seem to be that the Judge must be satisfied that the expectation of death is so immediate as to give to the declaration a solemnity sufficient to dispense with those sanctions necessary to ensure the purity of evidence in other cases (5) But in so far as it is not necessary under this Act that the declaration should have been made under expectation of death(6), the first named ground appears to be more properly that on which this kind of evidence is receivable When, however, the statement has been so made, it will further have the sanction
ording
and in
ere it is
s being

given where questions have been put (7) But the above-mentioned sanction has nothing to do with the nature of the crime or other act to which the evidence relates, it is just as existent in the case of declarations relating to the commission of one offence as another Further, if this evidence be admitted on the ground of necessity, that necessity is just as likely to exist where the deceased person has been robbed, or raped, or assaulted, as where he or she has been murdered (8) And therefore under the Act the statement is admissible whatever may be the nature of the proceeding in which the cause of the death of the person, who made the statement, comes into question (s. post) Three reasons have been given for restricting the application of this evidence to cases of homicide (a) the danger of perjury in fabricating declarations, the truth or falsehood of which it is impossible to ascertain, (b) the danger of letting in incomplete statements, which, though true as far as they go, do not constitute "the whole truth," (c) the experienced fact, that implicit reliance cannot in all cases be placed on the declarations of a dying person, for his body may have survived the powers of his mind, or his recollection if his senses are not impaired, may not be perfect, or, for the sake of ease, and to be rid of the importunity
atever they choose to sug
not been regarded by the
evidence in all cases other
mind when estimating the
weight to be allowed to dying statements in particular cases (10) This kind

(1) Taylor, Ev. § 716, Norton Ev. 176, Roscoe, Cr. Ev., 13th Ed. 29, 30 This ground seems not to have been admitted in *R v Bissorunjun Mookerjee*, 6 W R Cr. 75 (1866)

(2) Taylor, Ev., §§ 714 717 718 *R v Bissorunjun Mookerjee*, supra. In the matter of *Sheik Tenoo* 14 W R Cr. 11 13 (1871) see observation of Eyre L. C. B. in *R v Woodcock* 1 Lea, 502 cited in the last mentioned case at p. 13 and in Field Ev. 6th Ed. 124 Anderson B., in *Ashian's case* 2 Lew Cr. 147, Wigmore

Ev. § 1438

(3) Whitley Stokes at 841

(4) Field Ev. 6th Ed. 127, 128

(5) Taylor Ev. § 718

(6) s. post s. 32 cl. (1) Commentary

(7) Taylor § 714, *R v Mitchell* (1892)

17 Cox 503 *R v Smith* (1901) 65 J

P. 426 but see *R v Whitmarsh* (1898)

62 J P 680

(8) *R v Bissorunjun Mookerjee* supra

76

(9) Taylor Ev. § 716

(10) Field, Ev. 6th Ed., 125

of evidence has been found to be on the whole useful and necessary, but the caution with which it should be received has often been commented upon. It will often happen that the particulars of the violence to which the deceased has spoken were likely to have occurred under circumstances of confusion and surprise calculated to prevent their being accurately observed. The consequences also of the violence may occasion an injury to the mind, and an indistinctness of memory as to the particular transaction. The deceased may have stated his inferences from facts, concerning which he may have drawn a wrong conclusion, or he may have omitted important particulars, from not having his attention called to them. Such evidence, therefore, is liable to be very incomplete. He may naturally, also, be disposed to give a partial account of the occurrence, although possibly not influenced by animosity or ill will. But it cannot be concealed that animosity, and resentment are not unlikely to be felt in such a situation (1). Such considerations show the necessity of caution in receiving impressions from accounts given by persons in a dying state, especially when it is considered that they cannot be subjected to the process of cross examination, and the security afforded by the terror of punishment and the penalties for perjury cannot exist in this case. Further the remarks before made on verbal statements which have been heard and reported by witnesses apply equally to dying declarations, namely, that they are liable to be misunderstood and misreported, from inattention, from misunderstanding or from infirmity of memory (2). Where the declaration of a

I as made on the 13th
year, and there was
or accelerated by the
wounds received at the dacoity, or that it was the transaction which resulted
in his death, it was held that his declaration ought not to have been admitted
in evidence (3)

The English rule as to the admissibility of these statements is subject to several restrictions which, The considerations which of evidence have been said all suspicion of sinister motives a fair presumption arises that entries made

Statements made in the post) course of business
pecies interest
ice of (s 32, cl 2)

likely to bring clerks into disgrace with their employers, that, as most entries made in the course of business are subject to the inspection of several persons, an error would be exposed to speedy discovery, and that, as the facts to which they relate are generally known but to few persons, a relaxation of the strict rules of evidence in favour of such entries may often prove convenient if not necessary, for the due investigation of truth (4).

The ground of reception of such statements is the presumption that what a man states against his interest is probably true. Self interest is a sufficient security against wilful misstatement mistake of fact, or want of information on the part of the declarant. The place of the tests of oath and cross examination is in some measure supplied by the circumstances of the declarant and the

Statements against interest
(s 32, cl 3)

(1) Roscoe Cr Ev 13th Ed 33 34
Phill & Arn Ev 251 see Taylor Ev § 722 falsehood and the passion of revenge must also be guarded against and this more especially in India see remarks in Field Ev 6th Ed 127 128 Whitley Stokes ii 841 cited ante

(2) Roscoe Cr Ev 1b 1 Phill & Arn 1b

(3) R v Rudra Fakereppa 2 Bom L R 331 (1900)

(4) Taylor Ev § 697 Wills Ev, 2nd Ed 181 Phipson Ev 5th Ed 271, Hope v Hope (1893) W N., 20 C A.

character of his statement. Lastly, the inconveniences that would result from the exclusion of this kind of evidence are considered to be greater, in general than any which are likely to be experienced from its admission (1). The third clause of section 32 extends the rule as accepted in English Courts. For, while in the latter the interest involved must be pecuniary or proprietary, no other kind being sufficient (2), under the Indian Act the statement is admissible when, if true, it would expose or would have exposed, the declarant to a criminal prosecution or to a suit for damages (*à post*). It may well be thought that a declaration by which a man makes himself liable to a criminal prosecution or payment of damages, offers as good a guarantee for its truthfulness as one simply against his pecuniary or proprietary interest (3). Though the ground of admissibility of this kind of evidence is the improbability that a party would falsely make a declaration to fix himself with liability, yet cases may be put where his doing so would be an advantage to him (4).

Matters of
public and
general
interest
(s. 32, cl
4)

The admissibility of hearsay evidence respecting such matters, is said to rest mainly on the following grounds. "That the origin of the rights claimed is usually of so ancient a date, and the rights themselves are of so undefined and general a character that direct proof of their existence and nature can seldom be obtained, and ought not to be required that in matters in which the community are interested all persons must be deemed conversant, that, as common rights are naturally talked of in public and as the nature of such rights excludes the probability of individual bias what is dropped in conversation respecting them may be presumed to be true, that the general interest which belongs to the subject would lead to immediate contradiction from others, if the statements proved were false that reputation can hardly exist without the concurrence of many parties unconnected with each other, who are all alike interested in investigating the subject that such concurrence furnishes strong presumptive evidence of truth, and that it is this prevailing current of assertion which is resorted to as evidence for to this every member of the community is supposed to be privy and to contribute his share (5). The term "interest" here does not mean that which is interesting from gratifying curiosity, or a love of information or amusement, but that in which a class of the community have a pecuniary interest, or some interest by which their legal rights or liabilities are affected (6). But hearsay is not evidence of matters of mere private interest, for respecting these direct proof may be given, and no trustworthy reputation is likely to arise (7). But although a private interest

(1) Taylor Ev. § 668. Best Ev. § 500. Phipson Ev. 1b 5th Ed. 262. Wills Ev. 2nd Ed. 184. Wigmore Ev. § 1437. the attention and care ordinarily given by men to concerns in which their interests are involved are supposed to be a sufficient guarantee against inaccuracy. It is however easy to conceive cases e.g. that of a heedless spendthrift heir who has just succeeded to an inheritance in which these guarantees would be of little value. This is however a point concerned not with the admissibility but with the weight of the evidence. Field Ev. 6th Ed. 133 and see note *post*.

(2) *Sussex Peerage Case* 11 C. & F. 103 114 explained and acted upon in *Davis v. Lloyd* 1 C. & K. 276, *Illustration (f)* is particularly pointed to this case and indicates the departure in this Act from the English rule.

(3) Norton Ev. 184.

(4) Best Ev., § 500, e.g. the accounts

of the receiver or steward of an estate have through neglect or worse got into a state of derangement which it is desirable to conceal from his employer and one very obvious way of setting the balance straight is falsely charging himself with having received money from a particular person. *Id*.

(5) Taylor Ev. § 608 and cases there cited *R v. Bedfordshire* 4 E. & B. 542. *Starkie* Ev. 4th Ed. 43 50 186 190.

(6) *R v. Bedfordshire* *supra* per Lord Campbell.

(7) *Id* and see per Lord Kenyon in *Morewood v. Hood* 14 East 377n. Norton Ev. 183. In *Hecks v. Sparks* 1 M. & S. 690 Bayley J. modifies the rule thus. I take it that where the term public right is used it does not mean public in the literal sense but is synonymous with general that is what concerns a multitude of persons. *Gresley* Ev. 305.

should be involved with a matter of public interest, the reputation respecting rights and liabilities affecting classes of the community cannot be excluded or this relaxation of the rule against the admission of hearsay evidence would often be found unavailing (1) Evidence of this description is frequently included under the general term "reputation" (2) Strictly speaking, "general reputation" is the general result or conclusion formed by society as to any public fact or member of the community (3) such as

have possessed a knowledge on the subject derived either from their own observation or the information of others (3)

Section 32 in its fifth and sixth clauses deals with which are usually treated by English text-writers as a matter of pedigree and is in some respects more exact from, the English rule on the same subject (*v post*) The grounds upon which this class of statements is received are—necessity—such inquiries generally involving remote facts of family history known to but few, and incapable of direct proof, and—the special means of knowledge which are possessed by the declarant (4) cls 5, 6

As to statements in documents relating to a transaction by which any right or custom was created, claimed or the like, see *post*, and the thirteenth section, *ante*

Statements in document relating to transaction by which any right or custom was created claimed and the like

As to statements made by a number of persons, and expressing feelings or impressions (*v post*)

Statements made by a number of persons and expressing feelings or impressions

Before statements or depositions under section 32 or 33 are admissible, it must be shown that the circumstances and conditions mentioned and imposed by those sections exist, as that the person who made the statements sought to be proved is dead, or cannot be found, or the like The burden of proving this is on the person who wishes to give the evidence (5) If the terms of a deposition made by a person since deceased are such that it does not come within the provisions of these sections it will not be admissible otherwise, for instance under section 11 (6) Whenever any statement relevant under section 32 or 33 is proved, all matters may be proved either in order to contradict or corroborate it, or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved if that person had been called as a witness and had denied upon cross examination the truth of the matter suggested (7) Burden of proof, contradiction corroboration

(1) *R v Bedfordshire* supra

(2) *Starkie* Ev 4th Ed 43 *et seq* 186n *see* as to the difference between reputation of a fact and evidence of a fact *Mosely v Davis* 11 Price 167 *arguendo*

(3) *Starkie* Ev 43 44

(4) *See Taylor* Ev § 63 *Phipson*

Ev 5th Ed 291 *Gresley* Ev 319, and *post*

(5) S 104 *post*

(6) *Bela Ram v Malabar Singh*, A C (1912) 34 A 341

(7) S 158 *post* *see* further as to proof, the Commentary to ss 32, 33 *post*

Cases in which statement of relevant fact by person who is dead or cannot be found, etc. is relevant.

When it relates to cause of death

Or is made in course of business

Or against interest of makers

Or gives opinion as to public right or custom, or matters of general interest

Or relates to existence of relationship

32 Statements, written or verbal(1), of relevant fact made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:—

(1) When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question (2)

(2) When the statement was made by such person in the ordinary course of business(3), and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty, or of an acknowledgment written or signed by him of the receipt of money, goods, securities or property of any kind, or of a document used in commerce written or signed by him, or of the date of a letter or other document usually dated, written or signed by him (4)

(3) When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages (5)

(4) When the statement gives the opinion of any such person as to such right, custom or matter had arisen (6)

(5) When the statement relates to the existence of any relationship by blood, marriage or adoption between persons as to whose relationship by blood, marriage or adoption the person

(1) As to the meaning of this expression see *Chandra Nath v. Nilmadhub Bhattacharjee*, 26 C 236, s. c., 3 C W N 88 (1898), and *post* A reply made by signs by a person unable to speak in answer to a question put to him taken together with the question amounts to a verbal statement *Emperor v. Sadhucharan* 49 C 600 Q *Lup v. Abdullah* 7 A.

395

(2) III (a)
(3) As to the meaning of ordinary course of business see *Ningow v. Bhar maffa* 23 B, 63 (1897)
(4) III (b), (c), (d) (e) (h) (i).
(5) 21, III (b) (c)
(6) III (e), (f)
(6) III (i)

making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised.(1)

(6) When the statement relates to the existence of any relationship by blood, marriage or adoption between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree, or upon any tombstone, family portrait or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised.(2)

Or is made in will or deed relating to family affairs

(7) When the statement is contained in any deed, will or other document which relates to any such transaction as is mentioned in section 13, clause (a) (3)

Or in document relating to transaction mentioned in S 13, cl (a)

(8) When the statement was made by a number of persons, and expressed feelings or impressions on their part relevant to the matter in question (4)

Or is made by several persons and expresses feelings relevant to matter in question

Illustrations.

(a) The question is, whether *A* was murdered by *B*, or *A* died of injuries received in a transaction in the course of which she was ravished

The question is, whether she was ravished by *B* or

The question is, whether *A* was killed by *B* under such circumstances that a suit would lie against *B* by *A*'s widow

Statements made by *A* as to the cause of his or her death, referring respectively to the murder, the rape, and the actionable wrong under consideration, are relevant facts (5)

(b) The question is, as to the date of *A*'s birth

An entry in the diary of a deceased surgeon, regularly kept in the course of business, stating that, on a given day, he attended *A*'s mother and delivered her of a son, is a relevant fact (6)

(c) The question is, whether *A* was in Calcutta on a given day

A statement in the diary of a deceased solicitor, regularly kept in the course of business, that, on a given day, the solicitor attended *A* at a place mentioned, in Calcutta, for the purpose of conferring with him upon specified business is a relevant fact (6)

(d) The question is, whether a ship sailed from Bombay harbour on a given day

A letter written by a deceased member of a merchant's firm, by which she was chartered, to their correspondents in London to whom the cargo was consigned, stating that the ship sailed on a given day from Bombay harbour is a relevant fact (6)

(1) *Ills* (k) (f) (m)

(2) *Ills* (k) (1) (m)

(3) See s 13 ante v *post* notes -- clause (7)

(4) *Ill* (n) v *post*

(5) S 32 cl (1)

(6) S 32 cl (2)

- (e) The question is, whether rent was paid to *A* for certain land

A letter from *A*'s deceased agent to *A*, saying that he has received the rent on *A*'s account and held it at *A*'s orders is a relevant fact (1)

- (f) The question is, whether *A* and *B* were legally married

The statement of a deceased clergyman that he married them under such circumstances that the celebration would be a crime is relevant (1)

- (g) The question is, whether *A* a person who cannot be found wrote a letter on a certain day

The fact that a letter written by him is dated on that day is relevant (2)

- (h) The question is, what was the cause of the wreck of a ship

A protest made by the captain, whose attendance cannot be procured is a relevant fact (2)

- (i) The question is, whether a given road is a public way

A statement by *A*, a deceased headman of the village that the road was public, is a relevant fact (3)

- (j) The question is, what was the price of grain on a certain day in a particular market

A statement of the price made by a deceased buyer in the ordinary course of his business, is a relevant fact

- (k) The question is, whether *A*, who is dead, was the father of *B*

A statement by *A* that *B* was his son, is a relevant fact (4)

- (l) The question is, what was the date of the birth of *A*

A letter from *A*'s deceased father to a friend announcing the birth of *A* on a given day, is a relevant fact (5)

- (m) The question is, whether and when *A* and *B* were married

An entry in a memorandum book by *C*, the deceased father of *B* of his daughter's marriage with *A* on a given date is a relevant fact (5)

- (n) *A* sues *B* for a libel expressed in a printed caricature exposed in a shop window

The question is as to the similarity of the caricature and its libellous character

The remarks of a crowd of spectators on these points may be proved (6)

Principle.—The general ground of admissibility of the evidence mentioned in this section is that in the cases there in question no better evidence is to be had (7) As to the further and particular grounds on which each of the several classes of evidence mentioned are admitted, *see* Introduction, *ante*, and Note, *post*

s. 3 ("Relevant")

s. 3 ("Fact")

s. 3 ("Evidence.")

s. 3 ("Court.")

s. 3 ("Document")

s. 118 (Who may testify)

s. 163 (What matters may be proved in connection with proved statement relevant under s. 32)

s. 104 (Burden of proving fact to be proved to make evidence admissible)

s. 38 (Relevancy of deposition)

s. 80 (Presumption as to documents produced as record of evidence)

s. 114, ill. (f) (Presumption as to course of business)

s. 8 ill. (j) (k) (Examples of dying declarations)

(1) s. 32 cl. (3)

(2) s. 32 cl. (2)

(3) s. 32 cl. (4)

(4) s. 32 cl. (5) & (6)

(5) s. 32 cl. (5) & (6)

(6) s. 32 cl. (8)

(7) Steph Introd. 165

- s. 21, cl (1), (b), (c) (*Proof of admission by, or on behalf of, person making it*)
- s. 90 (*Ancient documents*)
- ss 47, 67 (*Proof of handwriting*)
- s. 50 (*Opinion on relation ship when relevant*)
- ss 13, 48 (*Public and general customs or rights*)
- s. 42 (*Judgments relating to matters of a public nature*)
- s. 65, cl (d) (*Secondary evidence*)

Dying Declarations —Steph Dig, Art 26 Wigmore, Ev, §§ 1430—1452, Taylor, 1 v, §§ 714—722, 3 Russ, Cr, 354—362, Best, Ev, § 505, Phipson, Ev, 5th Ed 299—304, Roscoe, Cr Ev, 13th Ed 29—34 Powell, Ev, 9th Ed 91—88, Wills, Ev, 2nd Ed 195—198 Field, Ev, 6th Ed 124—128, Norton, Ev, 175—177 *Declarations in the course of business* —Steph Dig, Art 27, Taylor Ev, § 697—713 Best Ev, § 501 Roscoe, N P Ev, 60—62 Wigmore, Ev §§ 1517—1561 Powell, Ev 9th Ed 316—323 Smith L C Note to *Price v Torrington*, Wharton Ev §§ 238—257, Phipson, Ev, 5th Ed 271—278, Wills, Ev, 2nd Ed 178—183 Field Ev, 6th Ed 128—131, Norton, Ev, 177—179 *Declarations against interest* —Steph Dig, Art 28 Wigmore Ev, §§ 1453—1477, Taylor, Ev, §§ 668—696 Phipson, Ev, 5th Ed 262—270, Best, Ev, § 50, Roscoe, N P Ev, 55—59, Smith L C Note to *Higham v Ridgway*, Powell Ev, 9th Ed 366—316, Wharton, Ev, 226—237 Wills, Ev, 2nd Ed 184—194, Act IX of 1908 (Limitation), s. 20, Field, Ev, 6th Ed 131—136, Norton, Ev 179—181 *Declarations as to public rights* —Steph Dig, Art 30 Taylor, Ev §§ 607—614, Best, Ev, § 497, Phipson, Ev, 5th Ed 279—290, Wigmore, Ev, § 1563, Roscoe, N P Ev, 48—51, Powell, Ev, 9th Ed 338—349, Wills, Ev, 2nd Ed 221—234, Field, Ev, 6th Ed 136—138, Norton, Ev, 184—188 *Declarations as to relationship* —Steph Dig, Art 31, Wigmore, Ev, §§ 1480—1510, Taylor, Ev §§ 635—637, Best, Ev, § 498, Phipson, Ev, 5th Ed 291—293, Wills, Ev, 2nd Ed 211—220, Roscoe, N P Ev, 44—48, Hubback's Ev of Succession, 618—711, Wharton, Ev, §§ 201—225, Powell, Ev, 9th Ed 349—357, Field, Ev, 6th Ed 139—143, Norton, Ev, 183—190 *Statements in documents relating to transaction mentioned in s 13* —Field, Ev, 6th Ed 143, Norton, Ev, 190—192 *Statements by a number of persons expressing feelings or impressions* —Field, Ev, 6th Ed 144, 145, Norton, Ev 192—193, cases cited

COMMENTARY.

The word "person" must not be read as "persons" If a statement, "Person" written or verbal, is made by several persons, and one or some of them is or are dead, and one or others is or are alive, the statement of the deceased person or persons is admissible under this section notwithstanding that the other person or persons who also made the statement is or are alive In such a case the statement is not one statement, but each person making the statement must be taken to have made the statement for himself or herself, and if any one of the makers of the statement is dead, the statement made by that person is admissible under this section if it comes under one or other of its clauses, being thus the statement of a person who is dead It may in such a case however be for legitimate comment that the statement of the deceased person is received with caution, if the party tendering it has not without proper called the author or authors of the statement still living to depose to its a but the matter cannot be placed higher than that (1)

The conditions upon which the statement may be tendered are the

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Committee to be inadmissible in evidence as statements of a deceased person. It was attempted to distinguish the case on the ground that the defendant had himself (after the person whose statements were filed was dead) filed certain other statements of this same man. As to this the Privy Council observed: "But those documents, which were doubtless filed in case the respondent's (plaintiff's) documents should be admitted, are not evidence, and their production by the appellant (defendant) cannot be held to compel the Court to depart from the rules of evidence in the decision of the case." (1) Where the document can be brought under this section by proof of the death of the person who prepared it or other facts contemplated by this section, it can be used not only as corroborative but as independent evidence. (2) This section has no application to the case of a witness who has been fully examined and cross-examined, but who happens to die before the termination of the suit. In such a case it is not open to either party to apply under this section for the admission of the previous statement made by the witness. (3)

See Notes to section 33, *post*

Incapable
of giving
evidence

See Notes to section 33, *post*

Delay or
expense

FIRST CLAUSE

Statement
as to cause
of death

The first clause is widely different from the English law upon the subject of "dying declarations," according to which, (a) this description of evidence is admissible in *no civil case* and in criminal cases only in the single instance of *homicide* that is, murder or manslaughter where the death of the deceased is the subject of the charge and the circumstances of the death are the subject of the dying declaration. (4) On the other hand under this Act the statement is relevant *whatever may be the nature of the proceeding* in which the *cause of the death* of the person who made the statement comes into question. (5) And further, (b) according to English law certain conditions are required to have existed at the time of declaration, *viz* it is necessary that the declarant should have been in *actual danger of death* that he should have been *aware of his danger* and have abandoned all hope of recovery, and that *death should have ensued*. (6) The existence of the last condition is of course as necessary under

person who made it was or was not at the time when it was made, under expectation of death. (7) Therefore, whether the declarant was or was not in actual danger

(1) *Jagatpal Singh v Jagdish Bahsh* 25 A. 143 (1902)

(2) *Charlter Rai v Kalash Belari* 4 Pat. L. W. 213 s. c. 44 I. C. 42

(3) *Sahdeo Naran Deo v Kusum Kumari* 46 I. C. 929

(4) Taylor Ex. §§ 714-716 thus in a trial for robbery the dying declaration of the party robbed has been rejected, and where a prisoner was indicted for administering drugs to a woman with intent to procure abortion her statements in extremis were held to be inadmissible. *ib* § 715 Roscoe Cr. Ev. 12th Ed. 2879 3 Russ. Cr. 354-362

(5) S. 32 cl. (1) Illustration (a) gives an example of a *civil* as well as of a *criminal*

case and as an example of the latter a charge of *rape*. Even under the present law as contained in s. 371 of Act XXV of 1861 and s. 29 Act II of 1900 it was held that the rule of English law restricting the admission of this evidence to cases of homicide had no application in India and that the dying declaration of a deceased person was admissible in evidence on a charge of *rape*. *R v Bisso* 11 J. N. Mookerjee 6 W. R., Cr. 75 (1866) Field Ev. 171 Norton Ev. 175

(6) Taylor Ex. § 718 Roscoe Cr. Ev. 12th Ed. 2831 3 Russ. Cr. 354-362

(7) S. 32 cl. (1) *R v Degumber Thakoor* 19 W. R. Cr. 44 (1873), *R v Blechinden* 6 C. L. R. 278 (1880)

of death and knew or did not know himself to be in such danger, are considerations which will no longer affect the *admissibility* of this kind of evidence in India. But these considerations ought not to be laid aside in estimating the weight to be allowed to the evidence in particular cases (1). Of course before the statement can be admitted under this section the declarant must have died. Where a person making a dying declaration chances to live, his statement cannot be admitted in evidence as a dying declaration though it may be relied on under s. 157 to corroborate the testimony of the complainant when examined in the case (2).

The statement must be as to the cause of the declarant's death or as to any of the circumstances of the transaction which resulted in his death (3) that is to say the *cause and circumstances of the death* and not previous or subsequent transactions (4) such independent transactions being excluded as not falling within the principle of necessity on which such evidence is received (5). Nor must they include matter inadmissible from the mouth of a witness—e.g. hearsay or opinion (6) and whatever the declaration may be it must be *complete* in itself, for, if the dying man appears to have intended to qualify it by other statements which he is prevented by any cause from making it will not be received (7).

The person whose declaration is thus admitted is considered as standing in the same situation as if he were sworn as a witness. It follows therefore, that when the declarant if living would have been incompetent to testify by reason of imbecility of mind or tender age his dying declarations are inadmissible (8). And his credibility may be impeached or confirmed in the same manner as that of a witness (9). In a trial for dacoity the statement of a deceased person ought not to be admitted in evidence in the absence of evidence to show that his death was caused or accelerated by the wounds received at the dacoity, or that the dacoity was the transaction which resulted in his death (10). As to the weight which should be attached to this kind of testimony, and the caution with which it should be received, see *ante* p. 308.

The declarations may be oral or written (11). A person was tried for the murder of one D. The deceased had been questioned by a Police officer, a statement

Subject
matter of
the declara-
tion

Competency
and credi-
bility

Form of
statement

(1) Field Ev *loc cit* Norton Ev 175. Under the law which was in force prior to this Act (s. 371 Act XXV of 1861) s. 29 Act II of 1855 and which with one modification relating to the entertainment by the deceased of hopes of recovery was similar in this respect to the English law it was held that before a dying declaration could be received in evidence it must be distinctly found that the declarant knew or believed at the time he made the declaration that he was dying or likely to die. In the matter of *Sheikh Tenoo* 15 W R Cr 11 (1871) *R v Bissorunji Mookerjee* 6 W R Cr 75 76 (1886) *R v Symbur Singh* 9 W R Cr 2 (1868) as to the English rule see *R v Glosier* 16 Cox 471 (1888) in which the result of the case law is stated and *R v Mitchell* 17 Cox 503 (1892) and text books cited *supra*.
(2) *R v Rana Suttu* 4 Bom L R 434 (1902).

(3) S. 32 cl. (1) Steph Dig Art 26.
(4) *R v Mead* 2 B & C 605 *R v Hind* 8 Cox 300 *R v Murton* 3 I & F 492 Steph Dig Art 26 *Khana v R* 67 P L R 2 Cr L J 237.

(5) Phipson Ev 5th Ed 300 301 so also in America the declarations are restricted to the *res gesta* *ib* and cases there cited.

(6) Taylor Ev § 720 citing *R v Sellers Carr* C L 233 Phipson Ev 5th Ed 300 301 citing 1 Greenleaf s 159 note (a).

(7) Taylor Ev § 721.

(8) *R v Pike* 3 C & P 598 *R v Dru* 1 Lea C C 338 *R v Perkins* 9 C & P 295 Taylor Ev § 717 Field Ev *loc cit* Norton Ev 175 see s 118 *post*.

(9) S. 158 *post* Steph Dig Art 135. This rule is also established in America. Thus previous consistent statements by the deceased not made under the fear of death were admitted for this purpose (*Felder v State* 59 Am Rep 777 cited in Phipson Ev) and dying declarations were allowed to be corroborated by proof of prior consistent statements though the latter were not admissible themselves as dying declarations (*State v Blackburn* 80 N C 474 cited in Best Ev p 45) see also Roscoe Cr Ev 12th Ed 33 3 Russ Cr 361.

(10) *R v Ridda* 25 Bom 45 (1900).

Magistrate and a Surgeon, the deceased was unable to speak, but was conscious and able to make signs. Evidence was offered and admitted to prove the questions put to D, and the signs which she had made in answer to such questions, as the questions were verbal statements of her gestures may be to the meaning of the gestures was not.

Sometimes declarations by dying persons are made on oath, in which case, assuming them to be in the presence of the accused and otherwise formal, and that an opportunity for cross examination has been given they are depositions. The essence of a dying declaration so called is that it is not upon oath. The lapse of time between the declarations and death is immaterial, and the presence of the accused at the making of the declaration is unnecessary. But it cannot be used as a deposition unless taken in the presence of the accused with all the usual formalities of a deposition and unless admissible within the terms of the following section (v post)(3). Though the declaration must in general narrate facts only, and not mere opinions (v ante), and must be confined to what is relevant to the issue(4), it is not necessary that the examination of the deceased should have been conducted after the manner of interrogating a witness in the cause though any departure from this mode may affect the weight of the declarations(5). Therefore in general it is no objection to their admissibility that they were made in answer to leading questions(6) or obtained by earnest solicitation(7). But where a statement ready written was brought by the father of the deceased to a Magistrate who accordingly went to the deceased and interrogated her as to its accuracy paragraph by paragraph it was rejected(8). A declaration is not irrelevant merely because it was intended to be made as a deposition before a Magistrate but is irregular and inadmissible as such(9).

Record and
proof of
declaration

The right to offer the declaration in evidence is not restricted to the prosecutor, but it is equally admissible in favour of the accused(10). When a Judge is sitting with a jury, the admissibility of this evidence in any particular case is a question to be decided by the Judge alone(11). Before the statement can be

the provisions of the Criminal Procedure Code(13). If this be done and the injured person die or become incapable of giving evidence at the Sessions the depositions so taken will, subject to the provisions of the following section be admissible in evidence without further proof(14). If the statement be not taken

(1) *R v Abdulla* 7 A 385 F B (1885) *Bata v R* Punj Rec 1886 p 2 cited in Henderson's Cr Pr Code. So also in America it has been held that the declaration may be by signs or any other method of expressing thought. *Com v Casey* 11 Cush 417 421 cited in Best Ev p 456.

(2) *Chandrika Ram Kolar v King Emperor* 1 Pat 401.

(3) Norton Ev 175 176 Roscoe Cr Ev 12th Ed 32 if the evidence be inadmissible under s 33 it may yet be admissible under s 32 cl (1). *R v Roch* a Mohato 7 C 42 (1881).

(4) S 32.

(5) Taylor Ev § 720.

(6) *R v Smith* 10 Cox 82, but see

also *R v Mitchell* 17 Cox 503 cited post.

(7) *R v Fagent* 7 C & P 238 *R v Reason* 1 Str 499 *R v Whitworth* 1 F & F 382.

(8) *R v Fitzgerald* Ir Cir Rep 168 169 cited in Taylor Ev § 720 where see observations of Crampton J in the same cause.

(9) *R v Woodcock* 1 East P C 556 Steph Dig Art 26 v post.

(10) *R v Scarfe* 1 M & Rob 551.

(11) Cr Pr Code s 298 Taylor Ev

§§ 23a 24 Roscoe Cr Ev 35.

(12) S 104 illust (a) post.

(13) Ch XV Act V of 1894 see

Field Ev loc cit.

(14) Field Ev loc cit, ss 33 80 post.

down in the presence of the accused, and as a formal deposition, it will none the less be relevant under this section, but, before it can be admitted in evidence, it must be proved to have been made by the deceased it is not rendered admissible without such proof because it was taken down by a Magistrate. The writing made by such Magistrate cannot be admitted to prove the statement of the deceased without making it evidence in the ordinary way by calling the Magistrate who took down the declaration and heard it made. If the Magistrate either speak to the words of the writing made by himself or may speak to the writing itself as being an accurate reproduction of what the deceased had said in his presence (1). A dying declaration recorded in the absence of the accused and by a Magistrate other than the inquiring Magistrate is not admissible until it is proved by the recording officer (2). In this case what is admissible is the oral statement of the deceased and not the record of it, and such oral statement must be proved by the person who recorded it and heard it made (3). A dying declaration made to a Police officer in the course of an investigation may, if reduced to writing, be signed by the person making it, and may be used as evidence against the accused (4), if such writing be properly proved by the Police officer in whose presence it was signed, and the declaration, which it embodies, was made. A petition of complaint and examination of complainant on oath admissible as dying declarations under this clause are not matters required to be reduced to the form of a document within the meaning of section 91 so as to exclude oral evidence of their terms (5). The written record of a dying declaration not taken down in the presence of the accused is admissible when it is proved by a witness that the statements contained therein were, in his presence, recorded by a Magistrate and read over to the accused who admitted their correctness (6). And it has been held by the Madras High Court that though the written record of a statement made to a Police officer in the course of an investigation is inadmissible (under section 162 of the Criminal Procedure Code) oral evidence of such statement (whether it had been taken down in writing or not) is admissible (7). "A declaration should be taken down in the exact words which the person who makes it uses in order that it may be possible from those words to arrive precisely at what the person making the declaration meant. When a statement is not the *ipsissima verba* of the person making it, but is composed of a mixture of questions and answers, there are several objections open to its reception in evidence, which it is desirable should not be open in cases in which the person has no opportunity of cross examination. In the first place the questions may be leading questions, and in the condition of a person making a dying declaration there is always very great danger of leading questions being answered without their force and effect being freely comprehended. In such circumstances the form of the declaration

(1) *R v Fata Aduji* 11 Bom H C R 247 (1874) *R v Samiruddin* 8 C 211 (1881) 10 C L R. 11 followed in *R v Daulat Kungra* (1902) 6 C W N 921 and see as to proof of dying declaration *R v Mathura Thakur* (1901) 6 C W N 72.

(2) *Panchu Das v R* (1907) 34 C 698 11 C W N 666.

(3) *Gowridas Namasudra v R* (1909) A C 36 C 665.

(4) See Cr Pr Code s 162 Field Ev 4th Ed 161 such a declaration is admissible not under s 162 of the Cr Pr Code which is a purely negative provision but under the general law as embodied in

s 32 cl (1) of the Evidence Act. The Code merely declares that that law shall not be affected by the fact that the declaration was made to a Police officer in the course of an investigation.

(5) *Gowridas Namasudra v R* A C (1909) 36 C 665 referred to in *Emperor v Balaram Das* 49 C 358.

(6) *Emperor v Balaram Das* 49 C 358.

(7) *Muthukunarasami Pillai v King Emperor* 35 M 397 (1912) Letters Patent appeal reviewing *R v Vilkanta* 35 M 247 (1912) and see *Fanindra Nath Banerjee v R* 36 C 281 (1908), *Emperor v Hammaraddi*, 39 B 58 (1915).

should be such that it would be possible to see what was the question and what was the answer, so as to discover how much was suggested by the examining Magistrate and how much was the production of the person making the statements"(1)

SECOND CLAUSE

Statements made in the course of business

Statements made in the course of business, whether written or verbal, of relevant facts by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an unreasonable amount of delay or expense, are themselves relevant. Though the statement is admissible, whether it be verbal or written(2), the effect of the statement as to weight may be very different in the two cases. The words "and in particular" in this clause seem to point to the superior force of written over verbal statements (3)

Illustrations (b), (c), (d), (g), (h), (j) refer to this Clause as also Illustration (b) and (c) of section 21, the leading case in English law on the subject being that of *Price v Torrington* (4). In this case the plaintiff, who was a brewer, brought an action against the Earl of Torrington for beer sold and delivered, and the evidence given to charge the defendant was that the usual way of the plaintiff's dealing was that the draymen came every night to the clerk of the brew house, and gave him an account of the beer they had delivered out, which he set down in a book kept for that purpose to which the draymen set their names, and that the drayman was dead but that this was his hand set to the book, and this was held good evidence of a delivery, otherwise of the shop-book itself singly, without more (5). Thus also where the plaintiff, a Mahomedan lady, sued for her deferred dower, an entry as to the amount of her dower entered in a register of marriages kept by the *Muytahid*, since deceased, who celebrated the marriage was held to be admissible as evidence of the sum fixed, being an entry kept in the discharge of professional duty within the meaning of this section (6). In another case, a deed of conveyance which purported to bear the mark of the defendant as vendor was tendered in evidence. The defendant, however, demed that she had ever put her mark to it. It was proved to be attested by a deed writer, who was dead, and it was manifestly all in his writing, including the words descriptive of the markswoman. The court held that the mark was that of the defendant, was held apparently on the ground that it had been used in the course of his business (7). The section makes

particular mention of statements contained in *business books*(8), in *receipts*(9), in documents used in commerce, such as invoices, bills of lading, charter parties, waybills(10), and of statements by a person who cannot be called as a witness,

(1) *R v Mitchell* 17 Cox C C 503 507, per Cave J adding It appears to me, therefore that a statement taken down as this was giving the substance of questions and answers cannot be said to be a declaration in such a sense as to make it admissible in evidence and that this document cannot be admitted upon that ground"

(2) S 32 cl 2 ante, ill (j) *Stapylton v Clough* 2 E & B 933, *Edie v Kingsford* 14 C B 750, *R v Buckley* 13 Cox 293

(3) *Norton* Ev 177

(4) 1 Smith L C (9th ed) 352 and notes Salkeld 285, as to English rule see Taylor Ev § 697 713, Steph Dig. Art 27 Roscoe N P Ev 60 62 Best

Ev § 501 Phipson Ev 5th Ed, 271, Wills Ev 2nd Ed 178 183 Powell Ev, 9th Ed 316—323

(5) See also *Doe v Turford* 3 B & Ad 898 in which the earlier cases are cited and discussed

(6) *Zakari Begum v Sakina Begum* 19 C 689 (1892) 19 I A, 157

(7) *Abdulla Paru v Gannibai* 11 B 690 (1887)

(8) *Illusts.* (b), (c) as to the admissibility and effect of entries in books of account and official records whether the maker is dead or not v post ss 34 35

(9) For some cases relating to *dakhilas* see Field Ev, loc cit

(10) As to letters of advice see *R v Tarinicharan Dey* 9 B L R, App, 42

made in the ordinary course of business, consisting of the *date* of a letter or other document usually dated, written, or signed by him (1) In a suit to recover loss sustained on the sale by the plaintiffs of goods consigned to them by the defendants for sale by their London firm account sales are good *prima facie* evidence to prove the loss unless and until displaced by substantive evidence put forward by the defendants (2) It cannot, however, be said that the execution of a mortgage-deed is an act done in the ordinary course of business (3) Notwithstanding the provisions of section 21 and the present section, cess returns cannot, under section 95 of the Road Cess Act be used as evidence in favour of the person by whom, or on behalf of whom, they are filed (4) Entries in accounts relevant only under section 34 are not by themselves alone sufficient to charge any person with liability corroboration is required But where accounts are relevant under this clause they are in law sufficient evidence in themselves, and the law does not as in the case of accounts admissible only under section 31, require corroboration Entries in accounts may in the same suit be relevant under both the sections and in that case the necessity for corroboration does not apply (5) In the case cited (6) it was held that a medical certificate of testator's soundness of mind made twenty six days after the execution of the will was admissible under this clause, and was relevant but that a letter by the testator speaking of his relations with his wife in whose favour he subsequently made the will was not admissible Although zemindari papers cannot be admitted under section 34 as corroborative evidence, without independent evidence of the fact of collection at certain rates they can be used as independent evidence if they are relevant under this clause (7) The entries in the diary of a deceased chaukidar relating to birth and death are not admissible under this clause, where from the evidence it appears that the entries were not made by the chaukidar at all, as he was an illiterate person, but by other persons who deposed that they made the entries at the request of the chaukidar It was held that the entries were admissible either under section 157 or section 159 or possibly under both (8) Under section 34 talab baki papers are not sufficient evidence to charge any person with liability Talab baki papers may be evidence under this clause, but before they can be admitted a landlord must show that the person making the statement is dead and that the entries were made by him in the ordinary course of business (9)

(1872) In this case the prisoner was charged with forging for the purpose of cheating and using as genuine a forged railway receipt for the purpose of obtaining from a Railway Company certain goods which had been entrusted to the Company to be carried from Delhi to Calcutta The *Standing Counsel* for the prosecution sought to prove the delivery of the goods to the Company by putting in a letter from the consigner at Delhi to his partner in Calcutta advising the despatch of the goods submitting that the letter was a document used in commerce written or signed by a person whose attendance could not be procured etc The Court (Macpherson J) refused to receive the evidence and intimated a doubt whether such a letter would under any circumstances be receivable since it was beyond the instances specified in the section As to estimates see *Hari Chintaman v Moro Lakshman* 11 B 97 (1886)

(1) Illustration (g)

(2) *Barlow v Chuni Lal* 28 C 209 (1901)

(3) *Ningaua v Bharnappa* 23 B 63 65 0 (1877)

(4) *Hem Chandra v Kali Prasanna* 26 C 824 838 (1899) But they are otherwise admissible *Chattro Singh v Jhero Singh* 39 C 995 (1912) following *Hen Chandra Choudry v Kali Prasanna Bhaduri* P C 30 C 1033 30 I A 177 distinguishing *Nusseerun v Gourree Sunkur* 22 W R 192 (1874) and see *Sead v Nara n Singh v Ajudhya Prosad Singh* 39 C 1005 (1912)

(5) *Rampyarabai v Balaji* 6 Bom L R 50 (1904) s c 28 B 294

(6) *Woolmer v Daly* 1 Lahore 173

(7) *Char tar Rai v Kailash Belari* 4 Pat L W 213 s c 44 I C 422

(8) *Mussumat Naina Koor v Gobardhan Singh* (1919) Pat 352

(9) *Umed Ali v Nasab Khaji Haher* 31 C L J 68

the declarations must have been made a mere personal custom not involving such limitation appears in the words and from a consideration of the Illustrations thereto. It may be that the framers of the Act considered the accuracy which is generally produced by commercial or professional routine to be a sufficient guarantee of the credibility of this class of evidence without having recourse to the guarantee which exists in the obligation to discharge an imposed duty faithfully. Declarations in the course of duty differ, in English law, from those against interest, in requiring contemporaneity, personal knowledge, and the exclusion of collateral matters, none of which restrictions are declared by the section to exist upon the admissibility of such declarations in Indian Courts.

Course of business

The applicability of this clause entirely depends on the exact meaning of the words 'course of business' (2). In using the phrase the Legislature probably intended to admit in evidence statements similar to those admitted in England as coming under the same description. The subject is dealt with in Chapter XII(3) of Mr Pitt Taylor's treatise on the Law of Evidence, and the cases which he has collected show that this exception to the general rule against hearsay extends only to statements made during the course, not of any particular transaction of an exceptional kind, such as the execution of a deed of mortgage, but of business or professional employment in which the declarant was ordinarily or habitually engaged. The phrase was apparently used to indicate the current routine of business which was usually followed by the person whose declaration it is sought to introduce (4). "The expression 'course of business' occurs in more than one place in the Evidence Act. Thus in section 16, where there is a question whether a particular act was done, the existence of any course of business according to which it would naturally have been done is a relevant fact. Illustration (a) to that section is evidently the case of *Hetherington v Kemp* (5). The 'course of business' there put forward was

It was not a usage in a private the same weight as the ordinary he Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case. What is meant by the common course of public and private business? Illustration (f) with its explanations refers to the public business of the Post Office. Private business would apparently apply to such a case as that alluded to above (*Hetherington v Kemp*). If the expression was meant to include the dealings of a private individual apart from his avocation or business, different language would have been used. The Explanation to Illustration (c) of the same section (114) speaks 'of a man of business,' which in its well known popular sense must mean a man habitually engaged in mercantile transactions or trade. Again,

of a professional avocation. The illustration is that of a broker, to whom letters are shown for the purpose of advice

(1) *Hope v Hope* (1893) W N 20
c a R v Worth 4 Q B 132 *Massey v Allen* 11 Ch D 558 563 "the entry must be made in the course of business in the performance of duty" *ib.*, per Hall V C an apparent exception is presented by the case of *Doc v Turford* 3 B &

Ad 890 but see as to this case *Wills* E. 128

(2) *Ningaua v Bharmappa* 23 B 63 64 (1897) per Candy J

(3) Chapter VII Part III of 10th Ed

(4) *Ib.* at p 70 per Fulton J

(5) 4 Camp 193

Again, by section 31, entries in books of accounts, regularly kept in the course of business, are relevant. In *Munchershaw Bezoni v The New Dhurmsay Spinning and Weaving Company*(1), West, J., referred to a private account tendered in evidence, which had been entered up casually once a week or fortnight, with none of the claims to confidence that attach to books entered up from day to day, or (as in banks) from hour to hour as transactions take place. 'These only' (he said) 'are, I think, regularly kept in the course of business.'

Having regard then, to the above considerations, there can, I think, be no doubt that the expression 'in the ordinary course of business' in the second clause of this section must be read in the same sense. It may, in one sense be true that it is in the ordinary course of business for a mortgage deed to contain recitals of the boundaries of the land mortgaged. But that would not make the recitals evidence. The question is whether the mortgage deed itself is a statement made in the ordinary course of business. Looking at the particulars set out in the second clause of this section which though not exhaustive may fairly be taken as indicating the nature of the statements made in the course of business and looking at the sense in which the expression is apparently used in other sections of the Evidence Act, it cannot be said that a mortgage deed executed by an agriculturist falls within that term. It is not the 'profession, trade or business' (to borrow the words used in section 27 of the Contract Act), of an agriculturist to execute mortgage deeds. (2) A family pedigree kept by the family chronicler prepared by him from time to time from information supplied by members of the family is admissible under this clause as having been kept in the ordinary course of business by a professional man or a person whose business it was to keep the books for the benefit of the families (3).

According to the English rule, it is necessary that the declarant should have had personal knowledge of the transaction recorded (4). But this appears not to be law in India (5). Under the present section it seems to be not necessary that the person making the entry or other statement should have had a personal knowledge of the fact recorded or stated, it is sufficient to show that the statement was made in the ordinary course of business, the question as to how the person making the statement came to know about the matter, though it might affect the weight to be given to the statement not affecting its

Personal knowledge

(1) 4 B 576 583 (1880). This decision was not approved of by the Privy Council in *Deputy Commissioner Bara Banki v Ram Persad* 27 C 118 (1899) s c 4 C W N 147.

(2) *Vingala v Bharmappa* 23 B 63 65 67 (1897) per Candy J.

(3) *Molansig v Umed Ramol v Dalpat sing Kanbaji* 24 Bom L R 289 (1922).

(4) *Bran v Preece* 11 M & W 773 where the facts were as follows—It was the ordinary duty of one of the workmen at a coal pit named H to give notice to the foreman of the coal sold. The foreman who was not present when the coal was delivered being himself unable to write employed a man named B to make the entries in the books from his dictation and these entries were read over every night to the foreman H and the foreman being dead B was called with the book to prove delivery of the coal but the evidence was held inadmissible, on the

ground that although the entries made under the foreman's direction might be regarded as made by him yet as he had no personal knowledge of the facts stated in them but derived his information second hand from the workman there was not the same guarantee for the truth of the entries as in *Price v Torrington* where the party signing the entry had himself done the business. See *Taylor v Evans* 609 700 708 Wills Ev 128 Phipson Ev 5th Ed 272 Steph Dig Art 27 Powell Ev loc cit Ryan v Ryan (1889) 3 P Wms 139.

(5) *R v Hanmants* 1 B 610 (1877). The observations of the Privy Council as to the necessity of personal knowledge and belief which must be found or presumed in any statement of a deceased person (*Jagatpal Singh v Jogeshwar Bakhsh*) 25 A 143 (1902) relate to statements under cl (5) the terms of which require special means of knowledge.

admissibility (1) So it has been held that account books containing entries not made by, nor at the dictation of, a person who had a personal knowledge of the truth of the fact stated, if regularly kept in course of business are admissible as evidence under section 34 and *semble* under the second clause of this section (2)

Contem-
poraneous-
ness

According to the English rule, the statement must also have been made at the time of, or immediately after, the performance of the transaction (3) Thus an interval of two days has sufficed to exclude a declaration (4) But contemporaneousness is not required by the section for the admissibility of the evidence though in determining the weight to be allowed to it in particular cases it will always be important to consider how far the statement or entry was contemporaneous with the fact which it relates (5)

Collateral
matters

Further, entries made in the course of business are, under English law, evidence only of those things which according to the course of business it was the duty of the person to enter and are no evidence of independent collateral matters, however intimately any such collateral matters may be incorporated in the statements (6) Thus, where the question was whether A was arrested in a certain parish, —a certificate annexed to the writ by a deceased sheriff's officer, stating the fact, time, and place of the arrest returned by him to the sheriff was held inadmissible on the ground that the duty merely required the fact and time but not the place of the arrest to be returned (7) But this restriction on inadmissibility is not imposed in terms by the section The statement or entry, in order to be admissible under the Act must relate to a *relevant* fact (8), and it would appear to make no difference so far as the question of admissibility is concerned, whether this fact is connected with the performance of a duty or is merely an independent collateral matter Whether this fact naturally finds a place in the narrative, what is the nature of its connection with the fact the statement of which was matter of duty and whether this connection was such as to raise a presumption of accuracy of information or observation, must however, be questions of importance in estimating the *weight* due to such evidence when it relates to collateral matters merely (9)

Extrinsic
proof

The person wishing to give the evidence must give extrinsic proof of the death of the declarant or of the existence of the other circumstances conditional to the admission of this evidence (10) Similar evidence of the ordinary course of business will also be necessary (11) "Once, evidence must be given that it is in the to have made it, and this may be done by one who is conversant with his handwriting (12)

(1) *R v. Hanmanta* supra Field Ev loc cit Cunningham Ev 156

(2) *R v. Hanmanta* supra.

(3) *Doe v Turford* 3 B & Ad 890 *Sturla v Frezza* 5 App Cas 623 *Smith v Blakey* L R 2 Q B 326 *The Henry Coxon* 3 P D 156 Taylor Ev § 704

(4) *The Henry Coxon* supra

(5) Field Ev loc cit Cunningham Ev 157

(6) *Chambers v Bernascone* 1 C M & R 347, Taylor, Ev § 705

(7) *Id per* Lord Denman — We are all of opinion that whatever effect may be due to an entry made in the course of any office reporting facts necessary to the performance of a duty the statement of other circumstances however naturally they may be thought to find a place in the narrative is no proof of these circum-

stances

(8) And must have been made in the ordinary course of business

(9) Field Ev loc cit cases may perhaps however occur in which the matter in question is so collateral and the entry for this and other reasons is of such an unusual character that it can scarcely be said to have been made "in the ordinary course of business"

(10) *v ante* Intro to ss 32-33 s. 104 post Field Ev loc cit Phipson Ev 5th Ed 272 and cases there cited

(11) In connection with this see s 114 *illustr (f) post*

(12) Field Ev loc cit as to ancient documents see s 90 post *Doe v Dav* 10 Q B 314 *Riggs Miller v Healey* 28 L R Ir 144, and see ss 47, 67 post as to proof of hand writing

THIRD CLAUSE

The leading case on the subject matter of this clause is that of *Higham v Ridgway* (1). There the question was whether one William Fowden, junior, was born before or after the 16th April, 1768. The plaintiff, in order to prove that his birth was subsequent to that date, tendered in evidence the following entries from the Day Book and Ledger of a man midwife, who had attended the mother of William Fowden, junior, at his birth and was since deceased —

Statements
against
interest

DAY BOOK ENTRIES

22nd April 1768

38* Richard Fallow's wife, Brimhall Filus circa hor 9, matutin, cum forcepe, etc.,
paid

[Then followed in the same page the entry in question without any intervening date]

Wm Fowden, Junr's† wife 79* filus circa hor 3 post merid, nat, etc

LEDGER ENTRY

Wm Fowden, junr, 1768

Aprilis 22 Filus natus etc

Wife

1 6 1

26th Haustus purg

0 15 0

Pd 25th Oct, 1768

2 1 1

It was held that all these entries were connected together or one whole and that the entry as to the payment of the man midwife's charges rendered them all admissible. It will be observed that the entry of the date (22nd April, 1768) was in no way against the interest of the person who made it, but was collateral to that portion of the entry, namely—"Pd (paid) 25th Oct, 1768" which was against interest, as showing that a certain sum of money was no longer due and owing to such person. On this point Lord Ellenborough said "It is idle to say that the word 'paid' only shall be admitted in evidence without the context, which explains to what it refers, we must, therefore, look to the rest of the entry to see what the demand was which he thereby admitted to be discharged" (v post). The statements, provided they be relevant, may be either written or verbal. The form in which such declarations are ordinarily offered is that of written entries, the inaccuracy with which oral statements are repeated makes them less satisfactory, but such objection lies to the credibility of the statement and not to its reception (2). Such entries are not receivable where better evidence is to be had to prove the same fact, as where the maker of the entry is himself forthcoming personally, but they are not the less receivable because the same fact may be proved by evidence of another description. "For instance, in *Higham v Ridgway*, the evidence of the entry of the accoucheur would not have been rejected, because the evidence of a midwife

(1) 2 Smith's L. C. (9th Ed.) 348 10 East 109. Illustration (b) in this case with the portion of the entry which was against interest omitted. It is intended to illustrate the rule as to statements made in the course of business not that as to the present class of statements which is exemplified by Illustrations (c) and (f). See *Aingasa v Bharmappa* 23 B 69 (1897) see also *Doe v Davies* referred to in the last mentioned case and in *Hari*

Chintaman v Mero Lakshman 1 B 97 (1886)

* The figures 38 and 79 referred to the corresponding entries in the Ledger

† This was the designation at that time of the father of the William Fowden junr in question

(2) Cf. Section and *Mussammat Zaynub v Hadjee Baba* 2 Ind Jur N S, 54 (1866) Best Ev § 502

who was present at the delivery, might have been forthcoming, though this may seem at first sight to militate against the rule that the best evidence shall alone be received. The entry of the accoucheur would not have been receivable if he himself had been forthcoming because then his testimony on oath would have been superior to his entry, which was not on oath, but as we shall see hereafter, when we come to consider the rule, that the best evidence must always be given the rule applies to the quality and not the quantity of evidence, and that a fact may often be proved by independent testimony, notwithstanding there may be two distinct ways of proving it (1) The distinction should be observed between mere admissions and statements receivable under the present Clause. An admission may or may not be against the interest of the maker at the time when it is made. An admission merely as such is neither receivable in maker's favour nor in favour of his representatives in interest, nor against any person other than the maker or his representative. On the other hand an admission which amounts to a statement against interest within the meaning of this Clause may not only be received in favour of the maker thereof and his representatives but is evidence in favour of or against strangers. A class of statements which may be admissible under this Clause is that of endorsements or entries in respect of the payment of interest due on bonds and similar instruments (2) Such endorsements or entries if made *before* the claim became barred by the law of Limitation would be against the interest of the payee, inasmuch as they are admissions of payment but if they are made *after* the claim became so barred they would be for and not against the creditors interest inasmuch as by the admission of a small payment he would be enabled to recover the larger remaining portion of the debt such payment having the effect of preventing the claim to the capital sum from being barred. Whether then the endorsement or entry is admissible as an entry against interest, depends upon the question whether it was *bond fide* made before the claim became barred by Limitation and it ought not to be admitted until it be shown by evidence *dehors* the instrument that it was made at a time when it was against the interest of the creditor to make it (3) (See next paragraph) Recitals in documents not *inter partes* are ordinarily irrelevant unless the statements in the documents can be brought within the conditions of this section. Statements in documents not *inter partes* limiting the interest of the executants by declaring the boundaries of certain land fall within this clause and are therefore admissible in evidence if the conditions necessary to bring this section into operation are proved (4)

The main difference between the rule enacted by this section and the English law (5) upon the same subject consists in the nature of the interest to

(1) Norton Ex 181 Thus the mere fact that there has been a written receipt given for money will not preclude the proof of payment by the oral evidence of witnesses who saw the payment. Thus in the case of *Middleton v Melton* (10 B & C. 317) a private book kept by a deceased collector of taxes containing entries by him acknowledging the receipt of sums in his character of collector was also held to be admissible evidence in an action against his surety although the parties who had paid him were alive and might have been called 'ib 182

(2) See s 20 of Act IV of 1908 (Limitation) and ib Art 75 Sched II and remarks in Field Ex loc cit Norton Ex 182 183

(3) Taylor Ex §§ 690—696 and cases there cited *Rose v Bryant* 2 Camp 321 Field Ex loc cit Norton Ex 182 183 *Briggs v Wilson* 5 D M & G 12 The express provision of s 20 of the Limitation Act that the payment whether of interest or principal must have been made before the right to sue had become barred appears to require proof of the time of payment

(4) *Rajadatta Sardar v Ganga Charan Bhattacharya* 53 I C 863

(5) See Steph Dig Art 28 Taylor Ex § 668—696 Roscoe N P Fr. 55—59 Best Ex § 500 Wills Ev 2nd Ed 184—194 Powell Ex 9th Ed. 306—316 Phipson Ev 5th Ed 267—270 Smith L C Note to *Higham v Ridgway*

- which statement must be opposed. According to the latter the interest involved must be (a) pecuniary or (b) *proprietary*. But declarations against interest in any other sense, as for instance an admission of liability to criminal prosecution, do not come within the rule (1). Thus where the question was whether *A* was lawfully married to *B*, a statement by a deceased clergyman that he performed the marriage under circumstances which would have rendered him liable to a criminal prosecution was held not to be relevant as a statement against interest (2). But in so far as the present section includes (c) *an interest in escaping a criminal prosecution* the statement would have been admissible under this Act (3). Further, under the present section the interest to which the statement may be opposed may be (d) *an interest in escaping a suit for damages*. The section not only extends the English rule by recognising two additional forms of interest but also in rendering this class of statements under certain circumstances admissible even if the persons who made them be still living.

An entry against interest means an entry *prima facie* against the interest of the maker that is to say, the natural meaning of the entry, standing alone, made it (4). If the entry is *prima facie* for purposes irrespective of its effect on the entry in the handwriting of a person, it is admissible (5). If the entry is in the handwriting of a person, it is admissible if it is supported by other entries pointing to a loan to *J W* was held to be admissible as evidence whether or not the effect of it when admitted would be to establish the existence of a debt due to the testator (5). Where the fact that the declaration is against the declarant's interest does not clearly appear from the statement itself, it is permissible to give independent evidence to supply this want (6). Though the statement must have been *prima facie* against an interest specified by the section yet the amount of the interest is immaterial so far as the admissibility of the declaration is concerned (7). When a declaration is partly against interest, only such part is admissible (8).

The declarations must have been against interest *at the time they were made*, it is not sufficient that they might possibly turn out to be so afterwards (9). Statements and entries against interest may be received as evidence of independent and collateral matters which though forming part of the declaration, were not in themselves against the interest of the declarant. A statement, though indifferent in itself, becomes against the proprietary interest of the

(1) *The Sussex Peerage case* 11 C & F 108

(2) *Ib*

(3) *Illustration (f)* Norton Ev 183
184 Field Ev 184 185 Cunningham Ev 158

(4) *Taylor v Witham* L R 3 Ch D 605 607 per Jessel M R following Parke B in *R v Inhabitants of Lower Heyford*. Of course if you can prove *al unde* that the man had a particular reason for making it and that it was for his interest you may destroy the value of the evidence altogether but the question of admissibility is not a question of value. The entry may be utterly worthless when you get it if you shew any reason to believe that he had a motive for making it and that though apparently against his interest yet really it was for it but that

is a matter for subsequent consideration when you estimate the value of the testimony. *Ib* per Jessel M R

(5) *Ib*

(6) *Wills* Ev 134 see *Mussa mat Zaynub v Hadjee Baba* 2 Ind Jur N S 54 (1866)

(7) *Phipson* Ev 5th Ed 252 Field Ev loc cit but upon the amount of interest involved the degree of attention likely to secure accuracy must materially depend. *Ib*

(8) *Bijay Chand Mahatap v Kahi Pada Clatterjee* 17 C W N 1013 (1913)

(9) *Ex parte Edwards* Re *Tollmache* 14 Q B D 415 416 *Massey v Allen* 13 Ch D 558 *Smith v Blakey* L R 2 Q B 376 [the interest must not be too remote] *Wigmore* Ev § 1466

declarant when made as a material part of a deed, the object of which is to limit his proprietary interest. It cannot be said not to affect his interest because assuming it to be material, the deed if it were struck out, would be less effective than it otherwise would be. If, on the other hand, the statements were unconnected with the purpose of the deed and were not in themselves adverse to the declarant's interest, they would doubtless have to be rejected (1). In an early case where the declarations were *partially* against interest the rule was applied as follows: "We cannot concur in the opinion of the learned

It is a statement by
is reduced or affected,
it The effect of it is

to cut down the proprietary right, to subject it to the tenure or incumbrance which is mentioned. It is true that in one part of it there is what may be said to be not against his interest but in his favour, namely, the amount of the original rent and increased rent payable to him. But when a document of this kind is tendered in evidence, it is not to be divided into parts and the part which is in favour of the person making it rejected, and that which is against his interest accepted. The question is whether taking the document as a

ght of the person making it
that may be looked at, but
determined is whether it has

been made under such circumstances as make it reasonable to suppose that it was done *bona fide* and the statements are true" (2). So in the undermentioned case (3) the plaintiff sued in 1893 to recover possession of certain land. The defendants denied the plaintiff's title. The latter tendered in evidence a registered mortgage deed of adjacent land executed in 1877, which set forth the boundaries of the land comprised in the mortgage, and as one of such boundaries, referred to the land in question as then belonging to the plaintiff. At the date of the deed there was no litigation existing between the present litigants, and at the date of the present suit the mortgagor was dead. It was held that the statement in the deed was admissible under this clause of this section. The Court referring to the case cited in the preceding note at the foot of this page and pointing out that the law under and previous to this Act was the same, observed as follows: "If then a statement of a zemindar that there was a certain *ghatali* occupant in portion of his *mehal* was held to be a statement against the interest of the zemindar in the same way the statement of a registered occupant of a survey number in the Bombay Presidency that he is indebted in a certain sum of money which is a charge on his land must be held to be both against his pecuniary and proprietary interest. If so, then the same case quoted above is also an authority for holding that the whole statement is admissible in evidence not only to prove so much contained in it as was adverse to the interest of the person making it, but to prove any collateral fact contained in the statement which fact was not foreign to the part actually against interest and formed a substantial part of it" (4). Thus, accounts are admissible, some items of which charge the declarant though other connected items discharge him or even show a balance in his favour, for it is not to be presumed that a man will charge himself falsely for the mere purpose of getting a discharge, and in the latter case the debit items would still be against interest, since they diminish the balance in his favour (5). A statement

(1) *Ningaua v Bharnappa* 23 B 63 71 72 (1897) following case next cited

(2) *Rajah Leelanund v Mussamut Lakhputte* 22 W R 231 233 (1874) per Couch C J cited and followed in

Vigaia v Bharnappa 23 B 63 67 91 (1897)

(3) *Ningaua v Bharnappa* 23 B 63 (1897)

(4) *Id*

(5) *Taylor Ev* 1 674

by a deceased *Sapinda* that he had received a sum of money for consenting to an adoption, thereby invalidating such consent, has been held admissible under this clause (1)

But it is immaterial that the declaration may prove, in the circumstances which have happened at the time when it is sought to be put in evidence, to be for the interest of the declarant, or even that it can be shown by independent evidence to have been in truth for his interest at the time when it was made, provided that, standing by itself it was, at the time when it was made against his interest (2)

A declaration is against the pecuniary interest of the declarant who makes it, (1) Pecuniary whenever it has the effect of charging him with a pecuniary liability to another, or of discharging some other person upon whom he would otherwise have a claim (3) A declaration may be against the pecuniary interest of the person who the parts of the liability the state is part of the charge of which the entry shows the subsequent (5) liquidation Notwithstanding the provisions of the twenty first section and the present section, cess returns cannot, under section 95 of the Road Cess Act, be used as evidence in favour of the person by whom or on whose behalf they are submitted (6) But they can be used as evidence otherwise (7)

Declarations made by persons in disparagement of their title to land are (11) Proprietary admissible, if made while the declarant was in actual possession (8) of the property (9) as statements against their proprietary interest And as in the absence of other declaration by an absolute interest that he has no interest in the land whatever (12) So where a Hindu widow had

(1) *Danakota Ammal v Balasundara Mudaliar* 36 M 19 (1913)

(2) *Taylor v Witham* L R 3 Ch D 605 Wills Ev 130 131 *ante*

(3) *Doe v Robson* 15 East 32 33 *per* Bayley J Wills Ev 130 *Higham v Ridgway* affords an example of a statement which discharges another and *Williams v Graves* (see next note and *illustr* (e) of a statement charging the maker)

(4) *Steph Dig Art 28* thus where the question was whether A received rent for certain land a deceased steward's account charging himself with the receipt of such rent for A was held to be relevant although the balance of the whole account was in favour of the steward *ib id* (d) *Williams v Graves* 8 C & P 592 see *Raja Leelanund v Mussamut Lakkhputee* 22 W R 231 (1874)

(5) *Taylor Ev* § 675 *Steph Dig Art 28 R v Heyford* cited in *Note to Higham v Ridgway* in 2 Smith L C *aliter Doe v Lockes* 1 M & R 261 in *Taylor v Witham* L R 3 Ch D 605 *Jessel M R* followed *R v Heyford* and dissented from *Doe v Lockes* There is nothing in the Act to prevent the admission of the statement in the case above

mentioned any objection that may be made will go to the weight and not to the admissibility of such evidence *Field Ev* 181

(6) *Hem Chandra v Kali Prasanna* 26 C 832 838 (1899) s c 8 C W N 1 7 and see *Hem Chandra Choudhry v Kali Prasanna Bhaduri* P C 30 C 1033 30 1 A 177

(7) *Seideo Varan v Ajodhya Prosad* 39 C 1005 (1912) *Chalko Singh v Jhera Singh* 39 C 995 (1912)

(8) There ought to be some evidence that the declarant was actually in possession since otherwise his declaration that he has an interest though limited may appear to be a statement rather in his favour than otherwise

(9) The English rule adds and as to matters within his personal knowledge or belief *Phipson Ev* 5th Ed 262—263 *Taylor Ev* § 683 *Triambak v Kaimis* 9 C & F 780 *aliter* under this section *v post*

(10) *Taylor Ev* § 683

(11) *Phipson Ev* 5th Ed 262—263 *Wills Ev* 136 *Field Ev* *loc cit* *Taylor Ev* §§ 684—686 *Norton Ev* 179 180

(12) *Grey v Redman* 1 Q B D 161

executed, in favour of one *B D*, a *varaspatra* or deed of heirship, this deed was in subsequent suit between the heir of *B D*, and a mortgagee of certain property covered by it, admitted in evidence as being against the widow's proprietary interest as by it she divested herself of her widow's estate in the property (1) Thus also a statement by a deceased occupier of land that he held a life estate in it under a particular will, of which *C* and *B* were executors was held admissible to prove the existence and executors of the will, being against proprietary interest on account of its two fold limitation of the declarant's estate to a life interest, and under a particular document (2) A statement by a landlord who is dead that there was a tenant on the land is a statement against his proprietary interest (3)

A distinction however exists between statements which limit the declarant's *own title* and those which go to abridge or encumber the *estate* itself According to English law the former are admissible even between strangers whereas the latter are only so as against the declarant and his privies Thus admissions by the holder of a subordinate title are not receivable to affect the estate of his superior which he has no right to alienate or encumber—e.g., those of an occupier, his landlord's title or those of a tenant for life, the title of the remainderman or reversioner The ground for this distinction is said to be that, though it is unlikely (to take a specific instance) that a person possessed of an absolute interest in property will admit that he is only a tenant, many causes might induce a tenant to acknowledge the existence of an easement or a highway, or the like which might be either not inconvenient or even absolutely beneficial to him (4)

(III) Interest in escaping a criminal prosecution or a suit for damages

It has been already noticed that the section at this point extends the English rule (5) The words 'would have exposed him' mean 'would have exposed him at the time that the statement was made' It was hardly intended that

ant to a prosecution or suit for damages (6) This construction is supported by the rule laid down with regard to statements against pecuniary and proprietary

(1) *Hari Chintaman v Moro Lakshman* 11 B 89 (1886)

(2) *Sly v Sly* 2 P D 91 so again where the question was whether *A* (deceased) gained a settlement in the parish of *B* by renting a tenement a statement made by *A* whilst in possession of a house that he had paid rent for it was held relevant because it reduced the interest which would otherwise be inferred from the fact of *A*'s possession *R v Exeter* L R 4 Q B 341 Steph Dig Art 28 ill (f)

(3) *Abdul Aziz v Ebrahim* 31 C 965 (1904) following *Burla Mundari v Megh Nath* 2 Cal L J 4n (1905)

(4) *R v Bliss* 7 A & E 550 *Scholes v Chadwick* 2 M & Rob 507 *Howe v Malk* 40 L T 196 27 W R (Eng) 340 *Papendick v Bridgewater* 5 E & B 166 [In this case the question was whether there was a right of common way over a certain field A statement by *A* a deceased tenant for a term of the land in question that he had so much right was held to be relevant as against his successors in the term but not as

against the owner of the field] *Phipson* Ev 5th Ed 262—263 Steph Dig Art 28 Powell Ev 224, Taylor Ev § 687 It is difficult to see any objection in principle to treating declarations by an occupier of land which admit the existence of an easement over it as being within the rule since the admission of its existence might well be considered a statement against interest See remarks in Wills Ev 136 137 Probably here as elsewhere under the Act any objection that may be made will go not to the admissibility but to the weight of the evidence

(5) *ante* Intro to ss 32 33

(6) The construction given in the text and adopted in the first edition from Whitley Stokes is 874 Field Ev 185 was subsequently approved by the Calcutta High Court in the case of *Acholas v Asphar* the final judgment in which is reported in 24 C 216 (1896) The decision of the Court however upon this point having been given during the course of the examination of the witnesses has not been reported

interest (1) On the other hand it may be said that if the fact that the risk had passed away was not known to the declarant the statement might in the belief of the latter though not in fact be against his interest and thus have the guarantee which is proper to this class of evidence

The statement against interest is not only evidence of the precise fact which is against interest but of all *connected* facts (though not against interest) which are necessary to explain or are expressly referred to by, the declaration and whether contained in the same or other document (2) (*v. ante* Interest) Thus in an action by the executor of one T by which it was sought to establish against the defendant a debt of £ 2 000 as due to the testator's estate for money lent and where the defence was that the defendant had received it as a gift the plaintiff tendered in evidence a private account book of the deceased containing (a) entries of several sums of £ 20 each purporting to have been received from the defendant as quarterly payments of interest and (b) an entry stating that the defendant had on a particular date acknowledged that he had borrowed of the testator the sum of £ 2 000 The defendant objected to the admissibility of the book on the ground that the tendency of the entries was to establish the claim for £ 2 000 in favour of the estate But it was held that the entries of the receipt of interest taken by themselves (3) were at the time admissible notwithstanding that the entry by which the testator recorded the

becomes admissible (5) So statements by tenants have been admitted to prove not merely the fact that they were tenants but also both the amount (6) and the payment (7) of the rent and the nature of the tenure (8) But *disconnected* facts though contained in the same document or statement are inadmissible statements not referred to in or necessary to explain declarations against interest and are not relevant merely because they were made at the same time or recorded in the same place (9) Upon the question in the case of written entries as to what is to be deemed the whole statement within the meaning of the rule it would seem that the same tests which exist in regard to admissions must be applicable here namely that the statement which is sought to be given in evidence as a part of the main statement must if antecedent have been incorporated in it by reference and if contemporary have been virtually parcel of it (10)

The statements are admissible although the declarant had no personal knowledge of the fact stated but received them merely on hearsay (11) Nor

Personal knowledge contemporaneousness

(1) See *Ex parte Edwards and Massey v. Allen* (*v. ante*)

(2) *Angaria Bharappa* 23 B 63 (1897) *Phipson* Ev 5th Ed 263 *Steph Dg Art 28 Powell* Ev 9th Ed 307 308 *Wills* E 2nd Ed 386 *Taylor* Ev §§ 67 680 *Higgin v Raguay* 2 Smth L C (*v. ante* p 325) *Taylor v Withan* 3 Ch D 311

(3) *v. ante*

(4) *Taylor v Withan* L R 3 Ch D 605 *supra* and see *ante Higgin v Raguay* and the remarks on debtor and creditor accounts *Rajah Iccan d v Mssa ut Lakhtlee* 22 W R 231 (1874)

(5) *Peacobl Watson* 4 Taunt 16

(6) *R v Brigg* 31 L J M C 63

(7) *R v Exeter* L R 4 Q B 341

(8) *Doe v Jones* 1 Camp 367

(9) *Steph Dg Art 28 Doe Bct ss 7 C B 456 Anglt Waterford 4 Y & Coll 293 Whaley Carlisle 15 W R (Eng) 1183 Naga a Blarappa 23 B 63 (1897) v. ante*
(10) *Wills* E 132 b 2nd Ed 187

(11) *Crease v Barrett* 1 C M & R 919 *Percival v Naso* 7 Ex 1 *Taylor* E § 669 but see *Wills* E 133 134 b 2nd Ed 189—191 these were cases of declarations against pecuniary interest in England declarations against proprietary interest are not admissible unless the declarant adds his own belief to the hearsay *Trubstone v Kemm* 9 C & F 80 The Act however makes no such distinction As to the decision in *Jagatpal Singh v Jagatpal Bakshi* 25 A 143 (1902) which refers to cl (5) see notes to cl (2) *ante*

is it necessary that such statements should be contemporaneous with the fact recorded, it is sufficient that they are made at any subsequent time (1) These circumstances affect the weight, not the admissibility of the declaration

Extrinsic proof must be given of the declarant's death or of the existence of the other circumstances under which alone this evidence is receivable and that the statement was either made written or signed by him or if made or written by another on his behalf that it was authorized or adopted by the declarant (2) Further if the declarant purports to charge himself as the agent or receiver of another it is generally necessary in addition to give some proof that he really occupied the alleged position (3)

FOURTH CLAUSE

Statements giving opinion as to public right or custom or matter of public or general interest

Illustration (1) exemplifies this clause the points to be regarded in which are that (a) *opinion* may be given in evidence as to the existence of (b) any *public* custom or right (c) or of any matter of *public* or *general* interest (d) provided there was a probability of knowledge on the part of the declarant and (e) provided the declaration was made *ante litem motam*. The grounds upon which the evidence in this and the seventh clause mentioned is admitted are considered in the *note* to such last clause and in the Introduction *ante*. It is not essential to the admissibility though it is to the weight of the declarations that they should be *corroborated* by proof of the exercise of the right within living memory (4) The best way to prove ancient rights is to prove particular acts and usage as far back as living memory goes and then adduce evidence of reputation in regard to the preceding time In a suit in which the question was whether there existed a custom of the Kadwa Kanbi caste to which the parties belonged prohibiting a widow from adopting a son the lower Court apparently considering that it would be unreasonable to oblige the plaintiff to incur the expense of procuring the attendance of the witnesses admitted in evidence under this clause a statement signed by several witnesses to the effect that a widow of this caste cannot adopt according to the custom of the caste without the express authority of her husband It was *Held* that the fourth clause of the thirty second section was not applicable to the case as the evidence was required to prove a fact in issue and not merely a relevant fact The statement was therefore inadmissible to prove the alleged custom (5)

Opinion Particular facts

The statement declared by the Act to be relevant is a statement which gives the *opinion* of the reputation which the declarant's belief alone but also the concurring opinions of others similarly interested to himself and those opinions in their turn may be based in part on earlier traditions extending back through any number of generations This is what is understood in this connection by the term reputation But if the declarant's circumstances were such that he was apparently competent to testify as to what the common report upon the subject was it will be presumed till the contrary

(1) *Doe v Turford* 3 B & Ad 890 897 898

(2) *Doe v Hawkins* 2 Q B 212
Barry v Bebbington 4 T R 514
Lancaster v Lovell 6 C & P 437
Exeter v Warren 15 Q B 773
Bradley v Jones 13 C P 822
quære whether the Act adopts a different rule by the use of the word made in the opening clause of the section
Field v Field 180 181 15 6th Ed 132 133 as to proof of handwriting

see ss 4 67 and as to documents 30 years old see s 90 post

(3) *Taylor v Fyfe* §§ 682 683 as to independent evidence of the existence of the charge suitably liquidated *ante* pp 327-328

(4) *Crease v Barrett* 1 C M & R 919 930 and cases cited in *Taylor v Fyfe* § 619

(5) *Patel Landroan v Patel Manlal* 15 B 365 (1890)

is shown that his utterance was an expression of opinion common both to himself and others. Reputation as to the existence of *particular facts* is inadmissible. The declaration must relate to the general right, and not to particular facts which support or negative it, or the latter not being equally notorious are liable to be misrepresented or misunderstood and may have been connected with other facts which if known would qualify or explain them (1). Thus if the question be whether a road is public or private declarations by old persons since dead that they have seen repairs done upon it, are inadmissible (2). On the other hand on the same question declarations by deceased residents in

but which indirectly do so as by setting up an inconsistent private claim or by omitting all mention of it where mention might reasonably have been expected (5).

The terms public and general are sometimes used as synonymous (6). But a distinction is drawn in English law between the two terms public and general when dealing with the question of the competent knowledge of the declarant ^{general interest}.

parish or manor. The distinction is when the point in issue is of a public

or presumed from the circumstances under which the declaration was made (7). But as this clause requires a probability of knowledge in all cases this distinction ceases to be of importance in India. In both classes of rights public and general the rights must have been one of the existence of which if it existed, the declarant *would have been likely to be aware* (8). Instances of

owners to repair a bridge or sea wall manorial customs and the like. On the other hand questions as to the boundaries of two private estates the existence of a private right or way over a field a custom of electing the master of a grammar school and the like have been held to be matters of a private nature (9).

(1) Wills Ev 2nd Ed 222—223 and cases there cited Taylor Ev § 617 Steph Dig Art 30 [Declarations as to particular facts from which the existence of any such public or general right or custom or matter of public or general interest may be inferred are deemed to be irrelevant.]

(2) *R v Bliss* 7 A & E 550

(3) *Crease v Barrett* 1 C M & R 925

(4) *Drinkwater v Porter* 7 C & P 181

(5) *Drinkwater v Porter* supra followed in *Sivasubramanya v Secretary of State* 9 M 285 294 (1884). [No distinction can be drawn between evidence of reputation to establish and to disprove a public

right.] Taylor Ev § 620 Field Ev 6th Ed 17 138

(6) As to the meaning of the term interest *vide* Intro to ss 3 33 *R Bedfordshire* 4 E & B 535

(7) Taylor Ev §§ 609—612 Steph Dig Art 30 Phipson E 5th Ed 9 as to the meaning of general custom or right *vide* s 48 post as to whether the rights mentioned in this clause are incorporeal only see *Gujri Lall v Fateh Lall* 6 C 180 186 187 (1880) and cf *Sivasubramanya v The Secretary of State* 9 M 285 (1884)

(8) S 32 cl (4)

(9) *S Taylor Ev* §§ 613 614 where a large number of cases are collected

"The Indian decided cases furnish few examples (1) Illustration (i) is taken from those parts of the country in which the village system still exists it has long died out, if it ever perfectly existed, in Lower Bengal Public rights or customs are little understood, and the order of the Government or of the Executive head of a district is often accepted as conclusive concerning them In large *zemindaries* questions, however, occasionally arise somewhat analogous to those which occur in manors in England, such for example as to the *zemindars* right to take dues on the sale of trees or to receive one fourth of the sale proceeds in cases of involuntary sale, as in execution, or in case of a house sold privately (2)

Declarations by deceased persons as to private rights are inadmissible since these are not likely to be so commonly or correctly known, and are more liable to be misrepresented (3) In the undermentioned case it was held that neither cl 4 nor cl 5 of this section justifies the admission of hearsay evidence upon the question whether a particular person survived another or upon the question whether a man was at the time of his death joint with or separate from other members of his family nor can the grounds of the opinion of a deceased person as to the existence of a custom even if stated to a witness be as such proved under this section (1) The grounds upon which evidence of reputation upon general custom is receivable do not apply to private titles, either with regard to particular custom or private prescriptions as it is not generally possible for strangers to know any thing of what concerns only private title (5) Reputation may, however, be given in evidence under this Act in proof of private rights if it consists of the written statements mentioned in the seventh clause *post*

Form of the
declaration

Declarations as to the public and general rights may be made in any form or manner (6) The statements under this clause may have been written or verbal But reputation as to matters of general interest is not confined to the declarations here mentioned It may be evidence by recitals in deeds wills or other documents under the provisions of the seventh clause The following are instances of the manner in which declarations as to matters of public and general interest may be made they may be made by or in statements, verbal or written, giving opinions (7), maps prepared by or by the direction of person interested in the matter (8) deeds and leases between private persons (9), orders, judgments, and decrees of Courts if final (10)

Lis mota
and
interest

In order to prevent bias the declarations to be admissible, must have been made *ante litem motam*, or before the commencement of any controversy, legal or otherwise, touching the matter to which they relate By *lis mota* is meant the commencement of the controversy and not the commencement of the suit (11) This qualification is not confined to matters of public and general interest but equally governs the admissibility of hearsay evidence in matters

(1) See *Sivasubramanya v The Secretary of State* 9 M 265 (1884) *post*

(2) Field Ev 6th Ed 138—as to Manorial customs see s 42 *post* and as to presentments of Customary Courts see Wills Ev, 2nd Ed 230—232

(3) Taylor Ev, §§ 615 616 Phipson Ev 5th Ed 279—Roscoe N P Ev 49 and cases there cited *Heimger v Dros* 25 B 433 440 441 (1900) s c 3 Bom L R 1 [S 32 cl (4) is manifestly inapplicable to a document purporting to deal with the right of a private individual as against the public in which the interests of the individual formed the subject matter of the statements] as to the

evidence of ancient possession *post*

(4) *Mussamat Parbati Kunuar v Rani Chandrapal Kunuar* 8 O C 94 I C. (1902) 361 I A 125

(5) *Morewood v Wood* 14 East 379

"

(6) Steph Dig Art 30

(7) S 32 cl (4) *ante*

(8) *Hammond v Bradstreet* 10 Ex 390 see cl (7) *post*

(9) *Plaxton v Dare* 10 B & C 17

(10) S 42 *post*, Steph Dig Art 30

illustr (b)

(11) *Barkley Peerage case* 4 Camp 417 *Monckton v Atty Genl* 2 Russ & Myl 161, Taylor, Ev § 629

of pedigree(1) "There must be, not merely facts which may lead to a dispute, but a *lis mota* or suit, or controversy preparatory to a suit, actually commenced, or dispute arisen, and that upon the very same pedigree or subject matter which constitutes the question in litigation"(2) Therefore, declarations will not be rejected in consequence of their having been made *with the express view of preventing disputes*(3), they are admissible if no dispute has arisen, though made in direct support of the title of the declarant(4), and the mere fact of the belief that he stood, in *pari jure* with the will not render his statement inadmissible(5) eived, although made after a claim had been asserted but finally abandoned(6), or after the existence of non contentious legal proceedings involving the same right(7) or after the existence of contentious legal proceedings involving the same right only collaterally and not directly(8) for the controversy must have related to the particular subject in issue(9) But declarations made after the controversy has originated are inadmissible although the existence of the controversy was not known to the declarant, for to enquire into this would be to enter into a collateral issue(10) The admissibility of declarations terminates with the commencement of the controversy and the termination of this admissibility is not affected by its being shown that proceedings were fraudulently commenced with the view to exclude the possibility of any such declaration(11) and the evidence will be excluded even though the former controversy were between different parties, or had reference to a different property or claim, if matters to which the statement relates were clearly under discussion in the former dispute(12)

FIFTH & SIXTH CLAUSES

For the purpose of Indian Courts the extent to which hearsay evidence with regard to relationship is admissible may be summarized shortly under three heads—(a) statements made orally or in writing by persons deceased, etc., having special knowledge, *ante litem motam* (section 32, fifth clause) (b) statements in writing as to relationship between persons deceased in wills or deeds relating to the affairs of the family to which they belonged, etc., made *ante litem motam* (section 32, sixth clause), (c) opinion shown by conduct as to the existence of a relationship by a person who had special means of knowledge (section 50) (13)

Clauses fifth and sixth, which are exemplified by Illustrations (k) (l) and (m), together with section 50 *post*, deal with the relevancy of certain facts which are treated by English text writers under the single head of 'matters of pedigree' There are, however, important differences between the English and Indian law on the subject of the statements which are dealt with by the above mentioned clauses of this section There is further a distinction to be noted between the kinds of evidence to which each clause refers The statement

(1) See cls (5) and (6) its operation may therefore be illustrated by indistinct reference to both these classes of cases Taylor Ev § 628

(2) *Davies v Loandes* 7 Scott V R 214 *per* Lord Denman Taylor Ev § 630 and cases there cited

(3) *Berkeley Peerage case* *supra*

(4) *Doe v Davies* 10 Q B 314 325 [although a feeling of interest will often cast suspicion on declarations it will not render them inadmissible *Per cur*]

(5) Taylor Ev §§ 630 631

(6) *Physon* Ev 5th Ed 251 citing Hubb Ev of Suc 668

(7) *Ib* *Briscoe v Lomar* 8 A & E 198 citing Hubb *Gee v Ward* 7 F & B 509

(8) *Ib* *Freeman v Phillips* 4 M & S 486

(9) Taylor Ev § 632 Wills Ev 2nd Ed 230—see as to this Field Ev 6th Ed 137

(10) *Shedden v Atty Genl* 30 L J P & M 217 *Berkeley Peerage case*, *supra*

(11) *Shedden v Atty Genl* *supra*

(12) Taylor Ev § 633

(13) *Bejay Bahadur v Bhupindar*, 17 A 465 459 (1895). see s 50, *post*

declared relevant by the *fifth* clause is a statement relating to the existence of any relationship between persons *living or dead*, as to whose relationship the person making the statement had *special means of knowledge*, such as the statement of deceased relatives, servants and dependants of the family (1) The statement mentioned in the *sixth* clause is a statement relating to the existence of relationship between *deceased* persons only. This last clause does not embrace the case of a statement of relationship between a deceased person and a living person (2) It does not deal with the question by whom the statement is to be made nor does it require that it should have been made by a person who had special means of knowledge possibly on the ground that it is improbable that any person would insert in a solemn deed, will etc., any matter the truth of which he did not know or had not satisfactorily ascertained (3) but states that it must be contained in the documents of other material things therein mentioned. It has been recently held that a family pedigree kept by the family chronicler prepared by him from time to time from information supplied by members of the family was admissible both under the second clause as also under this clause as having been kept by a person engaged by the members of the family to keep a record of the family events (4)

Besides the documents and other material things mentioned in the sixth clause family bibles, coffin plates mural tablets hatchments, rings, armorial bearings and the like, amongst Christians and horoscopes among Hindus, are examples of other documents and things on which such statements are usually made (5) It has been held that a horoscope is inadmissible unless its correctness is vouched either by its writer or by a person with special means of knowledge (6) As to statements contained in wills (7) and deeds (8) see the cases noted below. Inscriptions on tombstones mural inscriptions and the like may be proved by any secondary evidence (9) The statement in a

(1) *Garurudhwaja Prasad v Sagarandhuaja Pershad* 27 I A 238 251 (1900) s c 23 A 37 51 *Oriental Life Assurance Co v Narasinha Chari* 25 M 183 207 209 in which the statements of the deceased himself his sister and others were tendered or admitted as to the report of a punchayet as evidence of pedigree see *Ajabsing v Vanabhau* 26 I A 48 (1898) 25 B 1 3 C W N 130

(2) *Raminarain Kallia v Monee Bibee* 9 C 613 614 (1883)

(3) Field Ev 189 190 1b 6th Ed 139—140

(4) *Mohansing Umed Ramol v Dalpat sing Kanbaji* 24 Bom L R 289 (1922)

(5) See generally Taylor Ev §§ 650—657

(6) *Krishnamacharier v Krishna nacharier* 38 M 166 (1915) Horoscopes have been held inadmissible in two earlier cases *Raminarain Kallia v Monee Bibee* 9 C, 613 (1883) The chief ground on which the evidence was rejected in this case was that it was not shown that the attendance of the writer was not procurable *Satis Chunder v Mohendro Lal* 17 C 849 (1893) [*quare* as to this case assuming the horoscope to have been tendered as stated under cl (6) that clause does not require that the maker of the statement should have had any special means of knowledge and if tendered under cl (5),

Ra nara n Kallia v Monee Bibee which this case purported to follow does not seem in point Further upon the question whether the evidence is limited to cases where the question in issue is one of relationship *v post* and whether the words relates to the existence of relationship *p* cover statement as to the commencement of relationship *p* in point of time *v post* A distinction is to be observed between horoscopes tendered under s 32 cl (6) and under s 32 cl (5) as the statements of persons having special means of knowledge and as being an admission under ss 17 18 See as to their use as admissions *Raja Goundan v Raja Goundan* 17 M 134 (1893) See *Rottonbhai v Chabildas* 13 B 7 (1888)

(7) *Nil Moiree v Musru ut Zuheer unnessa* 8 W R 371 (1867) [where the incidental mention of a child's age in the recital of a will was held to be no proof of the exact age of such child The Report does not show whether the child was dead at the time the evidence was offered If dead the case is no longer law Field Ev 6th Ed 142] *Chamanbhu v Multon chand* 20 B 562 (1895)

(8) *Tima v Darani* 10 M 362 (1887) [in which it was ruled that a statement as to relationship in a deed held to be invalid was admissible in evidence]

(9) S 65 cl (d) *post* see definition of document in s. 3 *ante*

genealogical table filed by a member of a family who is dead, regarding the descendants of another member of the family, before any question arose as to the latter as also a record of family events are relevant under this clause (1) Statements, whether they are tendered under the fifth clause or the sixth clause, must, in order to be relevant, have been made *ante litem motam* (2), and for the admissibility of statements under either of these clauses it must be shown that the attendance of the person who made the statement is not procurable (3) So where a plaintiff tendered in evidence a horoscope under the sixth clause, but was unable to say who wrote it, and therefore unable to say whether the writer was dead, or could not be found, etc., the document was on this, as on other grounds, held to be inadmissible (4) It will in no way affect the admissibility of this class of evidence that witnesses might have been called to prove the very facts to which it relates (5) A register of baptism while evidence of that fact and of the date of it, furnishes even if it states the date of a person's birth, no proof of the age of that person further than that at the date of such ceremony the person referred to was already born Evidence regarding the date of a man's birth has been held under certain circumstances to be admissible under the fifth clause, but in the case of an entry in the register in question there is nothing to show by whom the statement entered was made much less that the person making the statement had any special means of knowledge (6)

According to English law (7) declarations made by *deceased relatives* are admissible if made *ante litem motam* to prove matters of *pedigree* only They are relevant only in cases in which the pedigree to which they relate is *in issue* but not to cases in which it is only *relevant* to the issue (8) Thus where the question was whether A, sued for the price of horses, and pleading infancy, was on a given day an infant or not, the fact that his father stated in an affidavit in a Chancery suit to which the plaintiff was not a party that A was born on a certain day, was held to be irrelevant (9) The terms 'matters of pedigree' or 'genealogical purpose' are confined *primarily* to issues involving family succession (testate or intestate), relationship and legitimacy, and *secondly*, to those particular incidents of family history which are immediately connected with and required for the proof of, such issues—*eg*, the birth, marriage, and death of members of the family, with the respective dates and places of those events, age, celibacy, issue or failure of issue, as well, probably, as occupation, residence, and similar incidents of domestic history necessary to identify individuals (10) The principle upon which such evidence has been admitted has,

The statements are admissible to prove the facts contained therein on any issue

(1) *Shyamanand Das v. Rana Kanta Singh* 46 B 753 (1904) *Mohansing v. Dalpat*

genealogical purpose they will be rejected *see next case*

(9) *Haines v. Guthrie* L R 13 Q B D 818 (1881) this case (in which all the authorities on this point are fully considered) is not law in India *see note* 2 p 338

(2) *v. post* p 341
(3) *Ramnaran Kalia v. Monoc Bibee* 9 C 613 (1883) *Surjan Singh v. Sardar Singh* 27 I A 183 (1900) s c 5 C W N 49 2 Bom L R 942

(10) *Phipson Ev* 5th Ed 291—citing *Taylor Ev* §§ 643 646 *Steph Dig Art* 31 *Hubbacks Ev of Succession* 204 468 648—650 citing *Hood v. Lady Beau champ* 8 Sim 26 *Shields v. Boucher* 1 D G & S 40 *Rishton v. Nesbitt* 2 M & R 554 *Lotat Peerage* 10 Ap Cas 763 *see also* *Powell Ev* 201 *Taylor Ev* § 642 *Wills Ev* 2nd Ed 211 it was at one time a moot point in English law whether evidence as to date and place of birth was admissible even in pedigree cases but the weight of opinion was in favour of its admissibility (*Taylor Ev* § 642) and this view has been adopted

(4) *Ib*
(5) *Taylor Ev* § 641
(6) *Collier v. Baron* 2 N L R 34 as to proof of date of birth after lapse of years *see Nauab Shah Ara Begam v. Aamir Begum* P C (1906) 11 C W N 130

(7) *Taylor Ev* §§ 635—657 *Roscoe N P Ev* 44—48 *Phipson Ev* 5th Ed 291—295 *Steph Dig* 31 *Best Ev* § 498 *Powell Ev* 9th Ed 349—357 *Wills Ev* 2nd Ed 211—223

(8) *Steph Dig Art* 31 *Powell Ev* 207 when they are not required for some

as regards the date of birth, been stated to be that the time of one's birth relates to the commencement of one's relationship by blood, and a statement therefore, of one's age, made by a deceased person having special means of knowledge, relates to the existence of such relationship within the meaning of the fifth clause of this section (1)

But under the Act the declarations are admissible on any issue provided they relate to a fact relevant to the case (2) Thus where in a case one of the questions was as to whether the plaintiff deed, the plaintiff in a former suit, verified was held to be admissible under the fifth certain persons were born and their ages (3) "It was contended on the part of the plaintiff, on the authority of the English cases, that, as the question at issue in this case did not relate to the existence of any relationship by blood marriage, or adoption, the section did not apply, and the statements were excluded by the ordinary rules of evidence. I think that on this point the law in India under the Evidence Act is different to the law of England, and that the effect of the section is to make a statement made by such a person relating to the existence of such relationship, admissible to prove the facts contained in the statement on any issue, and that the plaintiff was admissible here to prove the order in which the sons of S were born and their ages, and when admitted, it to my mind satisfactorily proves that the defendant was the son who was born on the 6th of June, 1868 (4) So also a statement under this clause was admitted to prove the date of the plaintiff's birth for the purpose of the decision of a question of Limitation (5) Not only are such declarations admissible in proof of relationship upon any issue, whether of pedigree or not, but they are also admissible in cases other than those of pedigree to prove the commencement of the relationship in point of time or the date of the birth of the person in question (6) It would appear according to English law that hearsay evidence must be confined to such facts as are immediately connected with the question of pedigree, and that incidents which, although inferentially tending to prove are not immediately connected with, the question of pedigree, will be rejected (7)

Persons
from whom
declarations
are
receivable

In England such declarations are only admissible when made by deceased relatives by blood or marriage, and further the declarants must be legitimately related (8) But under the Act the statement may be made by any person

by the framers of the Act [s 32 illustrates (1) (m) *Bepin Behary v Sreedam Chunder* 13 C 42 (1886) *Ram Chandra v Jogeswar Narain* 20 C 758 (1893)] *Oriental Life Assurance Co Ltd v Narasimha Chari* 25 M 183 209 210 (1901) the words 'relates to the existence of relationship' being wide enough to cover statements as to the commencement of relationship in point of time and as to the locality when it commenced or existed. See Field Ev 191 As to the admissibility of the evidence in cases other than 'pedigree cases' *supra*

(1) *Oriental Life Assurance Co Ltd v Narasimha Chari* 25 M 183, 209 210 (1901) See also *Jagatpal Singh v Jageshwar Baksh* 25 A 143 152 (1902) in which the question was whether one P S from whom the respondents descended was born before Z S from whom the appellants had descended

(2) *Dhan Mull v Ram Chunder* 24 C 265 (1890) s c. 1 C W N, 270 cited in *Ram Chandra v Jogeswar Narain* 20

C 708 760 [overruling *Bepin Behary v Sreedam Chunder*, 13 C, 42 (1886)] followed in *Ram Chandra v Jogeswar Narain* 20 C 758 (1893)

(3) *Dhan Mull v Ram Chunder*, *supra*.

(4) *Ib per Petheram C J*

(5) *Ram Chandra v Jogeswar Narain supra*

(6) *Ib Dhan Mull v Ram Chunder supra*.

(7) Taylor Ev, § 644

(8) Taylor Ev §§ 635—638 *Doe v Barton* 2 M & R 28, see *Doe v Darus* 10 Q B 314 As to declarations by a deceased person as to his own illegitimacy see *Phipson Ev* 5th Ed 292 and cases there cited and Field Ev, 6th Ed 149 141 under the Act such a declaration would be relevant as against strangers s 47 of the repealed Act II of 1855 rescinded the English rule on this subject and admitted the declarations not only of illegitimate members of the family but also of persons who though not related by blood or marriage were yet intimately

provided only that such person had *special means of knowledge* of the relationship to which the statement relates. Proof of this special means of knowledge is a

as to who were her heirs, and made at a time when no controversy on the subject was in contemplation, and letters written by her, in reply to enquiries by the *wasika* officer, explaining and confirming such statements, was held to be admissible in evidence in support of the legitimacy of such heirs, and under the circumstances to be conclusive in their favour (5). A statement relating to the existence of any relationship contained in a document signed by several persons some only of whom are dead, is admissible in evidence under the fifth clause of this section (6). In a recent case it was held by the Privy Council that a statement on a point of relationship which was made with special means of knowledge five years *ante litem motam* in a will executed by a Hindu widow since deceased and was corroborated by other relatives against their interest and was not contradicted by reliable evidence, was conclusive where other evidence conflicted (7). And in another case where a material issue was whether the plaintiffs were sons of a paternal uncle of a deceased lady, it was held by the Allahabad High Court that a plaint in a suit filed by her *ante litem motam* in which she so described them was admissible (8).

According to English law, it is not necessary that the declarant should have had personal knowledge of the facts stated, it is sufficient if his information purported to have been derived from other relatives, or from general family repute, or even simply from "what he has heard," provided such "hearsay upon hearsay" as it has been called, does not directly appear to have been derived from strangers (9). But if the declarant's information purport to have been derived entirely from hearsay, it is not admissible (10).
 so founded will
 cessfully objecte
 that all the statements come from persons whose declarations on the subject are admissible (11). 'If this were not so, the main object of relaxing the

Personal knowledge

acquainted with the members and state of the family. The latter portion of this section would have included servants friends and neighbours who are excluded (*Johnson v Lawson* 2 Bing 86) under English law. The rule laid down by this Act is still more general in its terms than the Act of 1855 as it renders admissible not merely the statements of persons deceased but also of persons whose evidence is not procurable for other reasons. As to a person claiming as illegitimate son establishing his alleged paternity see *Gopalasami v Arunachellam* 27 M 32 34 35 (1903).

(1) S 104 *post* see Taylor Ev § 640 Wills Ev 2nd Ed 213—214.

(2) *Sangram Singh v Rajan Bibi* 12 C 219 222 (1885) 12 I A 183 see also *Bejai Baladur v Bhupindar Bahadur*, 17 A 456 (1895).

(3) *Slam Lall v Radha Bibee*, 4 C

L R 173 (1879)

(4) *Sangram Singh v Rajan Bibi* supra

(5) *Baqar Ali v Anjuman Ara* 25 A 236 (1903) s c 7 C W N 465

(6) *Chandra Nath v Nilmadhab Bhutta charjee* 26 C 236 s c 3 C W N 88 (1898)

(7) *Kedar Nath v Mathu Mal* P C, 40 C 555 (1913)

(8) *Manladad Khan v Abdul Sathar* 39 A 426 (1917)

(9) Taylor Ev § 639 *Shedden v Attorneys General* 30 L J P & M 217 Phipson Ev 5th Ed 293 Wills Ev, 2nd Ed 218. See *Mohansing Unied Raol v Dalpatsing Kanvaji* 24 Bom L R 289 (1922)

(10) *Davies v Loundes* 6 M & G, 525

(11) Thus the declarations of a deceased widow respecting a statement which her husband had made to her as to who his

ordinary rules of evidence would be frustrated since it seldom happens that the declarations of deceased relatives embrace matters within their own personal knowledge"(1) A similar rule will be followed in cases under the Act provided all the statements come from persons whose declarations on the subject are admissible (that is, persons who are shewn to have had special means of knowledge) the evidence will not be rejected merely on the ground that the declarant had no personal knowledge of the facts stated. But where on a question of relationship the statements of certain witnesses who were supposed to be speaking from information derived from others were sought to be made admissible, but these witnesses did not state the persons from whom they derived that information nor at what period of time they derived it, the evidence was rejected (2). In other words, where the witness is speaking from hearsay he must show that his knowledge comes from a person whose statements are admissible. The statement however, which is relied on, must be shown to be the statement of a person whose statement is admissible under this section. So in the undermentioned case the alleged author of a document R G S had died before the trial but the exhibit in question is merely a genealogical table filed on behalf of G in a claim made by him for certain villages. The document

being an exhibit binding
uncoloured held that the docu-
(G's) relation to the docu-
personal knowledge and
of a deceased person

which is admissible in evidence. For aught that appears the genealogical table in question might never have been seen or heard of by G, personally, but have been entirely the work of his pleader (3). But where a *kursinama* was pro-

by the pen of gomasta
establish the same fact in

(1) According to English law in the case of marriage, repute and conduct need not be confined to the family, general reputation among and treatment by, friends and neighbours being receivable, except in certain cases.

as evidence of marriage (5). But then merely on the statements of some

as general reputation, and can only be tendered on a question of pedigree, and in England, as the statement of a deceased relation (6) or in India as the statement of a

The ground
partly the
because

notam (7)
reliable and
and partly
favourably

situated for knowing, raises a reasonable presumption that the facts concurred

cousins were have been received see
Taylor Ev § 639

(1) Taylor Ev § 639 and cases there
cited

(2) *Musst Shafiqunnissa v Shaban Ali*
9 C W N 105 (1904) s c 16 A,
581

(3) *Jagatpal Singh v Jageshwar Singh*
25 A 43 (1902) s c 7 C W N 209

(4) *Shah adl Begam v Secretary of*
State for India P C (1907) 34 C 1059,
L R. 4 I A 194

(5) Taylor Ev § 578 Phipson Ev
5th Ed 367 107 Wills Ev, 2nd Ed.
206—209 Field Ev., 6th Ed., 144, as to
conduct see note to s 50 post

(6) *Siedden v Patrick* 30 L J P M,
& A 217 231 232. There is no doubt
that general reputation of a marriage may
be given *valcat quantum*. A person living
in a particular neighbourhood—say in New
York—may be called to say that the reputa-
tion in New York was that A and B were
man and wife but you cannot ask what
any particular individual not being a
member of the family said on the sub-
ject that is getting into a different class of
evidence *ab per* Sir C Crosswell see
also Wills Ev 2nd Ed 206—207

(7) S 32 cl (5) ante as to opinion
expressed by conduct, see s 50 post

in are true (1) While, however, provision has been made by the Act in s. 50 for the reception in evidence of c appears to be none for the admission of t But in a later case it has been held nce of direct proof, consent to a marriage in Burmah may be inferred from the conduct of the parties as established by general reputation (2)

The declarations need not refer to contemporaneous events; thus state- Contemporaneous-ments as to matters o nce. for such a restriction " let in, by preventing it whose declaration is to be adduced in evidence "(4)

It has been already observed that in matter of public or general interest Particular facts declarations as to particular facts are excluded But the same rule does not apply in cases of pedigree "In cases of general right which depend upon immemorial usage, living witnesses can only speak of their own knowledge to what passed in their own time, and to supply the deficiency, the law receives the declarations of persons who are dead There, however, the witness is only allowed to speak to what he has heard the dead man say respecting the reputation of the right of way, or of common, or the like A declaration, with regard to a particular missible In matters < the relationship of pa the family are admitted, but here, as the reputation must proceed on particular facts such as marriages, births, and the like, from the necessity of the thing, the hearsay of the family as to these particular facts is not excluded General and the family transactions is thus dropped in conversare "(5)

As in the case of statements with regard to public and general rights, de- Lis mota clarations as to relationship must have been made before the question in dispute in relation to which they are proved, was raised (6), but they do not cease to be relevant because they were made for the purpose of preventing the question from arising (7) Further, the fifth clause of section 32, does not apply to statements made by interested parties in denial, in the course of litigation, of It has been held by the Privy Council, record handed down from generation of the family died or was born, but a document drawn up on a particular occasion for a specific purpose by a member of the family) was to be treated as a mere declaration made by the person who made or adopted it It was also held in the same case that to make a statement inadmissible as *post litem motam* the same thing must be in controversy before and after such statement is made, and that this pedigree was admissible

(1) Taylor Ev §§ 577 578 Phipson Ev 5th Ed 362

(2) *My Me v My Mshue Ma* J C (1912) 39 I A 57 39 C 392

(3) *Monckton v Attorney General* 2 R & Myl 157 *Davies v Lowndes* 6 M & G 525 Phipson Ev (5th Ed 293) citing Hubb 659 Taylor Ev § 639

(4) Taylor Ev § 639 quoting Lord Brougham

(5) *Berkeley Peerage Case* 4 Camp 415 416 per Sir James Mansfield

(6) S 32 cls (5) and (6) v ante, p 337 In *Bahadur Singh v Mohar Singh*, 24 A 94 107 (1901) where it was ob-

jected that the statements were inadmissible as having been made *post litem* the Privy Council held that the heirship of the then claimant was not really in dispute at that time and that the construction of the Act contended for would practically exclude any attainable evidence in that case

(7) Steph Dig Art. 31 *Berkeley Peerage Case* 4 Camp 401—417, and see *Loxat Peerage Case* L R 10 Ap Ca., 797 Wills Ev 2nd Ed 217

(8) *Narain Kumar v Chandu Din*, 9 A., 467 (1886)

In the first place, it is to be observed, with reference to the law prevailing in India that while the fourth clause admits parol evidence of reputation in proof of public or general rights and customs, the present clause does not provide for the admissibility of parol evidence of reputation in the cases to which it applies (1) The Act, therefore (being in this respect in accord with English law), does not admit parol evidence of reputation in proof of private rights and customs. It, however, declares that reputation to be relevant in proof both of public and private rights (in respect of such last mentioned rights departing from the English rule) which consists of statements contained in any deed, will or other document relating to any transaction by which any right or custom was created, claimed, modified, recognised, asserted or denied, or which was inconsistent with its existence. In this respect it appears to deal with both public and private rights upon the same footing. Further, the present section includes any deed, will or other document, so that the rule as to ancient documents receivable either as evidence of reputation or as acts of ownership is in terms extended and enlarged for under this clause a statement in any relevant document, though not more than thirty years old, and however recent, is admissible (2) In practice however the rule under the Act in this last mentioned respect must remain much the same as that under English law since, in the case of modern documents, direct proof by witnesses will in most cases be procurable, and the conditions under which this form of hearsay testimony is alone admissible will not be found to exist. Moreover, even where such conditions exist, recent documents may often for various causes, be of little weight (3)

EIGHTH CLAUSE

Statements made by a number of persons and expressing feelings or impressions

Statements made by a number of persons and expressing feelings or impressions on their part relevant to the matter in question are relevant, and may be proved by the testimony of persons other than those who made them, when such persons are dead, or cannot be found or have become incapable of giving evidence, or when their attendance cannot be procured, without an amount of delay or expense, which under the circumstances of the case, appears to the Court unreasonable (4) Some or all of these conditions will necessarily be found to occur, at any rate in by far the greater number of cases when relevant evidence of this character is tendered. The meaning of this clause has been said to be "that when a number of persons assemble together to give vent to one common statement, which statement ex-

es to statements expressing feelings or impressions, not of an individual but an aggregate of individuals as the exclamations of a crowd, and the evidence is receivable on account of the difficulty or impossibility of procuring the attendance of all the individuals who composed such crowd or aggregate of persons (6) So to prove that a capture destroyed before the trial was meant to represent two of the relations of the defendant, exclamations of recognition by spectators in a public

(1) The statement made relevant by cl (7) must be written and the word 'verbal' at the commencement of this section has no application to this clause

(2) Norton Ev. 192 Field Ev 6th Ed 143-144, in *Hurronath Mullick v Nittanund Mullick* 10 B L R 263 (1872) the document in question was executed only 18 months before suit was brought. As to the admissibility of reports accompanying orders as hearsay evidence of

reputed possession see *Dinomons Choudhuran v Brojo Mohini* 29 C 198 (1901)

(3) *Hurronath Mullick v Nittanund Mullick* supra

(4) S 3 cl (8) illust (n) Field Fr. 6th Ed 144

(5) *R v Ram Dutt* 23 W R Cr 35 38 (18 4) per Jackson J

(6) Norton Ev 193 Field Ev 6th Ed 144 Taylor Ev 31 576 779

in are true (1) While, however, provision has been made by the Act in s 50 for the reception in evidence of conduct as proof of relationship, there appears to be none for the admission of the general reputation above mentioned But in a later case it has been held by the Privy Council that, in the absence of direct proof consent to a marriage in Burmah may be inferred from the conduct of the parties as established by general reputation (2)

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It has been already observed that in matter of public or general interest Particular declarations as to particular facts are excluded But the same rule does not apply in cases of pedigree In cases of general right which depend upon immemorial usage living witnesses can only speak of their own knowledge to what has passed in their own time, and to supply the deficiency, the law receives the declarations of persons who are dead There, however the witness is only allowed to speak to what he has heard the dead man say respecting the reputation of the right of way or of common or the like A declaration with regard to a particular fact which would support or negative the right, is inadmissible In matters of pedigree it being impossible to prove by living witnesses the relationship of past generations the declarations of deceased members of the family are admitted but here as the reputation must proceed on particular facts such as marriages births and the like, from the necessity of the thing,

As in the case of statements with regard to public and general rights declarations as to relationship must have been made before the question in dispute in relation to which they are proved was raised (6), but they do not cease to be relevant because they were made for the purpose of preventing the question from arising (7) Further the fifth clause of section 32 does not apply to statements made by interested parties in denial in the course of litigation, of

It has been held by the Privy Council, record handed down from generation of the family died or was born, but a document drawn up on a particular occasion for a specific purpose by a member of the family) was to be treated as a mere declaration made by the person who made or adopted it It was also held in the same case that to make a statement inadmissible as *post litem motam* the same thing must be in controversy before and after such statement is made and that this pedigree was admissible

(1) Taylor Ev §§ 577 578 Phipson Ev 5th Ed 367

(2) *Me v Mslac Ma* J C (1912) 39 I A 57 39 C 397

(3) *Monckton v Attorney General* 2 R & Myl 157 *Davies v Loundes* 6 M & G 575 Phipson Ev (5th Ed 293) citing Hubb 659 Taylor Ev § 639

(4) Taylor Ev § 639 quoting Lord Brougham

(5) *Berkeley Peerage Case* 4 Camp 415 416 per Sir James Mansfield

(6) S 37 cls (5) and (6) v a te p 337 In *Baladur Singh v Molar Singh* 24 A 94 107 (1901) where it was ob-

jected that the statements were inadmissible as having been made *post litem motam* the Privy Council held that the hearsay of the then claimant was not really in dispute at that time and that the construction of the Act contended for would practically exclude any attainable evidence in that case

(7) Steph Dg Art 31 *Berkeley Peerage Case* 4 Camp 401-417 and see *Loxat Peerage Case* L R 10 Ap Ca. 797 Wills Ev 2nd Ed 217

(8) *Aaram Kuar v Chandu Din* 9 A. 467 (1886)

as a declaration made and adopted by a deceased member of the family, and touching the family reputation, on the subject of its descent, and not shown to be *post litteram* — it is to be a family document, and it from him, it, the document, the document section does not make it necessary to show by whom such statements were made(2)

SEVENTH CLAUSE

Statements in documents relating to transactions by which any right or custom was created claimed and the like

Statements contained in any deed will, or other document which relates to any such transaction as is mentioned in cl (a) of the thirteenth section, that is, any transaction by which any right or custom was created, claimed modified, recognized, asserted or denied, or which was inconsistent with its existence may be proved under this clause. The thirteenth section which should be read together with the present clause, relates to both public and private rights and customs (3). The present clause, therefore, relates to *private*, as well as *public* rights and customs (4). According to English law, declarations, written or

with verbal and written, and, the latter with written, statements relating to public or general rights and customs in general accordance with the English law upon the same subject so far as the latter extends. The first mentioned clause admits the verbal or written statement giving the opinion of some particular persons to the existence of such rights. But hearsay as to matters of general interest is not confined to such declarations. It may be proved under this clause by recitals and descriptions of the public or general right, in wills, deeds, leases, maps, surveys, assessments, and the like (6) however recent such documents may be (7). In a suit by a zemindar to recover certain forest tracts from Government, the plaintiff relied on certain accounts called *ayukul* accounts as furnishing proof of the inclusion of the said tracts within the limits of his zamindary. *Held*, that inasmuch as they were from time to time prepared for administrative purposes by village officers, and were produced from proper custody and otherwise sufficiently proved to be genuine they were admissible as evidence of reputation (8).

(1) *Kalka Prasad v Mathura Prasad* P C (1908) 30 A, 510

(2) *Jehangir v Sheoray Singh* 37 A 600 (1915)

(3) *v ante*, s 13

(4) See *Hurronath Mullick v Nittanund Mullick* 10 B L R 263 (1872) in which the custom was a family custom.

(5) *v ante* cl (4) and *post*

(6) S 32 cl (7) Norton Ev, 190 see *Phipson* Ev 5th Ed 279—290, *Roscoe* N P Ev 48—51, *Powell* Ev, 9th Ed 237—249 *Best* Ev § 497, *Steph Dig Art* 30 *Taylor* Ev § 607—634 *Brett v Beales* M & M, 416 *Curzon v Lomax* 5 Esp, 60 *Plaxton v Dare* 10 B & C 17, *Doe v Mitcomb* 4 H L C 425, *Coombs v Goether* M & M 398 *Roscoe* N P Ev 214, *Private Acts*—*Curzon v Lomax* supra *Carnarvon v Lullebois* 13 M & W 313 *Beaufort v Smith* 4 Ex, 450, *Roscoe* N P Ev, 183, *Manor books and presentments*

—*Phipson* Ev 5th Ed 282—*Private Maps*—*R v Milton* 1 C & K, 53 *Harmond v Bradstreet*, 10 Ex 390 *Pipe v Fulcher* 28 L J Q B 12 *Daniel v Wilkin* 7 Ex 429 *Ancient Public Surveys*—*Freeman v Reed* 4 B & S 174 *Smith v Bracklow* L R 9 Eq 241 *Daniel v Wilkin* supra *Modern public surveys*—*Bidder v Bridges*, 34 W R (Eng) 514 54 L T 529 affirmed W N 1886 p 148 *Ancient public assessments*—*Plaxton v Dare* supra *Phipson* Ev 5th Ed 282 *Cooke v Banks* 2 C & P 478 *Ely v Caldecott*, 7 Eng 433

(7) Norton Ev 192, the words of the clause are in any deed will etc but *v post* as to judgments orders and decrees which are admissible in matters of public or general interest only see s 42 *post*.

(8) *Sitasubramanya v Secretary of State* 9 M, 235 (1884)

But further, this section deals with rights and customs generally, private

expect a higher species of evidence. It is, therefore, a rule that ancient documents (i.e., documents more than 30 years old) purporting to be a part of the transactions to which they relate, and not a mere narrative of them, are receivable in evidence that those transactions actually occurred, provided they be produced from proper custody (1)

But to prove or disprove a right or custom it is not enough to adduce evidence of a transaction in which or in the course of which the right or custom was asserted or denied, though the transaction will be relevant under section 13 cl (a) if it be one by which the right or custom was asserted or denied. When the question was whether a tenant held lands under the *nakdi* or *bhaoli* systems of rent, and the Court based its decision on a statement contained in a *heba nama* executed by the deceased grandfather of the tenant, it was held that the *hebanama* was not admissible under this clause read with section 13, cl (a) (2)

Evidence of
ancient
possession

The law upon the subject has been thus summarised —“Ancient documents by which any right of property purports to have been exercised (e.g., leases, licenses, and grants) are admissible, even in favour of the grantor or his successors, in proof of ancient possession. The grounds of admission are two fold,—*necessity*, ancient possession being incapable of direct proof by witnesses, and the fact that such documents are themselves *acts of ownership*, real transactions between man and man only intelligible upon the footing of title, or at least of a *bona fide* belief in title since in the ordinary course of things men do not execute such documents without acting upon them (3) (a) The documents should purport to constitute the transactions which they effect, mere *prior* directions to do the acts or *subsequent narratives* of them being inadmissible (4). Thus, though expired leases (or even counterparts) (5) may be tendered to show ancient possession of the property demised or reserved from the demise, recitals in such lease of other documents or facts will be rejected except as admissions (6) (b) Deeds of this nature must to ensure genuineness be like other ancient documents, produced from *proper custody*, and should to be of any weight, be *corroborated* by proof within living memory of payments made or enjoyment had in pursuance of them. The absence of evidence of modern enjoyment, however goes merely to weight and not to admissibility (c) Ancient documents admissible as *acts of ownership* may be tendered on questions either of public or private right and must be distinguished from those ancient documents which are received as evidence of *reputation* which latter may consist of bare assertions or recitals of the right but are confined to questions of public and general interest

Modern possession being susceptible of proof by witnesses cannot be established by modern leases etc even though supported by evidence of payments made thereunder (7)

(1) Powell Ev 9th Ed 285—288
(2) *Banshi Singh v Mir Amir Ali* (1907) 11 C W N 703

(3) *Malcolison v O'Dea* 10 H L C 593
Bristow v Cormican 3 Ap Cas 641 see also *The Lord Advocate v Lord Loat* 5 App 273 cited ante See also s 13 ante commentary to same *passim* and as to proof of ancient documents s 90 post

(4) *Ib*

(5) Taylor Ev § 427

(6) *Bristow v Cormican* supra 662

(7) *Bristow v Cormican* supra 668 per Lord Blackburn *Clarkson v Woodhouse* 3 Doug 189 the passage in quotation marks is from Phson Ev 3rd Ed. 91 ab 5th Ed 97 citing Taylor Ev, §§ 658—667 Roscoe N P Ev, 53 54, Powell Ev 9th Ed 283—288 Wharton Ev §§ 194—199

as a declaration made and adopted by a deceased member of the family, and touching the family reputation, on the subject of its descent, and not shown to be *post litem motam* (1) In a recent case

section does not make it necessary to show by whom such statements were made(2)

SEVENTH CLAUSE

Statements in documents relating to transaction by which any right or custom was created claimed and the like

Statements contained in any deed will, or other document which relates to any such transaction as is mentioned in cl (a) of the thirteenth section that is, any transaction by which any right or custom was created claimed modified, recognized, asserted or denied, or which was inconsistent with its existence may be proved under this clause The thirteenth section which should be read together with the present clause, relates to both public and private rights and customs (3) The present clause therefore, relates to *private* as well as *public* rights and customs (4) According to English law, declarations, written or

with verbal and written, and, the latter with written statements relating to public or general rights and customs in general accordance with the English law upon the same subject so far as the latter extends The first mentioned clause admits the verbal or written statement giving the opinion of some particular persons to the existence of such rights But hearsay as to matters of general interest is not confined to such declarations It may be proved under this clause by recitals and descriptions of the public or general right, in wills deeds, leases, maps surveys assessments and the like(6) however recent such documents may be (7) In a suit by a zemindar to recover certain forest tracts from Government, the plaintiff relied on certain accounts called *a yukt* accounts as furnishing proof of the inclusion of the said tracts within the limits of his zamindary Held, that inasmuch as they were from time to time prepared for administrative purposes by village officers and were produced from proper custody and otherwise sufficiently proved to be genuine they were admissible as evidence of reputation (8)

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—*Phipson* Ev 5th Ed 287—*Private Maps—R v Milton* 1 C & K 58 *Hammond v Bradstreet* 10 Ex 390 *Pipe v Fulcher* 28 L J Q B 12 *Daniel v Hildin* 7 Ex 429 *Ancient Public Surveys—Freeman v Reed* 4 B & S 174 *Smith v Brownlow* L R 9 Eq 241 *Daniel v Wilkin* supra *Modern public surveys—Bidder v Bridges* 34 W R (Eng) 514 54 L T 529 affirmed W N 1886 p 148 *Ancient public assessments—Plarston v Dare* supra *Phipson* Ev 5th Ed 282 *Cooke v Banks* 2 C & P 478 *Ely v Caldecott* 7 Bng 433

(7) Norton Ev 192 the words of the clause are in any deed will etc *ante* *post* as to judgments orders and decrees which are admissible in matters of public or general interest only see s 47 *post*

(8) *Sitasubramanya v Secretary of State* 9 M 285 (1834)

But further, this section deals with rights and customs generally, private

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The law upon the subject has been thus summarised—"Ancient documents by which any right of property purports to have been exercised (e.g., leases, licenses, and grants) are admissible, even in favour of the grantor or his successors, in proof of ancient possession. The grounds of admission are two fold,—*necessity*, ancient possession being incapable of direct proof by witnesses, and the fact that such documents are themselves *acts of ownership*, real transactions between man and man, only intelligible upon the footing of title, or at least of a *bona fide* belief in title, since in the ordinary course of things men do not execute such documents without acting upon them (3) (a) The documents should purport to constitute the transactions which they effect, mere prior directions to do the acts, or *subsequent narratives* of them, being inadmissible (4) Thus, though expired leases (or even counterparts) (5) may be tendered to show ancient possession of the property demised, or reserved from the demise, recitals in such lease of other documents or facts will be rejected except as admissions (6) (b) Deeds of this nature must, to ensure genuineness, be, like other ancient documents, produced from *proper custody*, and should, to be of any weight, be *corroborated* by proof within living memory of payments made, or enjoyment had, in pursuance of them. The absence of evidence of modern enjoyment, however, goes merely to weight and not to admissibility. (c) Ancient documents, admissible as *acts of ownership*, may be tendered on questions either of public or private right, and must be distinguished from those ancient documents which are received as evidence of *reputation*, which latter may consist of bare assertions or recitals, of the right, but are confined to questions of public and general interest

"Modern possession being susceptible of proof by witnesses cannot be established by modern leases, etc., even though supported by evidence of payments made thereunder" (7)

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(4) *Id*

(5) Taylor Ev § 42"

(6) *Bristow v Cormican* supra 662

(7) *Bristow v Cormican* supra 668 per Lord Blackburn *Clark v Hogg* house 3 Doug 189 the passage in question marks is from Phillips v Ford Ed 91 1b 5th Ed 6 Taylor Ev § 658—667 *Roscoe v Farnham* 53 54, P well Ev 9th Ed 191—192
Lv §§ 194—199

Evidence of ancient possession

In the first place, it is to be observed, with reference to the law prevailing in India that while the fourth clause admits parol evidence of reputation in proof of public or general rights and customs, the present clause does not provide for the admissibility of parol evidence of reputation in the cases to which it applies (1) The Act, therefore (being in this respect in accord with English law), does not admit parol evidence of reputation in proof of private rights and customs. It, however, declares that reputation to be relevant in proof both of public and private rights (in respect of such last mentioned rights departing from the English rule) which consists of statements contained in any deed, will or other document relating to any transaction by which any right or custom was created, claimed, modified, recognised, asserted or denied, or which was inconsistent with its existence. In this respect it appears to deal with both public and private rights upon the same footing. Further, the present section includes any deed, will or other document so that the rule as to ancient documents receivable either as evidence of reputation or as acts of ownership is in terms extended and enlarged for under this clause a statement in any relevant document, though not more than thirty years old and however recent is admissible (2) In practice however the rule under the Act in this last mentioned respect must remain much the same as that under English law since in the case of modern documents, direct proof by witnesses will in most cases be procurable and the conditions under which this form of hearsay testimony is alone admissible will not be found to exist. Moreover even where such conditions exist, recent documents may often for various causes, be of little weight (3)

FIFTH CLAUSE

Statements made by a number of persons and expressing feelings or impressions

Statements made by a number of persons and expressing feelings or impressions on their part relevant to the matter in question are relevant, and may be proved by the testimony of persons other than those who made them when such persons are dead or cannot be found, or have become incapable of giving evidence, or when their attendance cannot be procured, without an amount of delay or expense which under the circumstances of the case, appears to the

“that when a number of persons assemble together to give vent to one common statement, which statement expresses the feelings or impressions made in their

be repeated by the witnesses feelings and opinions is dealt as to statements expressing

feelings or impressions, not of an individual but an aggregate of individuals as the exclamations of a crowd, and the evidence is receivable on account of the difficulty or impossibility of procuring the attendance of all the individuals who composed such crowd or aggregate of persons (6) So to prove that a carture destroyed before the trial was meant to represent two of the relations of the defendant, exclamations of recognition by spectators in a public

(1) The statement made relevant by cl (7) must be written and the word ‘verbal’ at the commencement of this section has no application to this clause

(2) Norton Ev 192 Field Ev 6th Ed 143-144 in *Hurronath Mullick v Nittanund Mull ck* 10 B L R 263 (1872) the document in question was executed only 18 months before suit was brought As to the admissibility of reports accompanying orders as hearsay evidence of

reputed possess on see *D, on an Choudh v Raj v Brojo Moh n* 29 C 198 (1901)

(3) *Hurronath Mullick v Nittanund Mull ck* supra

(4) S 3 cl (8) illust (n) Field Ev, 6th Ed 144

(5) *R v Ram Dutt* 23 W R Cr J 38 (18 4) per Jackson J

(6) Norton Ev 193 Field Ev 6th Ed 144 Taylor Ev II 576 79

picture gallery,

(1) And to prove
had necessarily

publicly jeered at in consequence of the libel was held to be admissible (2) And it was held that, on a prosecution for conspiracy assemble for the purpose of inspiring terror in be called to prove that several persons, who had complained to him that they were alarmed at these meetings and had requested him to send for military assistance (3) But the section has no application to the case of a Police officer, who goes round and collects a great number of statements from persons in different places, nor can he be permitted to give the result of these statements as evidence (4)

33 Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding or in a later stage of the same judicial proceeding, the truth of the facts which it states when the witness is dead, or cannot be found or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable Provided—

Relevancy of certain evidence for proving in subsequent proceeding the truth of facts there stated

that the proceeding was between the same parties or their representatives in interest,

that the adverse party in the first proceeding had the right and opportunity to cross examine,

that the questions in issue were substantially the same in the first as in the second proceeding

Explanation—A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.

Principle—The general rule is that the best evidence must be given no evidence will be received which is merely substitutionary in its nature so long as the original evidence is attainable Thus depositions are in general admissible only after proof that the parties who made them cannot themselves be produced (5) The present section states the circumstances under which secondary evidence of oral testimony may be given (6) Under these circumstances, the production of primary evidence is either wholly (as if the witness is dead or cannot be found, or is incapable or is kept away) or partially (as in the case of delay or expense), out of the party's power In the last mentioned case there is the further ground of convenience But the use of such secondary evidence is limited by certain provisos based on the following principles The first is

(1) *Du Bost v Beresford* 2 Camp 511 see Norton Ev 192 193 Taylor Ev § 579

(2) *Cook v Ward* 4 M & P 99 Phipson Ev 3rd Ed 319

(3) *R v Vincent* 9 C & P 275 *Redford v Birley* 3 Stark R 88

(4) *R v Ram Dutt* 13 W R Cr 35 (1874)

(5) Taylor Ev § 391 As to English and Indian Law see *Lanka Lakshmanna v Lanka Parithanani* 15 M L J 657

(6) cf Taylor E § 464

enacted on the grounds of reciprocity, because the right to use evidence, other than admissions, being co-extensive with the liability to be bound thereby, the adversary in the second suit has no power to offer evidence in his own favour which, had it been tendered against him, would have been clearly inadmissible(1), the *second* because it is certainly the right of every litigant, unless he

whose test

the party

as evidence

be so used (2) The principle involved in the *third* proviso in requiring identity of the matter in issue is to secure that in the former proceeding the parties were not without the opportunity

upon which their evidence

admission of such evidence

the parties and the issues being the same, and full opportunity of cross examination having been allowed, the second trial is virtually a continuation of the first (4) Where the conditions mentioned do not exist then the evidence

is not relevant (5)

s 3 ("Evidence")

s 3 ("Court")

s 3 ("Relevant")

s 57, cl 7 (Judicial notice of public officers)

ss 74, 76 77, 79 (Public documents

certified copies)

s 91 Except 1 (Appointment of public officer)

s 104 (Burden of proof)

ss 107, 108 (Burden of proof, death)

s 158 (Matters which may be proved in connection with statements under this section)

s 80 (Presumptions as to record of evidence)

Steph Dig., Art 32, and see Ch XII, Roscoe, N P Ev., 201—202, Best, Ev., §496 Powell, Ev., 9th Ed 88, 89, 326 337, Taylor Ev., §§ 464—478, and Ch V, *passim* 546—549, Starkie, Ev., 408, *et seq.* Phipson, Ev., 5th Ed 416—421, Norton, Ev., 193—198; Wills Ev., 2nd Ed., 248—263, Act X of 1873, ss 5, 13 (Indian Oaths), Cr Pr Code, ss 353—355 503, 509 512, 263, 264, Civ Pr Code, O XVIII, 2nd Ed., pp 842—849, Cr Pr Code, s 512 (absconding accused), s 298 (evidence taken before Committing Magistrate) Woodroffe and Ameer Ali's Civ Pr Code, O XXVI, rr 1—8, 2nd Ed., pp 1088—1092, Cr Pr Code (Evidence on Commission) See sections, as also Acts and Statutes cited, *post*

COMMENTARY.

Depositions
in former
trials

The conditions on which the evidence is receivable are analogous to those relating to judgments, and whenever a decree in one case would be evidence of the facts decided when tendered in another, then the testimony of a witness in the former trial, who was liable to cross examination but is incapable of being called, is receivable. Depositions of witnesses in a former suit are not admissible in evidence when those witnesses are living and their oral evidence is procurable (6) "This section gives the Court new powers which require to be

(1) Taylor Ev. § 469, *Doe v. Derby* 1 A & E 783 786, Norton Ev. 196 *Laurence v. French*, Drew, 472, *Morgan v. Nichol* L. R. C P, 117

(2) *Gorachand Sircar v. Ram Narain* 9 W. R. 587 (1868) see also *Gregory v. Dooley Chand* 14 W. R. 17 (1870) *post*

(3) *R. v. Rams Reddi* 3 M. 48 (1881) at p. 52 *Bal Gangadhar Tilak v. Shrinivas Pandit* P. C. 39 B. 441 (1915), 42 1 A 135 cf 19 C W N 729

(4) Whart., s 177, cited in Phipson,

Ev. 5th Ed 416

(5) *Ponnusami Pillai v. Singaram Pillai* 41 M. 731 s. c. 34 M. L. J. 526

(6) *Hurish Chunder v. Tara Chand* 2 B. L. R. App. 4 (1868) Taylor Ev. § 464 *Bhoobun Moyee v. Umbica Churn* 23 W. R. 343 (1874) See generally as to conditions of section *Chakauri Singh v. Suraj Kwar* 2 All. L. J. 91 (1904) in which the conditions of the section not being fulfilled the deposition was rejected.

exercised with great caution. There is no doubt that it is necessary (just as much as ever it was) to produce every witness at the trial, unless it is proved to be either actually impossible to produce him, or to be so difficult to do so that it is, under the circumstances, unreasonable to insist on his production" (1). The grounds of admissibility in the present section depend not, as in the case of the previous section, on the character of the statement and the subject to which it refers, but on the circumstances under which it was made and these circumstances (which must be shown to exist, in order to the admissibility of the evidence) are —

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or solemn affirmation (8) The evidence of a witness given in a proceeding before a Judge or Magistrate who had no jurisdiction and which was thus pronounced to be *coram non judice*, cannot therefore be used under this section on a re trial before a competent Court (9) Where a plaintiff fails to appear the Court has no jurisdiction to hear the defendant's evidence before dismissing the suit for want of prosecution and evidence so based cannot be used under this section (10) (b) That the witness is dead, or that the other grounds mentioned by the section exist thus inconvenience to witnesses is no ground (11) (v post) these grounds are (with the exception of the witness being kept away) the same as those enumerated in section 32, ante (c) That the conditions required by the provisos have been fulfilled (v post)

The burden of proving these facts lies on the person who tenders evidence under this section (12)

It is doubtful whether evidence taken on commission can be used by either party till it has been tendered (13) But in a later decision of the C to the practice of the Mofussil should first be tendered (15)

The evidence is admissible for the purpose of proving the truth of the facts which it states either in an entirely new judicial proceeding, or in a subsequent stage of the same proceeding

The Court has no discretion as to admitting a deposition when the witness (i) is dead, or (ii) cannot be found, or (iii) is incapable, or (iv) is kept out of the way, the deposition of such witnesses is declared to be relevant and must

(1) *R v Moujan* 20 W R Cr 69 (1873) per Macpherson J concurred in by White J in *R v Pyari Lal* 4 C L R 511 (1879) and see *R v Mulu* 2 A 648 (1880)

(2) This can be generally proved by the production of the Original Record & ss 80 57 cl (7) 91 Exception (1) post or a certified copy see ss 74 76 77 79 post Steph Introd 166

(3) See *R v Dassaji Gula* 3 B 334 (1878) [British Consul at Zanzibar]

(4) As to evidence taken on commission & Woodroffe Civ Pro Code O V VI 2nd Ed pp 1088—1092

(5) *R v Rigg* 4 F & F 1083 and see Acts IV of 1871 V of 1889 and ss 174—176 Cr Pro Code

(6) *Jeheto Sleikh v Janbanessa Bibi* 8 C W N 605 (1913)

(7) And see Civ Pr Code O V N 2nd

Ed pp 830—851

(8) Act X of 1873 s 5 but see s 13 ib

(9) *R v Rams Reddi* 3 M 48 (1881)

(10) *Kesri Chand v National Jute Mills* 40 C 119 (1913) distinguishing *ex parte Jacobson* 22 Ch D 312 (1887)

(11) *R v Burke* 6 A 224 (1884) as to s 288 Cr Pr Code v post

(12) S 140 post

(13) Woodroffe and Ameer Ali Civil Procedure Code 2nd Ed p 1097

(14) *Nistaran Dass v Kundo Lal* (1899) 3 C W N 239 *D arka Nath v Ganga Dayi* (1872) 8 B L R App 102 *Kusum Kumari v Satya Ranjan* (1903) 30 C 999 *Hemanta Kumari Banku Behari Sirdar* (1905) 9 C W N 794

(15) *Dhanu Rai Mahto v Murla Mahto* (1909) 36 C 567

and under section 91 (*post*), no other evidence of such deposition was admissible (1) The usual presumptions, however, in favour of the proceedings and depositions having been regular will be made unless the contrary be shown (2) But where the law either does *not* require the statements of witnesses to be reduced to writing (3), or merely requires the substance of the evidence of witnesses (4), or of witnesses and parties called as witnesses (5), to be recorded, it would seem also in the second (though not in the first) class of evidence of such statements as is admissible under this section (6) What a witness has orally testified may be proved either by any person who will swear from his own memory, or by notes taken at the time by any person who will swear to their accuracy, or possibly, from the necessity of the case by the Judge's notes How far it may be necessary to prove the *precise words* does not clearly appear Perhaps on occasions when nothing of importance turns on the precise expression used, it will be considered sufficient if the witness can speak with certainty to the substance of what was sworn on the former trial (7) When a note of the evidence has been made by a reporter or shorthand writer, he could, of course, use the note to refresh his memory, and from such a source a shorthand writer might be able to swear to the very words (8) Under English law a stricter rule is applied in Criminal than in Civil proceedings (9) But this section which is generally more extensive than the English law on the same subject (10), applies alike to Civil and Criminal proceedings

The distinction should be carefully preserved between the use of previous statements as evidence in chief or substantive evidence under this section and the use of previous statements (whether on oath or not and whether in a judicial proceeding or not) to discredit or corroborate a witness only and as admissions made by the witness in a former, is partly to a subsequent suit (11) Depositions may also be used as dying declarations under the preceding section or to refresh the memory of witnesses under section 159 if the conditions set forth in that section exist Depositions, though informally taken are receivable, like any

Use of
previous
statements

When in a judicial proceeding it appears that a deposition of a deceased witness may, under the preceding section be admissible even against strangers as for instance, if they relate to a custom prescription or pedigree where reputation would be evidence, for, as the unsworn declaration of persons deceased would be here received their declarations on oath are *a fortiori*

(1) *R v Mayadeb Gossa* 11 6 C 762 (1881) and see cases cited in notes to ss 80 91 Roscoe Cr Ev 63 66 Taylor Ev 1756 *post* See notes to s 91 *post*
(2) v s 114 *illust* (e) *post*
(3) S 263 Cr Pr Code
(4) Ss 264 355 *ib* (Cr Pr Code)
(5) Civ Pr Code O XVI r 21 2nd Ed p 835 O XVIII r 13 2nd Ed p 84
(6) See notes to s 91 *post*
(7) Taylor Ev §§ 546 547 and v *Mylapore Kristi nasa ni v R* (1909) 32 M 384
(8) Norton Ev 194 195
(9) Taylor Ev § 479a for rule in civil case see R S C 1883 O XXXVII r

27 and as to notice required in Chancery see *re Channell* (1877) 8 Ch D 49 and for use of deposition when inquiry was recommended before a second Magistrate owing to the illness of the first see *Ex parte Botto* 1 v (1909) 2 K B 14
(10) See Taylor Ev § 464 *et seq* Roscoe N P Ev 183—189 Powell Ev 9th Ed 326—337 Steph Dig Arts 125 140—142 Roscoe Cr Ev 61 *et seq* Norton L v 195 Phipson Ev 5th Ed 416—421 Wills Ev 2nd Ed 248—263
(11) See ss 21 *ante* and 145 153 157 *post* Roscoe Cr Ev 61 62 —*Soojan Bibi v Ishmus Ali* 14 B L R App 3 *post*
(12) Taylor Ev § 1754

admissible (1) When depositions are tendered in evidence as secondary proof of oral testimony they are of course open to all the objections which might have been raised had the witness himself been personally present at the trial. Leading and other illegal questions are therefore constantly suppressed together with the answers to them and thus too whether the testimony has been taken *via voce* or by written interrogatories (2) But a party cannot repudiate an answer which has been given to an illegal question put on his own side (3) And if secondary evidence of documents is improperly given on commission and is accepted without objection made it will be too late for the party against whom the evidence is given to take subsequently the objection which he might have urged at the time (1)

Contradiction
Corroboration

As to what matters may be proved in connection with statements under this section by way of contradiction corroboration or otherwise see section 158 *post* (5)

Death

Some proof of death must be offered and proper enquiries be shown to have been made (6) In proof of this fact reference should be made to the provisions of sections 107 108 *post* As to the discretion of the Court and proceedings *coram iudice & ante* (7)

Cannot be
found

It must be shown that reasonable exertion has been made to find the witness (8) A deposition was rejected because there was nothing on the record to show that by ordinary care and the use of ordinary means the witness could not have been produced (9) When a summons was properly taken out to be served on one JA at the Cutcherry house in which he lived but the peon in his return stated that as he was unable to find JA and serve him personally he hung up the summons on the Cutcherry house and there was evidence to show that JA suddenly disappeared from the Cutcherry house and it was further shown that enquiry was made in his native village whether he had returned there but the result of the enquiry was that nothing had been heard of him and it was therefore impossible to say where JA was or to serve him with a summons it was held that JA's deposition was properly admitted (10) How far answers to enquiries respecting the witness are admissible to prove that he cannot be found is not very clearly defined by the decisions That such answers will be rejected as hearsay if tendered in proof of the fact that the witness is abroad is beyond all doubt (11) but where the question is simply whether a diligent and unsuccessful search has been made for the witness it would seem both on principle and authority that the answers should be received as forming a prominent part of the very point to be ascertained (12) In order to show that enquiries have been duly made at the house of the witness his declarations as to where he lived cannot be received (13) neither will his statement in the deposition itself that he is about to go abroad render it unnecessary to prove that he has put his purpose into execution (14) Where a warrant is not

- (1) Taylor Ev § 1754
- (2) Taylor Ev 548 *Hutcheon v Barnard* 2 M & Rob 1 Norton Ev 198 R v Ramchandra Goud 19 B 49 760 "61 (1895)
- (3) Small v Norne 13 Q B 840
- (4) Robnson v Davies 1879 5 Q B D 76 Taylor § 548
- (5) See *Foolksbury Dosse v Nobn Clunder* 23 C 441 (1895)
- (6) Benson v Ol 2 Str 970
- (7) In the matter of Pyars Lal R v Pam Redd supra Taylor Ev 4
- (8) R v Luckey Varan 24 W R Cr 19 185 R v Mulin 2 A 646 (1880)
- (9) *Bocha Mistr v R* 5 C. 958 (1880)

- Ran Redd (n re) 3 M 48 (1881) R v Luktun Santhal 21 W R 56 (1874)
- (9) R v Motjan 29 W R Cr 69 (1873)
- (10) R v Rocha Mohato 7 C 42 (1881)
- (11) Taylor Ev § 45 Robnson v Marks 2 M & Rol 375 Doe v Powell 7 C & P 617
- (12) *Ib* Hault v Bateman 7 C & P 586 Burt v Walker 4 B & A 697 Aust v Ru sey 2 C & Kr 36 R v Rocha Mohato supra
- (13) Doe v Powell 7 C & P. 61
- (14) Proctor v La nson 7 C & P. 631

produced and there is no proof of an endeavour to serve it, a statement by the Police that one has been issued is not sufficient proof that a person cannot be found (1) Neither is a statement to that effect by a Public Prosecutor (2) Evidence purporting to have been recorded under section 512 of the Criminal Procedure Code cannot be used unless there is proof that the Court before recording it had received satisfactory evidence that the person had absconded and that there was no immediate prospect of arresting him (3) As to the Court's discretion, *v supra*

The words "incapable of giving evidence," it has been held, denote an incapacity of a permanent, and not of a temporary kind, and where a witness is proved to be incapable of giving evidence, the Court has no discretion as to admitting his deposition. But where the absence of a witness is casual or due to a temporary cause the Court has such a discretion "if his presence cannot be obtained without an amount of delay or expense, which under the circumstances the Court considers unreasonable" (4) In a subsequent case (5), however the Court was of opinion that the incapacity to give evidence contemplated by this section is not necessarily a permanent incapacity (6) To bring a case within the section, in order to admit the deposition of a witness alleged to be unable to attend by reason of illness, it is not sufficient that such witness should be stated to be ill and confined to the house but precise evidence should be required by the Court as to the nature of the illness and the incapacity to attend (7) If the witness be proved at the trial to be insane, his deposition will be admissible (8) If from the nature of the illness or other infirmity no reasonable hope remains that the witness will be able to appear in Court on any future occasion, his deposition is certainly admissible (9) Of course a doctor's certificate, however authentic in itself, is no legal evidence of the state of the witness. His condition must be proved on oath to the satisfaction of the Judge who tries the case. It appears to be established practice that in the case of a witness being alleged to be ill, the doctor, if he be attended by one, must be called to prove his condition (10) Where the attorney for the prosecution was put into the box to prove that the witness was unable to attend, and stated that the witness's residence was 23 miles off, and that he had seen him that morning in bed with his head shaved, Earle J, said "The evidence is short of that of a medical man, but the person extremely unwilling to appear as a witness to be ill as to deceive any one but a medical man, and the evidence was rejected (11) And Lord Coleridge, C J, in giving judgment in *R v Farrell* (12), said it would be dangerous to admit any such latitude of construction as would bring this case within the words of the Statute"

The proposition that if a witness be kept out of the way by the adversary, his former statements will be admissible, rests chiefly on the broad principle of

Kept out of the way

(1) *R v Kangan Mall* 41 C 601 (1914)

(2) *Annay Muthirizham* (in re) 39 M 449 (1916)

(3) *R v Rustem* 38 A 29 (1916)

(4) In the matter of *Pyari Lall* 4 C L R 504

(5) In the matter of *Asgar Hoossein* 8 C L R 124 (1881) s c 6 C 774

(6) *Per Pontifex and Field JJ* The dictum is obiter as it was not necessary to decide that question in the case *v Roscoe* Cr Ev 65 66 Taylor Ev § 472 478

(7) In the matter of *Asgar Hoossein*

supra

(8) Taylor Ev § 472—478 Roscoe Cr Ev 65 *Doc v Po cell* 7 C & P 617 Norton Ev 196

(9) Taylor Ev § 472—478 and cases there cited as to blindness *v s* 47 note

(10) Roscoe Cr Ev 66 — as a general rule it will be prudent though it is not absolutely necessary to have the testimony of a medical man Taylor Ev § 483

(11) *R v Phillips* 1 F & F 105 and see *R v Willian s* 4 F & F 515

(12) L R 2 C C R 116 see also *R v Willian* 9 Cox 281 *R v Bull* 12 Cox C C 31

justice, which will not permit a party to take advantage of his own wrong (1) In a case where three prisoners were indicted for felony, and a witness for the prosecution was proved to be absent through the procurement of one of them the Court held that his deposition might be read in evidence as against the man who had kept him out of the way, but that it could not be received against the other two men (2)

Delay or
expense

The last ground for admitting the deposition of an absent witness is governed by three considerations,—the delay the expense, and the circumstances of the case (3) Of the last one of the chief which the Judge has and ought to weigh is *the nature and importance of the statements contained in the deposition* It would be unreasonable to incur much delay and expense when the facts spoken to in the deposition are of the nature of formal evidence for the prosecution or supply some link in the case for the prosecution as to which little or no dispute exists or are facts to which other witnesses speak besides the deponent, and which witnesses are produced at the trial On the other hand it might be very reasonable to submit to much delay and considerable expense when the evidence of the deponent is vital to the success of the prosecution or has a very important bearing upon the guilt of the accused (4) Where the delay likely to have been occasioned was about a fortnight, and the witness lived or was staying within a short distance of the Court the witness's deposition was rejected (5) When the witnesses were at a considerable distance from the place of trial and their attendance was not easily procurable their depositions were admitted (6) Where the witness changed his lodging after the order was

made to find him (7) It is only in extreme cases of expense or delay that the personal attendance of a witness should be dispensed with (8) 'In my opinion it was intended that the provisions of the section as to emergency (delay or expense) were only to be sparingly applied and certainly not in a case like this where the witness was alive and his evidence reasonably procurable' (9) *Quare*—Whether the expense contemplated by this section is confined to the expense of obtaining the attendance of the witness or whether it also includes the expense of a deposition admitted a deposition not be procured

unreasonable that the witnesses would be inconvenienced, and that their evidence did not concern the accused personally having reference only to the identification of the property in respect of which the accused was charged —*Held* that the Sessions Judge had improperly admitted such evidence Inconvenience to witnesses is no ground allowed under this section and the question of identification was a most material one, and the evidence of the witnesses in question was of the utmost moment the whole case resting on it, and as

been

(1) Taylor *Ev.* § 473

(2) *R. v. Seafie* 17 Q. B. 238 s. c. 5 Cox 243

(3) *Asiatic Steam Navigation Co. v. Bengal Coal Co.* 35 Cal. 751

(4) In the matter of *Pyari Lal* supra per White J. at pp. 507 510

(5) *Ib.*

(6) *A. v. Rani Reddi* 3 M. 43 (1831)

(7) *R. v. Lukhy Naran* 24 W. R. Cr. 18 (1875)

(8) *R. v. Mulu* 2 A. 646 (1880)

(9) *Ib.* per Straught J. at p. 648

(10) In the matter of *Pyari Lal* supra at p. 509 *R. v. Lukhun Santhal* 21 W. R. Cr. 56 (1874)

(11) *R. v. Burke* 6 A. 224 (1834)

taken by commission, nor, looking at his position, could he arrange for their cross examination. Held also that on similar grounds the Sessions Judge was

witnesses (2) Where a Sessions Judge, finding that the witnesses who had been summoned to give evidence for the prosecution did not appear upon the date fixed, adjourned the trial, and on the witnesses failing to appear, the evidence which they had given was set aside, so under this section, it was held that the court ought to have compelled the witnesses to attend (3) But where on remand by the Bombay High Court for the determination of certain issues, the District Court sent down the case to the first Court in order that the evidence might be taken there, and the evidence of the plaintiff was taken on commission, it was held that the defendant was not aggrieved by that procedure (4)

The 'proceeding' referred to is the former proceeding the language would have been more accurate if it had been — "those whom they represent in interest" (5) It makes no difference that the parties are differently marshalled in the two proceedings, the plaintiffs in the first proceeding being defendant in the second, or vice versa, nor if there have been plurality of parties in the one case and not in the other. Therefore, where a witness testified in a suit in which A and several others were plaintiffs and B defendant, his testimony

Same parties

same parties or their representatives in interest at the time when the suits are proceeding and the evidence is given (9) This section does not apply to the deposition of a witness in a former suit, when the witness is himself a defendant in the subsequent suit, and the deposition is sought to be used against him, not as evidence given between the parties, one of whom called him as a witness, but as a statement made by him, which would be evidence against him whether he made it as a witness or on any other occasion. Such a deposition is admissible under the sections relating to admissions, although it might be shown that the facts were different from what on the former occasion they were stated to be (10) (v. post, Note to Explanation) Statements of Insolvents under section 27 sub-section (1) of the Presidency Towns Insolvency Act cannot be received in evidence in a subsequent suit brought against them by their creditors, neither this section nor the last being in such case of avail (11)

(1) *Ib.*, see also *R v Jacob*, 19 C (1891) at p 120

(2) *R v Lukhun Santhal* supra

(3) *R v Nande Khan* A W N, 202 (1905) 2 A L J 599

(4) *Kashaba v Chandrabhogaba* (1908) 32 B 141

(5) *Norton*, Ev 169

(6) *Wright v Doe d Tatha* : 1 A & E 3

(7) *R v Ishry Singh* 8 A, 672 (1886) *R v Rams Reddi* 3 M 45 (1881) *R v Vaman* 5 Bom L R 599 601 (1903)

Cf Mahomed Khan v Mussamat Fattah 12 F L R 1919 *Deb Singh v Emperor* 20 Cr L J, 625

(8) See *Mrinmoyee Dabee v Bhoobun* 10 C Dabee 15 B L R 5 (1874) s c

23 W R 42 and notes to ss 21 ante and 40 post As to judgments for or against a remainderman where there are several remainders limited by one deed see remarks of Couch C J 15 B L R 6 supra and *Pyle v Crouch* 1 Ld Raym 30 *Doe d Lloyd v Pasingham* 2 C & P 446

(9) *Sutanath Dass v Mohesh Chunder*, 12 C 727 (1886)

(10) *Soojan Bibee v Achmut Ali* 14 B L R App 3 (1874) s c 21 W R 414

(11) *Luchram Moulal Boid v Radha* 49 C, 93 (1922).

Cross-examination

Under the old law, as well as under the present section, there must have been the right and opportunity to cross examine(1), and therefore if a commission be executed without any notice, or without a sufficient notice(2) being given to the opposite party, to enable him, if he pleases, to put cross interrogatories, the depositions will be rejected(3), yet it is by no means requisite that he should exercise that power. and if notice has been given to him of the time

cross-examine

be presumed

So, where

to examine

witnesses upon interrogatories, gave notice that he declined to proceed with the examination, whereupon the plaintiff sent him word that he should apply for a commission *ex parte*, which he accordingly did the Court held that the examinations taken under this order were admissible in evidence, although the defendant had received no notice of the time and place of taking them (5) The deposition of a witness who was not cross examined before the committing Magistrate and who died before the trial, has been held to be admissible in evidence inasmuch as the accused persons had the right and opportunity of cross examining him notwithstanding the omission of their pleader to avail himself of that right (6) But in a later case it was held that the admissibility of such a deposition was doubtful and that in any case its evidentiary value was small and it was said that the practice of postponing cross-examination at this stage in certain cases should be considered in deciding whether there had been an opportunity to cross examine (7) The words "opportunity to cross

But,
r that
show

Assistant Commissioner that the prisoner had an opportunity of cross examining and declined to avail himself of it We think that in order to make a deposition admissible under section 33, there must be evidence that the accused person did, in fact, have an opportunity of cross examining"(11) So also it has been held in the Bombay High Court that to make evidence admissible against an accused person, the fact that he had full opportunity of cross examination, if not admitted, must be proved (12) *Quære*—whether the

(1) *R v Eluarce Dharee* 21 W R Cr 12 (1874), and see *R v Luckhy Narsin* 24 W R Cr 18 (1875), *Atty Genl v Davison*, 11 Cl & G 160 Taylor, F., § 466, *R v Ishri Singh* 8 A, 672 (1886), *R v Ramchandra Govind* 19 B 749 757 (1895) [There may be circumstances where although a prisoner has the right he has not the opportunity, e.g., where the witness is at a great distance and the prisoner cannot go to the place and is too poor to employ a pleader or too unfamiliar with the ways of the place to get legal help there] *Per* Jardine, J

(11) *Fitzgerald v Fitzgerald*, 3 Sw & Tr 197 *Tarnucknath Mookerjee v Gourree Churn* 1 W R 47 (1865)

(3) *Steinkeller v Newton*, 9 C & P, 113 see *Gregory v Dooley Chand*, 14 W R 17 (1870)

(4) *Taylor, Ev*, § 466, *Cazenove v Laughan* 1 M & Sel, 4, *R v Mexican* 20 W R 69 (1873), *Norton* 156 197

(5) *McCombie v Anton* 6 M & Gr, 27 (6) *R v Barranta*, 2 Bom L R 761 (1900) 25 B 168

(7) *Ibrahim v King Emperor*, 17 C W 230 (1912)

(8) *R v Ram Chandra Govind* 10 B, 49 (1895)

(9) *R v Peacock* 12 Cox C C 21

(10) 20 W R Cr, 69 (1873)

(11) *Id* at p 70 *per* Macpherson J

(12) *A v Ramchandra Govind* 19 B

opportunity to administer cross interrogatories under a commission is "an opportunity to cross-examine" within the meaning of the proviso, so as to render the evidence taken on interrogatories admissible (1) The section requires an effectual cross-examination complete and not partial Therefore where a commission was returned when the witness had been in part but before he had been fully, cross-examined it was held to be inadmissible (2) Platt, B., in *R v Johnson* (3), reprobated the practice of taking depositions in the absence of the prisoner and then supplying the omission by reading them over to the prisoner and asking him if he would like to put any question to the witnesses The Magistrate should when the prisoner is undefended, invite him to cross-examine the witnesses at the end of each examination and not merely at the end of all the examinations and should allow him sufficient time to consider his questions (4) The fact that deceased attesting witnesses to a mortgage were cross-examined by the Special Registrar is enough to make the evidence admissible under this section (5) A deposition of a prosecution witness is admissible in evidence if the accused had an opportunity of cross-examining him before the charge and there was no opportunity for further cross-examination after charge (6)

The question in issue must have been *substantially the same* in the first as in the second proceeding And so if in a dispute respecting lands any fact comes directly in issue the testimony given to that fact is admissible to prove the same point in another action between the same parties or their privies, though the last suit relates to *other* lands (7) So also in the proceedings before a Magistrate on a charge of causing grievous hurt, two (among other) witnesses, one of whom was the person assaulted were examined on behalf of the prosecution The prisoners were committed for trial Subsequently the person assaulted died in consequence of the injuries inflicted on him At the trial, before the Sessions Judge charges of murder and of culpable homicide, not amounting to murder were added to the charge of grievous hurt The deposition of the deceased witness was put in and read at the Sessions trial—*Held* that the evidence was admissible, either under the first clause of section 32, or this section notwithstanding the additional charges before the Sessions Court The question whether the proviso is applicable—that is whether the questions at issue are substantially the same depends upon *whether the same evidence is applicable* although different consequences may follow from the same act (8)

Now here the act was the stroke of a sword which though it did not immediately cause the death of the deceased yet conduced to bring about that result subsequently In consequence of the person having died the gravity of the offence became presumptively increased but *the evidence to prove the act with which the accused was charged remained precisely the same* We therefore think that this evidence was properly admitted under the thirty third section (9) A statement made by a witness in a civil suit concerning the authenticity of a document before the Court may be admissible in evidence on the prosecution of a party to the suit for an offence relating to the document the witness having

Question
in issue

(1) *R v Ran chandra Govind* supra.

(2) *Bo sogomoff v Nalopiet Jute Co*, 5 C W N 605 (1911)

(3) 2 C & K 394 and see ss 353, 537 Cr Ir Code and notes to ss 135 167 post and *R v B shonath Pal* 12 W R Cr 3 (1869) *R v Mohun Bai* for 22 W R Cr 38 (1874) *Ali Meah* in re 25 W R Cr 14 (1876) *R v Na dra* 9 A 609 (1887) Norton Ex 197

(4) *R v Day* 6 Cox 55 *R v Watts* 9 Cox 95

(5) *Jeheto Sheskh v Ja baressa Bibi* 18 C W N 605 (1911)

(6) *Lockley v King Eric o* 43 W 411

(7) *Doe d Derby v Foster* 1 A & E 791 cited in *R v Rams Ridd* 3 M 48 (1881) see also *Laurence v French* 4 Drex 472 Phipson E 5th Ed 418

(8) *R v Rochia Mokato* C 42 (1881) s c 8 C L R 773

(9) *Id per Pontifex* I see Taylor Γ § 46 468 Norton Ex 195

since died, but such a statement witness in the same civil suit acc the party and of perjury (1) in the plural seems to imply th the same in both proceedings to render the evidence admissible, that is not the intention of the law. And though separate proceedings may involve issues of which some only are common to both, the evidence to those common issues given in the former proceedings may (on the conditions mentioned in section 33 arising) be given in the subsequent proceedings (2). The evidence of witnesses examined in an enquiry held by a Sub Registrar under section 41 (2) of the Registration Act as to the genuineness of a will is admissible in evidence in a subsequent suit between the same parties raising an issue as to the genuineness of the will if it is proved that the witnesses are dead at the time of the suit and that the adverse party at the enquiry before the Sub Registrar had an opportunity of cross examining the witnesses (3). In deciding whether the questions in issue are substantially the same, it is always a useful test to see whether the same evidence will prove the affirmative of the issue in both (4).

Explanation
to section

The Explanation to the section is inserted for the purpose of excluding the objection which may arise, when the depositions are taken in criminal cases, that they cannot be used in a subsequent proceeding for want of mutuality.

Thus a prosecution was instituted by *S* against *N C B* at the instance, and on behalf, of *F*, for criminal trespass into a house belonging to *F* (Penal Code,

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secution for trespass and the civil suit were the same that *N C B* had had the right and opportunity to cross examine and had, in fact, exercised that right, that the issues in the civil suit were whether *F* was in possession and whether *N C B*'s entry was unlawful, and that in order to establish the charge of criminal trespass, it had had to be shown that *F* was in possession, that *N C B* had unlawfully ousted her and that such ouster was with a criminal intent, that two of the issues in the suit were the same as those in the criminal trial, that the fact that there was an additional issue in the criminal trial made no difference (6), and that under the above circumstances the deposition of *S* in the criminal trial was admissible in the civil suit, in proof of the issue therein of possession. A certified copy of the deposition was therefore tendered and on objection that such copy was inadmissible and that the original record should be produced, the objection was overruled and the certified copy admitted in evidence. A witness under examination was then asked what information *S* had given him on the morning following the date of dispossession. On

(1) *Emperor v. Kadhe* Vol 42 A. 24
(2) *R v. Ramu Reddi*, 3 M. 48 (1881),
at p. 52

(3) *Lanka Lakshmanan v. Lanka Var
alanam* 35 M. L. J. 657, s. c. 42 M.
100

(4) *Field Ex.* 6th Ed. 149, see *R v.
P. in Mohara* supra.

(5) *Norton v. 197* 198 for the ques-
tion who is prosecutor see *Gaya Prasad
v. Bhagat Singh* 30 A. 525 and *Pandi
Gaya Prasad Tewari v. Sardar Bhagat
Singh* P. C. (1903) Times L. R. v. 24
at p. 46

(6) See *R v. Ramu Reddi*, supra.

objection being again taken, the question was held admissible under section 158 in corroboration of the deposition of S in the criminal trial (1)

Notwithstanding anything contained in this section Act XIV of 1908, Indian Criminal Law Amendment Act s. 13, provides for a special rule of evidence in the case of the trial of offences under that Act

(1) *Foolkissora Dossee v. Robin Chunder*, 23 C., 441 (1895)

since died, but such a statement can not be treated as evidence against another witness in the same civil suit accused of abetment of the offence charged against the party and of perjury (1) "Although the Act in using the word 'questions' in the plural seems to imply that it is essential that *all* the questions shall be the same in both proceedings to render the evidence admissible, that is not the intention of the law. And though separate proceedings may involve issues of which some only are common to both, the evidence to those common issues

is admissible in section 33

The evidence of witnesses

under section 41 (2) of the

Registration Act as to the genuineness of a will is admissible in evidence in a subsequent suit between the same parties raising an issue as to the genuineness of the will if it is proved that the witnesses are dead at the time of the suit and that the adverse party at the enquiry before the Sub Registrar had an opportunity of cross examining the witnesses (3). In deciding whether the questions in issue are substantially the same it is always a useful test to see whether the same evidence will prove the affirmative of the issue in both (4)

Explanation
to section

The Explanation to the section is inserted for the purpose of excluding the objection which may arise when the depositions are taken in criminal cases that they cannot be used in a subsequent proceeding for want of mutuality because the King is the prosecutor in all criminal proceedings (5). As so explained the section admits of the use in a civil suit of a deposition taken in a criminal trial or the reverse provided the conditions of the section are fulfilled. Thus a prosecution was instituted by *S* against *N C B* at the instance and on behalf of *F*, for criminal trespass into a house belonging to *F* (Penal Code

352 501)

subsequently

under section

41 (2) of the

Registration Act

died. At the hearing of the suit the deposition of *S* in the Criminal Court was tendered on the issue of possession. It was held that according to the evidence the charge of criminal trespass had been at the instance of *F*, and was therefore the charge of *F* as the real prosecutor that therefore the parties in both the prosecution for trespass and the civil suit were the same that *N C B* had had the right and opportunity to cross examine and had in fact exercised that right that the issues in the civil suit were whether *F* was in possession and whether *N C B*'s entry was unlawful and that in order to establish the charge of criminal trespass it had had to be shown that *F* was in possession that *N C B* had unlawfully ousted her and that such ouster was with a criminal intent that two of the issues in the suit were the same as those in the criminal trial that the fact that there was an additional issue in the criminal trial made no difference (6) and that under the above circumstances the deposition of *S* in the criminal trial was admissible in the civil suit in proof of the issue therein of possession. A certified copy of the deposition was therefore tendered and on objection that such copy was inadmissible and that the original record should be produced the objection was overruled and the certified copy admitted in evidence. A witness under examination was then asked what information *S* had given him on the morning following the date of dispossession. On

(1) *Emperor v. Kadhe* Vol 42 A 24

(2) *R v. Rani Reddi* 3 M 48 (1881)

at p 52

(3) *Lanka Lakshmanna v. Lanka Var*

Haami 30 M L J 657 s.c. 42 M

103

(4) *Field Ev.* 6th Ed 149 see *R v.*

Rani Lakshmi supra.

(5) *Norton v. 197 198* for the ques-
tion who is prosecutor see *Gaya Prasad*

v. Bhagat Singh 30 A 575 and *Pandi*

Gaya Parshad Tewari v. Sardar Bha.

Singh P C (1903) Times L R v 21

at p 46

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(1) *Foolkissory Dossee v Nobin Chunder* 23 C 441 (1895)

circumstances as to carry conviction that they are true" (1) They are, moreover, subject to the restrictions that they shall not be alone sufficient evidence to charge any one with liability without some independent evidence of the facts stated in them (2) The second class of statements are contained either in public documents such as official books, registers or records or in documents of at least a public character, such as maps offered for public sale. The grounds upon which these statements are admissible have been given in the Notes to the following sections. Public documents are entitled to an extraordinary degree of confidence on the ground of the credit due to the agents who have made them and of the public nature of the facts contained in them. Where particular facts are enquired into and recorded for the benefit of the public those who are empowered to act in making such investigations and memorials are in fact the agents of all the individuals who compose the public and every member of the community may be supposed to be privy to the investigation (3) The other documents mentioned in the following sections such as maps offered for public sale deal with matters of public interest are accessible to the entire community and being open to its criticism are unlikely to be inaccurate and if inaccurate, are liable to detection and to consequent correction (4)

34 Entries in books of account, regularly kept in the course of business, are relevant (5) whenever they refer to a matter into which the Court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability

Entries in books of account when relevant

Illustration

A sues B for Rs. 1 (00) and shows entries in his account books showing B to be indebted to him in this amount. The entries are relevant but are not sufficient without other evidence to prove the debt.

Principle—The presumption of truth which arises from the character and nature of this evidence and its constant liability if false to be detected (1 Introduction *supra* and the second clause of section 32)

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| <p>• 32 cl (2) (Statement made in course of business by person who can be called)</p> <p>• 65 (a) (Numerous accounts secondary evidence)</p> | <p>• 32 cl (3) (Statement against interest by some person)</p> <p>• 39 (How much of a statement is to be proved)</p> <p>• 3 (Relevant)</p> |
|--|--|

Widdie and Amir Ali's Civil Procedure Code O XVIII r 5 2nd Ed p 807 (Production of Account Books in Evidence) O XXVI rr 11 12 2nd Ed pp 1097 1098 (Committees to examine Accounts) Act VII of 1913 (as amended by Acts V and VI of 1914 and Act XLII of 1920) (Indian Companies) s 240 Acts XVIII of 1891 and I of 1893 (Bankers' Books and Books of Post Office Savings Bank and Money Order Offices) Taylor Ev § 709 Best Ev §§ 501 503 Field Ev 6th Ed 153 *Id* Appendix 4th Ed Wigmore Ev § 1518

(1) v s 32 cl (2) *supra* Taylor Ev § 709 Powell Ev 9th Ed 316 Starkie Ev 65 Steph Intro 164 165 Jaswant Singh v Sheo Narain *supra* 161 162 one test of genuineness is correspondence of books with themselves but a better is correspondence with other evidence id

(2) s 34 *post* and Commentary

(3) Starkie Ev 277 23 See *Samar Dasadh v Juggul Kshore* 23 C 366 370 (1895)

(4) v ss 36 38 *post*

(5) Relevant means admissible *Lala Laksh v Sayed Halder* 3 C W N 22 (1889)

COMMENTARY.

Books of
account

A question sometimes arises whether a particular account should be considered, and can be referred to as the original account. If accounts be merely memoranda and rough books from which the regular accounts are prepared, the former, it has been said, can hardly be considered the original account (1). Where account books, though dealing with the same subject matter, deal with it in different ways as in the case of a day book, cash book, ledger or the like, each of such books is an original account-book (2).

This section takes the place of section 43 of the repealed Act II of 1855 which was as follows: "Books proved to have been regularly kept in the course of business shall be admissible as corroborative but not as independent proof of the facts stated therein." Under that Act, therefore, account books would not have been admissible to prove a fact unless some other evidence tending to establish the same fact had also been given. "But the language" of that Act "differs very materially from that of the present Act. That language has not been adopted in the present Act. The only limitation in section 31 is that statements contained in documents of this kind shall not alone be sufficient to charge any one with liability. It appears to me that this change of expression has made substantial alteration in the law" (3). Therefore documents (*jama uasil baki* papers) admissible under this section though not alone sufficient to charge any one with liability were held to be sufficient to answer a claim set up to exemption from what would be the ordinary liability of a tenant *e.g.* in a suit for enhancement of rent to rebut a presumption arising from uniform payment for 23 years (4). These documents were not used alone in order to charge the defendant with the liability that had been imposed upon him. He was charged with the rent of the land he occupied by reason of its occupation by him, that rent being considered a fair and equitable rent for the land occupied, and what these documents were used for was not to charge him with the liability, but to answer the claim which he set up to exemption from what would be the ordinary liability of a tenant (5). Therefore, books of account when not used to charge a person with liability (civil or criminal) (6) may be used as independent evidence requiring no corroboration but when sought to be so used they must be corroborated by other substantive evidence independent of them (7). And in this sense books of accounts remain under the present as under the repealed Act, corroborative evidence only and cannot be used as independent primary evidence of the payment or other items to which the entry refers nor when payments entered in many of the items of a book of account are corroborated by other evidence can the inference be raised thereon that even the entries which are not so corroborated are accurate or in other words afford good substantive evidence of the

(1) *Raja Peary v Narendra Nath* 9 C W N 421 431 (1905). See Wigmore Ev § 1558.

(2) *Megraj v Seunawan* 5 C W N celxxviii (1901) see s. 63 post.

(3) *Belacet Khan v Rash Beharee* 22 W R 549 (1874) per Markby J (v post) the present section substitutes regularly kept for proved to have been regularly kept but of course proof is still required except in those cases in which it is rendered unnecessary by the admissions of the parties. As to account books as corroborative evidence of separation in estate see *Jagun Koor v Raghoonund* in Ill 10 W R (1868). As to Act II of 1855 see *Ramkrishna Pal v Hurjados Koondoo* Marshall 219 (1862).

(4) *Ib*.

(5) *Ib* this decision in so far as it held *jama-uasil baki* papers *in gilt* in certain cases be other than corroborative evidence only appears to be dissented from by Prinsep and Bose JJ in *Sur non oyi v Johur Mahomed* 10 C L R. 546 (1882) v post but it does not appear in the latter case what use was sought to be made therein of these papers see also *Gopal Mondul v Nobo Kishen* 5 W R. (Act N) 83 (1866) *Sitib Pershad v Promothonaith Glose* 10 W R. 193 (1868) and post.

(6) *R v Hurddeep Sahoy* 23 W R. Cr 27 (1875).

(7) *Ib* *Duarka Dass v Sant Bhat* 18 A 92 (1895).

payments to which they refer (1) This section only lays down that a plaintiff cannot obtain a decree by merely proving the existence of certain entries in his books of account, even though those books are shown to be kept in the regular course of the business. He will have to show further by some independent evidence that the entries represent real and honest transactions and that the monies were paid in accordance with those entries. No particular form or kind of evidence in addition to the entries is required. Any relevant facts which can be treated as evidence within the meaning of the Evidence Act would be sufficient corroboration of the evidence furnished in the books of account, if true (2) Entries in accounts relevant only under this section are not by themselves alone sufficient to charge any person with liability; corroboration is required (3) But where accounts are relevant also under the second clause of section 32 they are in law sufficient evidence in themselves, and the law does not, as in the case of accounts admissible under only this section, require corroboration. Entries in accounts may in the same suit be relevant under both the sections, and in that case the necessity for corroboration does not apply (4) In a suit to recover money due upon a running account the plaintiff produced his account books which were found to be books regularly kept in the course of business in support of his claim. One of the plaintiffs gave evidence as to the entries in the account books, but in such a manner that it was not clear whether he spoke from his personal knowledge of the transactions entered in the books, the entries in which were largely in his own handwriting or simply as one describing the state of affairs that was shown by the books. He was cross-examined, but no questions were asked him to show that he was not speaking as to his personal knowledge. *Held* that the evidence given as above should be interpreted in the manner most favourable to the plaintiff and might be accepted in support of the entries in the plaintiff's account books which by themselves would not have been sufficient to charge the defendants with liability (5) The mere production of the books without further proof is not enough (6), and such further proof must be afforded by substantive evidence independent of them as by that of witnesses who speak to the payment of

mercantile books of the banking firm and of a general statement by the defendant *G P* that the items in those books were correct. Their Lordships are of opinion that the books being (as is admitted) at most corroborative evidence, the mere general statement of the banker, where the fact of the payments was distinctly put in issue to the effect that his books were correctly kept, was not sufficient to satisfy the burden of proof that lay upon him particularly as with respect to many of the disputed items he had the means of producing much better evidence. (8) It has been held that though the actual entries in books of account are relevant to the extent provided by the section, such a book is not by itself relevant to raise an inference from the absence of any entry relating to a particular matter. (9) The decision cited, if it is to be taken to have ruled that the fact

(1) *R v Hurdeep Sahoy* 23 W R Cr 27 (1875)

(2) *Yesudharan v Subba Naicker* 52 I C 704

(3) *Abdul Ali v Puran Mal* 49 P R C J No 82 p 289 (1914)

(4) *Ra ipyabhai v Balaji Shridhar* 6 Bom L R 50 (1904) s c 28 B 294

(5) *Duarka Doss v Sant Buksh* 18 A 92 (1895)

(6) *Sri Kishen v Hur Kishen* 5 V

I A 432 *Sorabjee Vacha v Koorjee Manikjee* 1 M I A 47 s c 5 W R

(P C) 29 (1866) *Roushan Bhee v Hurray Kristo* 8 C 931

(7) *R v Hurdeep Sahoy* 23 W R Cr 27 (1875) and *v post*

(8) *Cunga Pershad v Inderjit Singh*, 23 W R (P C) 390 (1878)

(9) *R v Grees Chunder*, 10 C 1074 (1884) and see in the matter of *Juggun Jall* C L R. 356

of the absence of an entry is not evidence at all under any section of the act is it is submitted, erroneous and has not in such sense been followed (1) This section which deals with the question how far ties with liability, does not obvi that there is no entry is not admissible under this section but may be so under other sections of the act as for instance the ninth and eleventh sections Thus evidence having been given of the visit of *M* to Calcutta which he denied the latter's son was called by the other party to corroborate *M*'s statement He deposed that it was usual when a partner of his firm (to which both he and *M* belonged) made a journey on the firm's business journey and he was allowed to state that there was no entry if the party uses the statement of the party must be put in evidence but the Judge is not bound to believe the whole of it If, for instance the Judge upon the evidence really believes that the payments credited in a plaintiff's account books were made although he disbelieves the entry as to the amount of the debits there is nothing inequitable in his giving the defendant the benefit of the payments The Judge is bound to look at the whole of the entries, giving credit to such as he believes to be true and discrediting those which he believes to be false (3) Books of account regularly kept may be appealed to not only for the purpose of refreshing the memory of a witness but also as corroborative evidence of the story which he tells Books of account containing entries referring to a particular transaction are not entitled to the same credit that is given to the books that record that transaction in common with other transactions in the ordinary course of business (4) Where any company is being wound up all books accounts and documents of the Company and of the liquidators are as between the contributors of the Company *prima facie* evidence of the truth of all matters purporting to be therein recorded (5) As to a *hathchutta* book being in the absence of fraud binding upon the vendor for whose security it is kept see the undermentioned case (6) Besides their use as corroborative evidence under this section entries in books of account may, under the conditions mentioned in section 159 be used to refresh the memory or as admissions (*vide ante*) and also under other sections of the Act Further statements made in books kept in the ordinary course of business by persons who cannot be called as witnesses may be proved under the provisions of the second clause of the thirty second section (7)

kept in the regular course of business

The book must have been kept in the regular course of business A too limited meaning must not be given to this part of the section Where one of the plaintiff's witnesses named *K T* stated in cross examination that he had formerly been employed by *C D* at intervals of a week or fortnight to make entries in his (*C D*'s) cash book relating to private transactions which he (the witness) did from *C*'s loose memoranda or from oral instructions given by *C* and if this cash book was tendered in evidence West J refused to receive it and said — 'Under section 34 of the Evidence Act I do not think this book comes within

(1) *Sagurmull v Manraj* 4 C. W. N. ccvi (1900) In *Ram Pershad v Lakshmi Koer* 30 C. at p 247 Lord Davey referred to *R v Grees Clunder* 10 C. 1024 *supra* and Lord Robertson said The Act applies to entries in books of account but no inference can be drawn from the absence of an entry relating to any particular matter but this remark must be taken to have been made with reference to the preceding statement of Counsel which referred to this section

(2) *Sagurmull v Manraj* 4 C. W. N. cc (1900)

(3) *Isan Chunder v Haron Sydar* 11 W. R. 525 (1869) per Peacock C. J.

(4) *Bhog Hong Kong v Ramanathan Chetty* 29 C. 334 (1902) s. c. 4 Bom. L. R. 378

(5) Act VII of 1913 (Indian Companies) s. 240

(6) *Gopee Mohun v Abdool Rajah* 1 Jur. N. S. 338 (1866)

(7) *vide ante*

the designation of books of account regularly kept in the course of business. It is the private account book entered up casually once a week or fortnight and with none of the claims to confidence that attach to books entered up from day to day or (as in banks) from hour to hour as transactions take place. These only in I think regularly kept in the course of business' (1). But in a later

day to day or from hour to hour make them entirely irrelevant. It is thus not necessary that the entry should have been made at the time of the transaction provided

In the case cited

taluldar's estate

head office where they were abstracted and entered in an account book under the date of entry that being in some cases many days after the transaction of payment or receipt but the entries were made in their proper order on the authority of the officer who is duty it was to receive or pay the money. It was held that the entry in the account book was admissible as corroborative evidence of oral testimony as to the fact of a payment for what it was worth objection being only to be made to its weight not to its relevance under this section (3). But account books though proved not to have been regularly kept in the course of business but proved to have been kept on behalf of a firm of contractors by its servant or agent appointed for that purpose are relevant as admissions against the firm (4).

The regular proof of books and accounts required that the clerks who have kept those accounts or some person competent to speak to the facts should be called to prove that they have been regularly kept and to prove their general accuracy (5). Yet the necessity of strict proof may be removed by the admission of the defendant and the fact of the absence by him of any evidence to impeach the accuracy of the accounts the disputed items being satisfactorily accounted for (6). The section simply requires that entries in accounts should

Proof of accounts

which affects the value not the admissibility of the entries (7).

Jama wasil baki papers are accounts made up at the end of the year showing the total rent demandable from each *ranyat* for the current year the balance of previous years the amount collected during the year the balance due at the end thereof and sometimes an account of the land as well as the rent (8). They have been proved to have been kept by themselves they are not admissible of rent mentioned therein but it is

Jama wasil baki papers

(1) *Minchershaw Bejony v New Delhi Spinning Co* 34 B 56 (1880) at p 583 referred to in *Agarwal v Bha* 23 B 66 (1898).

(2) *Deputy Commissioner of Bara Baki v Rani Pershad* 2 C 118 (1899) s c 4 C W N 147.

(3) *Deputy Commissioner of Bara Baki v Rani Pershad* 27 C 118 (1899) s c 4 C W N 147.

(4) *Minchershaw Bejony v New Delhi Spinning Co* 4 B 576 (1880).

(5) *Darke Dass Jahee Dass* 6 M

I A 88 (1855) t p 98.

(6) As to Bankers Books and the book of Post Office Savings Banks and Money Order Office Acts XXIII of 1891 and I f 189.

(7) *Rani Hanata* 1 B 610 (1877) t p 616.

(8) *Feld E* 4th Ed *Appendix*.

(9) *Rani Lal v Tara Soondari* 7 W 80 (1867) *Kierro Moce v Bejony* 80 d W R 533 (1867) *Bejony* 80 d Bie koo R 10 W R 291 (1868) Jackson J doubts ng

perfectly right that a person who has prepared such papers on receiving payments of the rents should refresh his memory from such papers when giving evidence as to the amount of rent payable, when so used they are not used as 'independent evidence' (1) In a suit where the Lower Court found upon the evidence of (*inter alia*) certain *jama uasil baki* papers that the defendant had been the plaintiff's tenant at a certain rate of rent and gave the plaintiff a decree for that rent, it was observed as follows — "Then it is said that in the first Court, the Munsiff relied improperly on certain *jama uasil-baki* papers. These *jama uasil baki* papers, we all know, are not evidence by themselves. The mere production of such papers is not enough. But coupled with other evidence these papers often afford a very useful guide to the truth in cases of this kind, and it is only right that those who have been collecting rent with the assistance of such papers should produce them in Court" (2) And in a suit (3) for arrears of rent at an enhanced rate it was said — "The appellant's pleader contends that the *jama uasil baki* papers under the Evidence Act of 1872 are no longer Judge has taken a But we would obs

that therefore the
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e *Belact Khan v*

(4) we are not aware of any case in which this Court has regarded *jama uasil baki* papers in a different light. In fact, so far as my own individual experience goes as a Judge of this Court I have never known them to be looked upon as anything else. It seems to us moreover that the terms of section 34 of the Evidence Act do not give such papers any weight beyond that of corroborative evidence (5)

Value of
these
papers

With regard to the value to be attached to these papers there have been varying decisions. In a suit for possession on the allegation of wrongful dispossession it was said — *Jama uasil baki* papers in a case of this kind are really of very little consequence or value as it is a matter of perfect ease for either party in the suit to produce any number of such papers the absence of particular papers of this kind does not appear to be a very material omission (6) In the case of *Allyat Chinaman v Juggut Chunder* (7) the Court (8) remarked as follows — "But it is contended their allegations are corroborated by the *jama uasil baki* papers filed by the respondent in which the names of these *rajats* are entered. Now we observe that such a document—a private memorandum made for the zemindar's own use and by his own servants—must be looked upon as a case like the present than as a production of a document which has been examined and found to be a person calling himself a *Jurkun s mularrir* has been produced to depose to the signature to this particular paper, but the tehsildar himself has not been examined and it is not pretended that the man is either dead or unable to depose. The best evidence was required to prove a document so naturally open to suspicion and that evidence has not been given." In a subsequent case (9) Norman J., referring to this case said — "As to the value of *jama uasil baki* papers as evidence in rent suits for the zemindar the Deputy Collector quotes a passage from the 5th Volume of the Weekly Reporter, p. 213 and treats it as if the language applied to all *jama uasil bakis*. But there is a wide distinction between the

(1) *Akhill Chandra v Nayu* 10 C. 248 (1883) and see *Malomed Mahmood v Safar Ali* 11 C. 409 (1885)

(2) *Roushan Bibee v Hurray Kristo* 8 C. 931 (1887) per Garth C. J.

(3) *Surnonovi v Johur Mahomed* 10 C. 1 R. 545 (1887)

(4) 27 W. R. 549 *ante* p. 360

(5) *Ib.* at p. 546 per Prinssep & Fosse

JJ

(6) *Slee Suhaye v Goodur Poy* 8 W. R. 378 (1867) per Jackson J. but see *Koushtai Bibee v Hurray Kristo* 8 C. 976 *supra*

(7) 5 W. R. 242 (1866)

(8) Phear and Glover JJ

(9) *Aheero Monce v Dejoy Gotsal* 7 W. R. 533 (1867)

case with which the learned Judges were then dealing, and to which they applied their remarks, and the present Here we have a series of *jama uasil bakis* apparently regularly kept for ten years, with one gap, from 1249 to 1253 There is a single paper unattested, the writer of which was not called and his absence not accounted for Of course, all books of account and entries made by or on behalf of a party when produced as evidence in his favour must be received with caution, but there seems to be no reason why a series of collection-accounts, or *jama uasil-baki* papers, appearing to be regularly kept, should not be entitled to credit on the same principle as other contemporary records made and kept by the party producing them in the ordinary course of his business' In a case(1), where, in order to rebut the presumption in favour of a permanent tenure created by the fourth section, Act X of 1859, the fact of the rate at which rent was paid having varied, was the fact sought to be proved by *jama uasil baki* and similar papers, it was observed —“The Judge(of the Lower Court) alludes to the evidence of the *gomastahs* who filed or attested certain papers of the zemindar Such papers, we need hardly observe, cannot *incontestably* prove variations in a *rayat's jama*, unless it can be shown not merely that the *jama uasil baki* and similar papers show a varying rate but that the *rayat* has paid at a varying rate, otherwise every *rayat* would be at the mercy of a zemindar or his agents The Judge says that the witnesses attest these papers but he does not say how he considers the *rayats* bound by them (2)

The *jamabandi* shows the quantity of land held by each cultivator, its different qualities (i.e., what is grown upon it) the rate of rent for each kind of land, the total rent for all the land of that particular kind in each cultivator's possession, and lastly, the grand total for all the lands of every kind held by him (3) Many of the following cases were decided under the law as it stood prior to the passing of this Act In *Gujjo Koer v. Aalay Ahmed*(4) D N Mitter, J., said “The *jamabandi* paper may be only used as corroborative evidence, viz., of the same value as that which is attached to books of account under Act II of 1855 These papers were admittedly prepared by the zemindar and other papers

would be safe” And where certain *jamabandi* papers prepared by former *patwari* were produced in order to show the rent paid by the defendant in previous years, Phear, J., said “Had the former *patwari* come forward as a witness and sworn that he had collected rent from the defendant at the rate shown in the *jamabandi* and that the *jamabandi* was his own record of the fact then this would have afforded very material evidence in support of the plaintiff's claim but this man is not called and his *jamabandi* papers without him are valueless” (5) *Jamabandi* papers for the year in respect of which rent is claimed, made out by the *patwari* (as being the officer) as to the amounts collected in previous years, corroborated by the *jamabandis* of those years, would be about as conclusive in respect of the claim as it well could be (6) But where the *rayats* signed a *jamabandi* they were held to be bound by it (7) A tenant cannot be sued for enhanced rent upon a *jamabandi* to the terms of

(1) *Gopal Mundul v. Nobo Kissen* 5 W. R. (Act X) 83 (1866)

(2) *Ib.* at p. 84 but see *Shib Pershad v. Protho Nath* 10 W. R. 193 (1868) and *Belacet Khan v. Rash Behary* supra

(3) Field Ev. 4th Ed. Appendix 739

(4) 14 W. R. 474 (1871) s. c. 6 B. L. R. App. 62 and see *Clarnace Bibee*

v. Arnoonlah Sirdar 9 W. R. 431 (1863)

(5) *Bhugwan Dutt v. Sheo Mungal* 22 W. R. 56 (1874)

(6) *Dhanookdharee Sahee v. Toomey* 20 W. R. 147 (1873) and see *Kishore Dass Piers in Maltoo* 20 W. R. 171 (1873)

(7) *Watson & Co. v. Mahendra Nath* 23 W. R. 436 (1875)

which he has not consented (1) As to *Jaibaki* (2), *Ism navisi* (3), *Settlement Behari* and *Auargha* (4), *Hastabad* (5), and *Kanungo* (6) papers, see cases cited below (7) Although zemindari papers cannot be admitted under this section as corroborative evidence without independent evidence of the fact of collection at certain rates, they can be used as independent evidence if they are relevant under section 32 clause 2 *ante* (8)

35. An entry in any public or other official book, register, or record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register, or record is kept, is itself a relevant fact

Principle—The principle upon which the entries mentioned in this section are received in evidence depends upon the *public duty* of the person who keeps the book, register or record to make such entries after *satisfying himself of their truth*. It is not that the writer makes them contemporaneously, or of his own knowledge (9), for no person in a private capacity can make such entries (10) They are admissible, though not confirmed by oath or cross examination

..

them by means of sworn witnesses (11)

ss 65 (e), (f) 77 (*Proof of public documents*)

s 74 (*Definition of "public documents"*)

ss 76 77 (*Certified copies of public documents*)

s 78 (*Proof of certain official documents*)

s 79 (*Genuineness of certified copies*)

s 81 (*Genuineness of documents directed to be kept by law*)

(1) *Enayetoolah Meah v Nobo Coomar* 20 W R 207 (1873) *Reazooddeen Mahommed v McAlpine* 22 W R 540 (1874) both followed in *Akshaya Kumar v Shama Churn* 16 C 556 (1889)

(2) *Baidonath Parooie v Russick Lall* 9 W R 274 (1868)

(3) *Fergusson v Government* 9 W R 158 (1868) *Farguharson v Duarkanath Singh* 8 B L R 504 (1871) s c 14 M I A 259 *Erskins v Government* 8 W R 232 (1867)

(4) *Buncharry Lall v Forlong* 9 W R 239 (1868)

(5) *Ram Narsing v Tripoora Sundarce* 9 W R 105 (1868)

(6) *Akheero Monce v Bhejoy Gobind*, 7 W R 533 (1867), *Aund Duntpat v Tara Chand* 2 W R (Act N), 13 (1865) *Duarkanath Chuckerbutty v Tara Soon duri* 8 W R 517 (1867)

(7) *And v Field*, Ev 6th Ed, 159

(8) *Charitar Rai v Kailash Behari*, 4 Pat I W 213 s c 44 I C 422

(9) The dictum of Garth C J, which appears to be to the contrary in *Sarasua*

Dasi v Dhanpat Singh 9 C 434 (1892) was dissented from in *Shoshu Dhootun v Girish Chunder* 20 C 940 (1893) and it is submitted opposed to the decision of the Privy Council in *Lekraj Kuar v Mahpal Singh* 5 C. 744 751, 753 (1879) of also acceptance of this principle in ss 19 A 20 21 of Act VI of 1886 (*Registration of Births Deaths and Marriages*), post *Graham v Phanindra Nath Mitra* 19 C W N 1038 (1915) (admissible irrespective of knowledge as when copy of another entry)

(10) *Phipson* Ev., 5th Ed, 320, *Deo v Andreus* 15 Q B, 756 per *Frie J* *Sturla v Freccia* 5 App Cas 624-644 *Isall v Kennedy* 56 L. T. 647 *Lekraj Kuar v Mahpal Singh*, ante Where it is not shown that it is so made the entry is inadmissible *Sheo Balak v Gora Prasad* 20 A L J, 601

(11) *Starkie*, Ev., 272 273, *Taylor*, Ev. § 1591 see remarks of Privy Council in *Raja Bommarauze v Rangasamy Mulsly* 6 M I A at p 249 (1885), *Samar Dasadh v Juggil Kishore* 23 C, 370 371

Relevancy of entry in public record made in performance of duty

Public and Official books registers and records—Marriage Register(1)—Acts VI of 1860 (as amended by Act XXXVIII of 1920 XX of 1920) (*Parsee Marriage and Divorce*) ss. 6 8 and Schedule III of 1872 (*Non Christian Marriage*) ss. 13 13A 14 and Schedule III (See Act XXX of 1923), VI of 1872; (*Christian Marriage*) ss. 28 30 31 32—37, 54 62 79 80 and Schedules III IV (See Acts II of 1891, I of 1903, XIII of 1911, VI of 1914), 14 & 15 Vic, Cap. 40 Acts VI of 1886 (as amended by Act XXXVII of 1900) (*Registration of Births Deaths and Marriages*) ss. 7, 9, 32—35A I of 1876 (B C) (*Mahommedan Marriages*) amended by Act I of 1903 (2) *Birth and Death Registers*—Act VI of 1889 (*Registration of Births Deaths and Marriages*), ss. 7, 9 18 22 25 28 32—35A *Registers or Records of Baptism Naming Dedication Burial*—Act VI of 1886 as amended by Act XXXII of 1900 (*supra*) ss. 32—35A *Registers directed to be kept by the Indian Registration Act*—Act XVI of 1908 (*Indian Registration*) Part VI (3) *Log books*—Act I of 1859 (*Merchant Seamen*) ss. 103—108, 17 & 18 Vic Cap. 104 (*Merchant Shipping Act*) ss. 280 285 *Registers of Printing Presses Newspapers and books published in India*—Act XVI of 1867 (*Printing Presses and Newspapers*) ss. 6—8 and Part V, *Registers of Inventions and Designs*(4)—Act II of 1911 as amended by Act XII of 1914 Sch. 1 and Acts XXXIII and XXXIV of 1900 (*Inventions and Designs*) ss. 20 46 71 *Registers of Literary Scientific and Charitable Societies*—Act XVI of 1860 (*Registration of Societies*) *Registers of Companies*—Act VII of 1913 as amended by Acts VI and XI of 1914 and Act XLII of 1920 (*Indian Companies*) ss. 31 40 87 120 123—125 Part VI and *passim* (5) *Register of British Ships*—Act VI of 1841 (*Ship Registry*) s. 4 17 & 18 Vic Cap. 104 (*Merchant Shipping Act*) *Records of Rights*—Act XVII of 1887 (*Punjab Land Revenue*) N W P Act III of 1901 (*N W P Land Revenue*) *Settlement Record*—Beng Reg. VII of 1892 cl. 9 s. 9 *Register of Tenures*—Act II of 1869 (B C.) (*Chota Nagpur Tenure*) (6) *Registers*—Act VII (B C.) of 1876 (*Bengal Land Registration*) (7) *Registers of Common and Special Registry*—Act XI of 1859 (*Sales for Arrears of Revenue Lower Provinces*) Thirty ninth section (8)

Taylor, Fr. §§ 1591—1595 1774—1780, Powell Ev. 9th Ed. 271—273 Roscoe N P Fr. 24—129 209—216 Steph. Dig. Art. 34 Phipson Fr. 5th Ed. 320

COMMENTARY.

The Act does not contain any definition of either of the terms "public" or "official" or of a "public servant", but for the purposes of interpretation reference may be made to the seventy fourth(9) and seventy eighth sections *post* and to section 21 of the Penal Code in which the term "public servant" is defined. Certain Acts declare that the officers appointed under them are to be deemed "public servants". Thus every Registrar of Births and Deaths appointed under Act VI of 1886 is deemed to be a "public servant" within the meaning of the Indian Penal Code (10). So also are census officers(11) and

Public
Official
Duty

(1) See also following repealed Acts V of 1852 (*Marriage by Registrars*) ss. 41 42 49 XXV of 1864 (*Marriage of Christians*) V of 1865 s. 44 (*Marriage of Christians*) XV of 1872 (*Indian Christian marriage*)

(2) *v. Khadem Ali v. Taj ul-Ussa* 10 C. 607 (1884)

(3) Act XVI of 1908 (*Indian Registration*) has been amended by Act IV of 1914 and Acts V and XV of 1917 which see. See also repealed Acts VIII of 1871 XX of 1866 XVI of 1864 XI of 1861 XVIII of 184 IV of 1845 XIX of 1843 I of 1843 and XXX of 1838

(4) See also repealed Acts XV of 1859 (*Patents*) XIII of 1872 (*Patterns and Designs*) and V of 1888

(5) *v. Ram Dass v. Official Liquidator* 9 A. 366 (1887)

(6) *v. Kirpal Narain v. Sukarni* 19 C. 99 *Pertab Uda v. Mani Das* 72 C. 112 (1894)

(7) *v. post* cases under this Act

(8) *Lukhnarain Chattopadhyaya v. Gorachand Goosa* 39 C. 116 (1887)

(9) See *Soar Dosadh v. Juggul Kishore* 33 C. 366 369 (1895)

(10) Act VI of 1886 s. 14. A manager of an estate employed under the Court of Wards has been held to be a public servant under the Penal Code *R. v. Mathura Prasad* 21 A. 127 (1898) *R. v. Sidhu* 26 A. 542 (1904) [Gorant]

(11) Act XVII of 1890 (*Census*) s. 3 Notwithstanding anything to the contrary

registering officers appointed under Act XVI of 1908 (1) It has been queried whether the section applies to an entry in a public register or record kept outside British India (2)

This section in the main follows but somewhat extends the English law on the same subject (3) The book register or record must either be a public or an official one it must be one which the law requires to be kept for the benefit or information of the public (4) where so kept for information the public having access thereto are not necessarily all the world but may be limited (5) A 'public document' has been defined to be a document that is made for the purpose of the public making use of it—especially where there is a judicial or quasi-judicial duty to inquire Its very object must be that the public all persons concerned in it may have access to it (6) Registers kept under private authority for the benefit or information of private individuals are inadmissible (7) Two classes of entries are contemplated by this section (a) by the public servants (b) by persons other than public servants In the case of the latter the duty to make the entry must be *speciall* enjoined by the law of the country in which the book register or record is kept (the section thus includes British foreign or colonial registers) (8), in the case of entries by the former it is sufficient for their admissibility that they have been made in discharge of *official* duty But in either case as well in India as in England the entry must have been made by a person whose *duty* it was to make it Provision however is made by Act VI of 1886 for the admission in evidence under certain conditions of certain records and registers made otherwise than in the performance of a duty specially

evidence of certain village papers directed to be made by Reg VI of 1886 on the ground that they were not prepared or attested by the Settlement Officer in person as required by law the Privy Council said When documents are found to be recorded as being properly made up and when they are found to be acted upon as authentic records the rule of law is to presume that everything had been rightly done in their preparation unless the contrary appears (13)

In the last case it was also held on the question whether there did or did not exist a custom in the Bahmulla clan in Oudh excluding daughters from inheritance that entries in a *uajib ul arz* were properly admitted to prove this custom

Documents held admissible or not

in the Evidence Act Records of Census are not admissible in evidence in any civil proceeding or any proceeding under Chapters 1st or 36 of the Criminal Procedure Code (Act XVII of 1890 s 17)

(1) Act XVI of 1908 s 84 (Ind an Restr on)

(2) *Ponnamal v Sundaran Pilla* 71 M 492 (1900)

(3) 1 Field Ev 6th Ed 167

(4) Taylor Ev § 1592 and cases there cited

(5) *Sirla v Freccia* 5 App Cas 643

(6) *Id*

(7) Taylor Ev § 1592n and cases there cited See *Bair Natl v Sukh* 18 C 534 (1891)

(8) With regard to the books recognised as official registers and public documents

in England see Taylor Ev § 1596n Roscoe v P Ev 174—129 209—16 in part clear as to births deaths and marriages in India pp 127 128 Ratcliff

v Ratcliff 1 Sw & Tr 467 *Queen's Director v Fry* 4 P D 230 14 & 15

Vic Cap 40 s 11 42 & 43 Vic Cap 8

(9) Act VI of 1886 (Registration of Births Deaths and Marriages) s 35

(10) *Doe v Bray* 8 B & C 313

(11) *Lzell v Kennedy* 14 App Cas 437

As to the correction of errors in registers under Act VI of 1886 s 28 of the Act

(12) *Sturla v Freccia* 5 App Cas 643

Irish Society v Derry 12 C & F 641

(13) *Lekraj Kuar v Mahpal Singh* 5 C 757

this custom being a usage of the kind which Settlement Officers were required by Reg VII of 1822 to ascertain and record (1) And in another case it was held by the Privy Council that entries in village-records by the officer charged by Government with the duty of making them (as under the Oudh Land Revenue Act

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to the ordinary *Mutakshara* Law of Inheritance was forthcoming, the Court was right to disregard entries in a *uajib ul arz* which seemed rather to show the wishes of the persons consulted than to prove the custom (4) A *uajib ul arz* prepared and attested according to law is *prima facie* evidence of the existence of any custom of pre-emption which it records. It is a document of a public character which is prepared with all publicity, and accepted by the Courts as sufficiently strong evidence of the existence of any custom recorded in it so as to cast upon parties denying the custom the burden of proof (5) In the under-mentioned case it was held that upon a question of custom a *uajib ul arz* is generally more valuable as a record of opinion of persons presumably acquainted with the custom, than as an official record of the custom, but if duly attested by Settlement officials and signed by *zemindars* of the village to which it relates it may be admitted in evidence under this section (6) It has been held by the Allahabad High Court that an entry in a *uajib-ul arz* is *prima facie* a record of a custom rather than of a contract and that the fact that such a word as *irarnama* is used at the beginning or end of it is not enough to make the entry one of contract and not of custom (7) The same High Court has held in a more recent case that where there is an entry as to pre-emption and no contrary evidence, the Court, having regard to the prevailing practice, can take the custom of pre-emption as proved (8) The Privy Council has recently held that a *Ruraj jam* is a public record prepared by a public officer in discharge of his duties and under Government rules and is clearly admissible, for instance, as rebuttable evidence of a custom of inheritance among Mahomedan Jats settled in the Jhang district of the Punjab (9) And in another later case the Privy Council has held that 'conclusive evidence' in section 10 of the Oudh Estates Act (I of 1869) means not only evidence of being *taluqdars* but also of having that status on the lists and that a *uajib ul arz* which merely related traditions and purported to give the history of devolution in families (not the

(1) *Ib A uajb ul arz* is *prima facie* evidence of custom: its object is to supply a record of existing local custom see the following cases—*Jari Singh v Gunga* 2 A 8/6 (1880) *Muhammad Hassan v Munna Lal* 8 A 434 (1886) *Deoti nandan Sri Ram* 12 A 257 (1889) *Superundhuaya Prasad v Garurudhuaya Prasad* 15 A 147 (1893) *Uma Parsad v Gandhar Singh* 15 C 20 (1887) *Sadhu Sahu v Raja Rai* 16 A 40 (1894) *Garurudhuaya Prasad v Super undhuaya Prasad* 5 C W N 33 (1900) s c 23 A 37 *Ali Nasir v Manil Chand* 25 A 90 (1902) *Ram Sarup v Sital Prasad* 1 All L J 278 (1904) s c 26 A 549 [Entries in *uajib ul arz* Entry is *prima facie* evidence under this section of existence of custom *Gokul Dicht v Malabar Dicht* 2 All L J 790 (1902) *Musson at Lall v Murl Dhar* 10 C W

N 30 P C 8 B 402

(2) *Musst Parbati Kunwar v Rani Chanderpal Kun ar* P C (1909) 36 I A 125

(3) *Mahomed Iman v Surdar Hussain* 2 C W N 737 (1898)

(4) *Anant Singh v Durga Singh* P C (1910) 37 I A 191 *Mawasi v Mul chand* (1912) 34 A 434

(5) *Ali Nasir v Manik Chand* 25 A 90 96 (1902)

(6) *Musamat Parbati K ar v Rani Chanderpal Kunwar* 8 O C 94 P C (1909) 36 I A 125

(7) *Returaj Dubain v Pahlcan Bagol*, F B 33 A 196 (1911)

(8) *Fazal Hussain v Muhammad Sharif*, 36 A 471 (1914)

(9) *Beg v Allah Ditta*, P C 44 C, 749 (1917)

narrator's) was insufficient to rebut the presumption of a pre existing custom (1) In a suit for possession of a fishery, an admission made by the defendant's predecessor in title in a written statement filed in a previous suit was allowed to be proved under this section by the production of the decree in such previous suit it being the duty of the Court under the old practice of Mofussil Courts to enter in the decree an abstract of the pleadings in each case (2) Quinquennial papers were rejected by the Lower Court the latter was ordered to take these into consideration on the remand of the case (3) Revenue registers in the Madras Presidency judgments and other public records were admitted in *Bajalam v Atulla* (4) The measurement papers prepared by *Buttara Ameen* do not (5) but *chittas* of the revenue survey do (6) come within the description given in this section The *Batwara Akhasra* is generally prepared by the *Amin* on the admission of both the landlord and tenants regarding the latter's holding and in cases of difference on the basis of summary decisions by the *Batwara* Deputy Collector and as such is very valuable evidence in subsequent disputes But a *Khassra* prepared not on the basis of admissions of all parties but on information supplied by one of them and without enquiry as to whether the rent resulting therefrom is that which is at the time payable is absolutely valueless in evidence (7) Certified copies of papers in the Collectorate which relate to a partition made in a proceeding under

guarantee of a certain person on the register certificate is neither a book nor a register

accordance with any law but is a certificate as it professes to be of which there is only this one and which is not a public record or register of any kind but is a document issued to a particular person giving to that particular person and only to him a particular kind of authority It is no evidence of minority under this section (9) A *tehsil khana* register (so called from the number of columns in the statement or register) is not a public document nor is the *patwari*

It is a document prepared in the *zemindars' dastar* by the *patwari* who is paid by the *zemindar* but approved by the Collector These registers are no doubt kept for the information of the Collector but that does not make them binding as official records of the facts contained in them (10) A register of *Minbar dan*

Kanango Registers are to prove an omission and the General and *Mauzdar* Registers being intended to facilitate the collection of the Government Dues there was no authority to enter therein *lakheraj*es of less than

(1) *Murtaza Hussain Khan v Mahomed Yasir Ali* P C 38 A 552 (1916)

(2) *Parbati Dassi v Purno Chunder* 9 C 586 (1883) followed in *Dyalamma v Atulla* 15 M 23 (1891) and *Tilama v Kondan* 15 M 378 cf *Subbrana Sa v Pararas naran* 11 M 12 (1887)

(3) *Shoshu Blusun v Grish Chunder* 20 C 942 (1893)

(4) 15 M 24 25 supra *Krishnama charar v Krishnamachariar* 38 M 166 (1915)

(5) *Vohi Chowdhury v Dhoro M sira n* C L R 139 (1880)

(6) *Gurindra Chandra v Rajendra Nath* C W N 530 533 (1897)

(7) *Ras Babu Golab Choudhary v Syed Salka Hussa* 5 Pat L W 6 s c 36 I C 513

(8) *Akhetra Nath Mandal v Mahomed Alla H ksh* 73 C W N 48 s c 45 I C 971

(9) *Satish Chunder v Mahendra Lal* 17 C 849 (1890) followed in *Gunra Kumar Ablaki Pande* 18 A 48 (1896)

(10) *Bajji Nath v Sukhu Mahton* 18 C 534 (1891) followed in *Samar Doradhi v J golk shore Singh* 23 C 366 (1893) *Chalho Singh v Jhara Singh* 39 C 993 (1912)

(11) *Ra Bhaia Draj v Ben Mahesh* C W N 439

100 bighas in area of *lakheraj*s not the subject-matter of resumption proceedings. The Thak Officers not being empowered to measure and record *lakheraj*es of less than 50 bighas in area, the omission of *lakheraj* as in the Thak statement was not of any probative value (1) The map and chitta prepared by the Partition *Amin* under the provisions of section 54 of the Bengal Estates Partition Act, proved to have been accurately prepared or to have been accepted and acted upon by the landlord, are, independently of this section, admissible in evidence against the landlord for the purpose of proving what lands were held and by what tenants (2) Copies of judgments have been admitted under this section (3) Statements of facts made by a Settlement Officer in the column of re-
statu-
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and

being at that time invested with authority to decide questions of tenure between the *Thot* and his tenants, is not, even if regularly recorded, admissible (4) A report on a temple by a *khotal* made in 1840 at the instance of a Political Agent has been held relevant to the question of the ownership of the temple (5) A statement of a witness to a police officer under the provisions of section 162 of the Criminal Procedure Code, reduced to writing is not a record within the meaning of this section (6) Neither is a *bulwara khasra* prepared under the Estates Partition Act (V of 1897) (7) A recital in a judgment not *inter partes* of a relevant fact is not admissible in evidence under this section (8)

In a case in which the question was as to the existence of a customary right and certain reports of former Collectors on the subject of this right, made under sections 10 and 11 of Mad Reg VII of 1817, were used in evidence the Privy Council said — "Their Lordships think it must be conceded that when these reports express opinions on the private rights of parties, such opinions are not to be regarded as having judicial authority or force. But being the reports of public officers entitled to great credit, they are admissible in evidence and the conduct of the Government founded upon them" (9) A single document may be a public record within the meaning of this section and a report made by a District Officer in the discharge of his duty as such officer has been held admissible in evidence (10) But the question whether such a document is an entry in an

under the first part of this section to prove that the charities were not performed

(1) *Bipradas Pal Choudhury v Mono-rama Dev* 45 C 574 s c 22 C W N 396

(2) *Dinanath Chandra v Nawab Ali* 49 I C 984

(3) *Krishnasami Ayyangar v Raja Gopala Ayyangar* 18 M 73 78 (1895)

(4) *Madhavrao Appaji v Deonah* 21 B 695 (1896)

(5) *Baldeo Das v Gobind Das* 36 A, 161 (1914)

(6) *Isab Mandal v R* 5 C W N 65 (1900) s c 28 C 348

(7) *Nandlal Pathak v Mohan Chandra*

urpat Das 17 C L J 462 (1913), s c 17 C W N 779 (1913)

(8) *Seethapati Rao Dora v Venkanna Dora* 45 M 332 (1922)

(9) *Muttu Ramlinga v Perianayagam Pillai* 11 A 209 238 239 *Leelanund Singh v Mussamat Lakhputtee* 22 W R.

231 (1874) in which a report was rejected

(10) *Raman v Secretary of State*, 11 Mad L J 315

(11) *Mussamat Parbati Kunwar v Rani Chanderpai Kunwar*, P C (1909), 36 I A 125 and *Jigajamba Bai Sahiba v Venkatasani Ammal*, 7 M L J, 117

at that date (1) A document purporting to be a certified copy of a will taken from the Protocol of Record in Ceylon was held not to be admissible under this section (2) But a certified copy of an entry in a register of births and death has been admitted under this section (3) and a certified copy of an order of a Probate Court and grant of letters of administration has been held admissible under sections 66 and 74 (4) A passage in a district Gazetteer describing the lineage of one of the leading families of the district cannot supply the want of a pedigree showing the family and the members of it (5) The person's return in execution proceedings being an official record made by a public servant in the discharge of his official duty is admissible in evidence (6)

Proof by
Public Re-
cord

If the entry states a relevant fact, then the entry having stated that relevant fact, the entry itself becomes by force of the section a relevant fact, that is to say, it may be given in evidence as a relevant fact because being made by a public officer or other person in performance of a special duty it contains an entry of a fact which is relevant (7) The entry is evidence, though the person who made it is alive and not called as a witness For the proof of public and official documents see sections 76 to 78 (*post*) Though the register may be *prima facie* evidence of matters directed or authorized to be inserted therein yet the person relying on the register may, by offering other evidence displace the presumption which the register affords (8) A person who is not a party to the making of the entry is not bound by the statements in it in the sense of being estopped or concluded by them They are only received as evidence and are open to be answered, and the statements in them may be rebutted (9)

Facts of
which pub-
lic records
are evi-
dence

This section does not make the public book evidence to show that a particular entry has not been made in it (10) An entry is evidence of those matters which under the provisions of a particular law it is the duty (11) of a particular
that law
duty (12)

Where a husband and wife

gal Act I of 1876 setting c

as a special condition that the wife under certain circumstances therein set out might divorce her husband it was held in a suit by the husband that the special condition was a matter which under the provisions of the Act it

the person enjoined to make that entry has no personal knowledge of that fact as where it is reported to him (13)

(1) *Mallikarjuna Dugget v Secretary of State for India* 35 M 71

(2) *Ponnammal v Sundaram Pilla* 23 M 499 503 (1900)

(3) *Krishnanachariar v Krishnasachariar* 38 M 166 (1916)

(4) *Habram Das v Hem Nath Sarma* 19 C W 1068 (1915)

(5) *Balmakund v Bishva Nath* 52 I C 851

(6) *Heramba Nath Bandopadhyaya v Surendra Nath Mitra* 53 I C 20

(7) *Lekraj Fuar v Mahpal Singh* 5 C 34
Parbutti Dass v Purno Chunder ante

(8) *Ran Das v Official Liquidator* 9 A 386

(9) *Lekraj Fuar v Mahpal Singh* 5 C 755

(10) In the matter of *Jaggun Lal* 7

C L R 356 (1880) and see *R v Grist Chunder* 10 C 1074 (1884) *Al Nasir* *Manik Chander* 25 A 90 (1907)

(11) *Do d France v Andrews* 15 Q B 756 *Roscoe N P* Ev 124

(12) Cf *Lekraj Fuar v Mahpal Singh* ante and *Parbutti Dass v Purno Chunder* ante

(13) *Lyell v Kennedy* supra This section does not extend to entries which a Public Officer is not expected to add is not permitted to make *Al Nasir v Manik Chander* 25 A at p 104 the presumption as to truth and accuracy cannot be extended to entries which were never intended to find a place in the record. *Ib* at p 103

(14) *Ahadem Ali v Tajmunnissa* 10 C 690 (1884)

(15) *Do d France v Andrews* supra

per Guthrie C J contra (*v post*)

The admissibility of this class of evidence does not depend upon personal knowledge (1 *ante*). And so when the manner, in which certain *wajib-ul arazi* (or village-papers), directed to be made by Regulation VII of 1882, were made up with respect to a custom, appeared to be that the officer recorded the statements of persons who were connected with the villages in the *pargana* in which the *taluk* in suit was situated, and objection was taken to their reception in evidence on the ground that they were not prepared or attested by the Settlement Officer in person as required by the Regulation, and that the papers on the face of them did not show that the officers had passed any judgment upon the information they received, it was held that it was no valid objection that the papers had been prepared and attested by officers subordinate to the Settlement Officer, and that the fact that the officers recorded these statements and attested them by their signature amounted to an acknowledgment by them that the information they contained was worthy of credit and gave a true description of the custom (1). And in a recent case in the Calcutta High Court it was held that entries in a public register kept in the Survey Office for the public benefit and under sanction of official duty are admissible under this section, even when they appear to be copies of earlier entries, which had needed re copying, and therefore presumably made without personal knowledge (2).

In *Saraswati Das v Dhanpat Singh*(3), Garth, C J, said that he thought VII of 1876 (Ben-
ven of possession,
ty fifth section(4),
and that he understood this section (section 35) to relate to that class of cases where a public officer has to enter in a register or other book *some actual fact which is known to him* as for instance, the fact of a death or marriage, but that the entry that any particular person is the proprietor of certain land, is not properly speaking, the entry of a fact, but is a statement that the person is entitled to the property, and is the record of a right, not of a fact (5). But in a subsequent case(6), in which the plaintiffs tendered in evidence extracts from the Collector's Register, kept under the same Act, for the purpose of showing that certain persons were the registered proprietors of a block of land and the quantity of land held by them, and his evidence was rejected by the lower Courts on the authority of *Saraswati Das v Dhanpat Singh*, it was held [dissenting from the dictum of Garth, C J, which, it was pointed out, was not assented to by Field J, and was opposed to the decision of the Privy Council in *Lekhraj Kuar v Mahpal Singh*(7),] that the entries being of matters which it was the Collector's duty to record, and in the form directed by the law to be kept, certified copies thereof were admissible in evidence *quantum valeat* (8). In the undermentioned case(9), the Court said with regard to these entries "as evidence of ownership their value may be, and I think is very small, but it is impossible to say that they are not evidence and I therefore admitted them" (10).

(1) *Lekhraj Kuar v Mahpal Singh*
supra 751 753

(2) *Graham v Phanindra Nath Mitra*
19 C W N 1038 (1915)

(3) 9 C 431

(4) Act VII of 1876 (B C) which provides for cases in which there is a dispute between two persons as to which is entitled to be registered and the Collector has to ascertain which of those persons is in possession

(5) *Saraswati Das v Dhanpat Singh*
supra 434 435 and see *Ram Bhusan v Jebhi Mahto* 8 C 853 (1882)

(6) *Shoshu Bhoosun v Girish Chunder*
20 C 940 (1893)

(7) 5 C 744

(8) *Shoshu Bhusun v Girish Chunder*,
supra 942

(9) *Gungamoyee Devi v Apurba Chandra* Suit No 632 of 1901 Cal H C,
28 Nov 1902

(10) *Per Henderson J*—The value of these entries (which have frequently been admitted in other cases) must to some extent depend upon the circumstances proved. In the case cited the following documents were admitted—Collectorate Registers Registers under the Land Registration Act Land revenue challans, Municipal Bills Collectorate Bill Registers, Mutation proceedings Assessment Register

And in a case where there was no settlement of rent under the Bengal Tenancy Act, Chapter X, it was held that the entry in the record of rights, if it was duly published, would be only *prima facie* and rebuttable evidence in favour of the landlord (1). It has been held in Bombay that a Collector's book is kept for purposes of revenue, not for purposes of title, and the fact of a person's name being entered in the Collector's books as occupant of land, does not necessarily of itself establish that person's title, or defeat the title of any other person (2).

In certain cases the law has expressly declared of what *particular facts these entries shall be evidence*, as in the case of *Marriage Registers*. A certified copy under the 9th section of Act VI of 1886 is admissible in evidence for the purpose of proving the marriage to which the entry relates (3). A Register of Births and Deaths

A certified copy of certain registers of marriage made otherwise than in performance of a special duty is admissible under Act VI of 1886 for the purpose of proving the marriage to which the entry relates (7). The solemnization of a marriage between Christians in British India may be proved in England by the production of a certificate of the marriage from the India Office (8). Foreign Registers of marriages and baptisms or certified extracts from them are receivable in evidence in England as to those matters which are properly and regularly recorded in them when it sufficiently appears that they have been kept under the sanction of public authority and are recognized by the tribunals of the country where they are kept as authentic records (9). *Births & Deaths*. In the undermentioned case a certified copy of an entry in a Register of Births was produced in proof of the date of the birth of a party and admitted in evidence (10). A copy certified by the Registrar General is admissible for the purpose of proving the birth or death to which the entry relates (11). A copy given by the Registrar is admissible for the same purpose. A certified copy of certain registers of birth, baptism, naming, dedication, death or burial made otherwise than in performance of a special duty, is admissible under Act VI of 1886 for the purpose of proving the birth, baptism naming, dedication death or burial to which the entry relates (12). A Register of Births and Deaths kept at the Police stations is a public document within the meaning of this

of Calcutta Municipality and pottah granted by Government. As to the nature of the latter, see *Freeman v Fairlie* 1 M I A, 330 338 346.

(1) *Abdul Rasheed v Jogesh Chandra Roy* (1906), 11 C W N, 153.

(2) *Fatma v Durja* 10 Bom H C R 187 (1873), *Bhagoji v Bapuji* 13 B 75 (1888). *Bibi Khater v Bibi Rukha* 6 Bom L R, 983 (1904).

(3) Act VI of 1886 (Registration of Births Deaths and Marriages), s 9.

(4) Act XV of 1865 (Parsee Marriage and Divorce) ss 6 8.

(5) Act III of 1872 (Non Christian Marriage) ss 13 14.

(6) Act XV of 1872 (Christian Marriage) ss 79 80.

(7) Act VI of 1886, s. 35 [As to

Mahomedan marriages: Act I of 1876 (B C), and *Khadem Ali v Tajmunnisa* ante].

(8) *Westmacott v Westmacott* P D (1899) 183 s c. 3 C. W. N. exlu

(9) *Lyell v Kennedy*, 14 App Cas 437 448.

(10) In the estate of *Mary Goodrich* (deceased) *Payne v Bennett* (1904) 1 K B 138 diss from *In re Wainle*, L R, 9 Eq 373. See 1 All L J 76n.

(11) Act VI of 1886 s 9.

(12) *Id* s 35. As to Mad. Act III of 1899 see *Ramalinga Reddi v Kolavys* 41 M 26.

(13) *Sheikh Tamizuddin v Sheikh Tazul* 46 C 152, s c. 23 C. W. N 872 46 I C, 237.

writer, the register not being one directed to be kept by any law (1) The register matters by the Indian d therein (2) A certifica le to the shares and stock (3) The reports of Inspectors of Companies are admissible as evidence of the opinion of the Inspectors in relation to any matter contained in such report (4) The minutes of all resolutions and proceedings of general meetings are admissible in evidence in all legal proceedings (5) When a Company is being wound up, all documents of the Company and liquidators are as between the contributors, *prima facie* evidence of the truth of all matters purporting to be therein recorded (6) All copies given under section 52 of the *Indian Registration Act* are admissible for the purpose of proving the contents of the original documents (7) An office copy of a declaration under the *Printing Presses and News papers Act* is *prima facie* evidence that the person whose name is subscribed to such declaration was printer ^{or} and publisher of the periodical work mentioned in the declaration (8) The registers of *Patents and Designs* shall be *prima facie* evidence of matters inserted therein in accordance with the Act (9) And a certificate under the hand of the Controller as to any entry matter or thing (made by him in accordance with the Act or the Rules there under) shall be *prima facie* evidence of the entry having been made, and of the

Debtor's Act are without proof of seal or other proof whatsoever sufficient evidence of the same (12) Entries in registers prescribed to be kept by the various also

kept by any law for the Appendix In England an be received to prove incidental particulars concerning the main transaction even where these are required by law to be included in the entry

It is said that if such particulars are necessarily within the knowledge of the Registering Officer they will be admissible otherwise they seem to be evidence only when expressly made so by Statute (13) But it is submitted from a consideration of the words of the section and on the authority of the cases previously cited that (even where not so expressly declared) a public register in India is evidence of all particulars required by law to be inserted therein whether they relate to the main or incidental fact or transaction Under this section a statement made by a Survey Officer in a Village Register of Lands that the name of this or that person was entered as occupant would be admissible if relevant

(1) *Molamed Jafar v Emperor* 22 O C 230 s c 54 I C 166

(2) Act VII of 1913 (Indian Companies) s 40 *Ram Das v Official Lsq dator ante*

(3) Act VII of 1913 s 29 and Act XI of 1914

(4) *Ib* s 143

(5) Act VII of 1913 s 83

(6) *Ib* s 240

(7) Act XVI of 1908 s 57 See also Act VII of 1876 (B C) (Bengal Land Registration) *Ram Blus v Jebi Malto* 8 C 333 *Saraswati Das v Dhanpa*

Singh Soshi Bloosan v Girish Chunder ante

(8) Act XXV of 1867 ss 7 8

(9) Act II of 1911 ss 20(3) 46(3)

(10) *Ib* s 71

(11) Act XXI of 1860 (Registration of Literary Scientific and Charitable Societies) s 19

(12) 11 & 12 Vic Cap 21 s 74 and see s 78

(13) *Physon Ev* 5th Ed 373 *Doe v Bar* s 1 M & R 386 *Huntley v Do ota* 15 Q B 96

cases pencil *memoranda* on a Government survey map were held to be admissible. The Court observed with reference to a chart of the coast which I have already referred to is issued under the authority of the Government and the notes thereon may be referred to as authoritative. I find one note which is worthy of attention worded thus: "Owners of vessels are strongly advised not to risk their vessels laying at anchor awaiting orders at the Sandheads between the months of April to November inclusive. Vessels are recommended to go into Saugor Road where there is a safe anchorage and telegraph station." The record of the proceedings and the maps of the survey being public documents are provable by means of certified copies (2) Maps or plans made by Government are to be presumed to be accurate but maps or plans made for the purpose of any cause must be proved to be so (3) This provision refers to maps or plans made by Government for public purposes only, a map made by Government for a particular purpose which is not a public purpose may be admissible but its accuracy must be proved by the party producing it (4) The Court may however presume that a published map or chart the statements of which are relevant facts was written and published (5) by the person and at the time and place by whom or to which it purports to have been written or published. The Court may resort for aid to maps as documents of reference (6) The presumption provided for by section 90 (*post*) is applicable to maps or plans as well as to any other document purporting or proved to be 30 years old (7) The thirteenth section the corresponding section of Act II of 1835 included—but the present section is silent as to—maps made under the authority of any public municipal body.

Survey maps as evidence of possession

There are numerous decisions as to the true effect and value which should be assigned to survey maps (8) in evidence. If these cases are carefully examined it will be found there is no real conflict of decisions between them—reasonable allowance being made for observations which were directed not to the consideration of a general proposition but to the particular facts of the case which happened to be at the time before the Court (9) A survey in these provinces is not made under the authority of any enactment of the Legislature. It is a purely executive act. At the same time the proceedings of the Survey authorities have been recognized by the Legislature and are referred to in Act IX of 1847 (Assessment of New Lands) (10) The co-operation of the parties interested in the measurement is required to be sought by the Survey Officers. It is reasonable to presume that the parties were present at and had notice of the survey and the survey must therefore be evidence between the parties *quod iure talat* (12) that is is good evidence of

(1) In the matter of the German S S Drachenfels 27 C 860 871 (1900)

(2) Ss 74—77 *post*

(3) S 83 *post*

(4) *Kano Prashad v Jagat Chandra* 23 C 335 (1895)

(5) S 87 *post*

(6) S 57 *post*

(7) Ss 3 *Illustr. ante* and 90 *post* See *Madhab Sindari v Gajendra Nath* 9 C W N 111 113 (1904)

(8) For a description of the maps of the Trigonometrical Survey (sketches (boundary mark) and *Khasra* (detailed measurement maps) and *chittas* see *Feld* Ev. 4th Ed., 215 216 5th Ed. 166—168 and *Feld's* Land holding and the

relation of Landlord and Tenant. As to maps other than those of the survey see *Junajoy Mullik v Duarkanath Maitra* 5 C 287 (1879) *Kanto Prashad Jagat Chandra* 23 C 335 (1895) and *Note to*

s 83 and remarks of Jackson J. in *Collector of Rajshahi v Doorga Soondree* 3 W R 211 212 (1865)

(9) *Nobu Coomar v Gobind Chunder* 9 C L R (1881) per *Feld* J at p 307

(10) *Id* see also Acts XXXI of 1848 (Alluvial Lands Bengal) IV of 1868 (B C) V of 1867 (Bengal Survey)

(11) *Ran Nara Moles Chunder* 19 W R 202 (1873)

(12) *Radha Choudhary v Gadda* 20 W R 243 (1873)

possession has been declared by many decisions (1) When the question is simply one of title, and the available evidence is proof of possession at a particular period, a survey map is, and ought to be, most cogent evidence (2) But it is not conclusive evidence of possession (3) A survey map is evidence of possession at a particular time, the time at which the survey was made (4)

But evidence of possession, however short, is evidence of title, and if evidence of possession, they are also therefore evidence of title (5) There are some cases which seem to imply the contrary (6) "But the proposition which is to be deduced from all the cases is this a survey map is not direct evidence of title in the same way

Survey Officers have 1

Their instructions are

at the time, and this is what they do ascertaining such actual possession as well as they can, and, if possible by the admissions of all the parties concerned A survey map is therefore, good evidence of possession according to the boundary demarcated thereupon and which may be taken to have been admitted by the parties concerned to be correct regard being had to what has been said about the nature of this admission in each particular case In several of the cases quoted this Court has (to my mind, very properly) refused to lay down any general rule as to the weight to be assigned to a survey map as a piece of evidence and in one case (7) a learned Judge of this Court declined to say whether in any particular case maps ought not to be corroborated by independent evidence A survey map is then direct evidence of possession and with reference to particular circumstances of each case the Courts must decide whether this evidence of possession is sufficient to raise a reasonable presumption of title (8)

(1) *Gour Monce v. Huree Kishore* 10 W. R. 338 (1868) *Shusee Mookhee v. Bissessuree Debee* 10 W. R. 343 (1868) *Prahlad Sen v. Budhu Singh* 2 B. L. R. (P. C.) 140 (1869) *Gudadhur Banerjee v. Tara Chand* 15 W. R. 3 (1871) *Radha Choudhrai v. Gireedharee Sahoo* 20 W. R. 743 (1873) *Kashee Kishore Rofi v. Bana Soondaree* 23 W. R. 27 (1875) *Jugdis Chunder v. Choudhry Zuhoor* 24 W. R. 317 (1875) *Charoo v. Zobeida Khatun* 25 W. R. 54 (1876) *Prosonno Chunder v. Land Mortgage Bank* 25 W. R. 453 (1876) *Mohesh Chunder v. Juggit Chunder* 5 C. 212 (1879) [discussed in 15 C. 353] *Syam Lal v. Lachman Choudhry* 15 C. 353 (1888) *Jaytara Dassee v. Mohamed Mobarak* 8 C. 983 (1882) and see case cited ante and post

(2) *Mohesh Chunder v. Juggit Chunder* 5 C. 212 (1879) per Jackson J. at p. 214

(3) *Mahomed Meher v. Sheeb Pershad* 6 W. R. 267 (1866) and for a reason why it is not see remarks of the court in the same *Gudadhur Banerji v. Tara Chand* 15 W. R. 3 (1871) *Prosonno Chunder v. Land Mortgage Bank* 25 W. R. 453 (1876)

(4) *Syam Lal v. Luchman Choudhry* 15 C. 353 (1888)

(5) *Shusee Mookhee v. Bissessuree Debee* 10 W. R. 343 (1868) per D. N. Mitter J. at p. 344 *Gooroo Pershad v. Pshunto Chunder* 6 W. R. 82 (1866)

Oomut Fatima v. Bhujo Gopal 13 W. R. 50 (1870) *Rani Narain v. Mohesh Chunder* 1 W. R. 207 (1873) *Pogose v. Mokoond Chander* 25 W. R. 36 (1876) *Syam Lal v. Luchman Choudhry* 15 C. 353 (1888) *Satcourt Ghose v. Secretary of State* 27 C. 252 (1894) *Krishna Narayana v. Lingata* 20 B. 270 (1895)

(6) *Mahua Chandra v. Rajkumar Chuckerutty* 1 B. L. R. (A. C.) 5 (1868) [This decision however must be understood with reference to the facts of that particular case in which the award and the maps were the very subjects of litigation *Field Ex.* 6th Ed. 169] *Gourmonce v. Huree Kishore* 10 W. R. 338 (1868) following *Collector of Rayshahjee v. Doorga Sundree* 2 W. R. 210 (1865) Jackson J. doubting [Explained in *Oomut Fatima v. Bhujo Gopal* 13 W. R. 50 (1870) *Rani Narain v. Mohesh Chunder* 1 W. R. 207 (1873) and in *Mohesh Chunder v. Juggit Chunder* 5 C. 212 (1879)]

(7) *Rani Narain v. Mohesh Chunder* 10 W. R. 202 (1873) ref. to in *Choudhry Anwarul Haq v. Abdul Wahab* 1 Pat. 65 (1922)

(8) *Nobu Coomra v. Gobind Chunder* 9 C. L. R. per Field J. at p. 309. And so a survey or kistwari map has been recently held to be evidence between the parties quoted at both as regards possession and title *Choudhry Anwarul Haq v. Abdul Wahab* 1 Pat. 65 (1922)

And in *Syam Lal Saha v Luchman Choudry*(1) the High Court said 'We are not prepared to say that in no case can the evidence of survey maps be sufficient evidence of title. Each case must be decided upon its own merits. But though evidence of title, maps and survey proceedings are not conclusive (2) the Privy Council have held that maps and surveys made in India for revenue purposes are official documents prepared by competent persons and with such publicity and notice to persons interested as to be admissible and valuable evidence of the state of things at the time they were made. They are not conclusive and may be shown to be wrong but in the absence of evidence to the contrary they may be judicially received in evidence as correct when made (3). This decision was followed in the undermentioned case(4) in which it was held that the object of the *thal* map being to delineate the various estates borne on the revenue roll of the District, the entry in *thal* map that certain lands formed part of a certain estate becomes a relevant fact under this section and such entries in *thalbust* maps are evidence on which a Court may act. It is open to a Court to hold that the same state of things existed at the time of the permanent settlement. As to comparison of land with map(5) and of *thal* map with survey map(6) see the cases mentioned below. In the undermentioned case it was held that a *thalbust* map was not only evidence but very good evidence as to what the boundaries of the property were at the time of the Permanent Settlement and also as to what they (by the admission of the parties) were in 1859, when the survey was made and maps prepared (7). As to maps used in subsequent suit admitted to be correct in prior arbitration proceedings(8), and as to the amount of accuracy to be expected in a *thal* map(9) see the undermentioned cases.

And in a case where the ownership of land was disputed and the plaintiff produced survey maps of the year 1852 1853 and also a *thalbust* map which contained a statement supporting his case and it was shown that the predecessor of the defendant had had full notice of the *thal* proceedings it was held that the evidentiary value of the plaintiff's *thalbust* and survey maps was greater than that of an unsupported survey map of the year 1805 1806 produced by the defendant and that the statements of zemindars or their agents contained in *thalbust* maps may amount to admissions that the land belonged to one village and that such admissions should be greatly relied on as made at a time when there was no dispute as to boundaries (10).

Thal maps are as has been pointed out in many decisions of this Court good evidence of possession but the value of that evidence varies enormously. In the case of a *thal* map containing definite landmarks and undisputed boundaries signed by the parties or their accredited agents and representing land which has been brought under cultivation and is in the possession of *raijats* whose names are known or can be discovered from the zemindary papers a *thal*

Evidential
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(1) 15 C 353 (1888)

(2) *Pogose v Mokoond Chunder* 25 W R 36 (1876) *Luleet Narain v Naran Sing* 1 W R 333 (1865) *Tlacoor Bronnia v Tlacoor Lullit* W R (1864) 120 *Koylash Chunder v Raj Chander* (Survey award) 12 W R 180 (1869)

(3) *Jagadindra Nath v Secretary of State* 30 C 291 (1902) and *Secretary of State for India v Brendra Kishore Marikya* P C 44 C 328 (1917)

(4) *Abdul Hamid v Kiran Chandra* 7 C W N 849 (1903) and see *Tajhoo Damer Singh v Kolaor Jagatpal Singh* (1906) 11 C W N 230

(5) *Radha Churn v Anund Sein* 15 W R 445 (1871)

(6) *Burn v Arcunbit Roy* 20 W R,

14 (1873)

(7) *Syama Sundari v Jago Bhundu* 16 C 186 (1888) see also *Satcours Glor v Secretary of State* 22 C 252 258 (1894) had it not been questioned it would have seemed almost unnecessary to state that oral evidence is sufficient to prove boundaries. *Sirat Soonduree v Rajendra Kishore* 9 W R 120 (1868)

(8) *Hronath Sircar v Preonath Sircar* 7 W R 249 (1867) v Note s 33 ante

(9) *Rani Monmohun v Watson & Co* 4 C W N 113 (1899) s c 27 C 336

(10) *Dunce v Dharani Kanta Lahiri* (1908) 35 C 621 and see *Abdul Hamid Mian v Kiran Chandra Roy* (1903) 7 C W N 849

map is very valuable evidence of possession. But the value of such a map is greatly diminished when we find that there are no natural landmarks delineated thereupon, that the land was jungle when measured, that the boundaries are not discoverable from a mere inspection of the map, and that neither the zemindars nor their agents have by their signatures admitted the correctness of the *thal* (1). The officers engaged in survey operations are required to seek the co-operation of the parties interested in the measurement. These parties are to be induced, if practicable, to make themselves acquainted with the contents of the *thal* and *khasra* plans, and to sign them or state their objections in writing. Persons who are familiar with what takes place in these provinces when Survey Officers commence operations in a locality are well aware that neighbouring proprietors do, as a rule, carefully watch their proceedings, and if the persons interested consider that the boundary demarcated by those officers between any two estates is incorrect, they take immediate and prompt action to object and to have the map rectified. We must then look at the matter somewhat in this way: the proprietors of estates have reasonable notice and may be presumed to be well aware that the boundaries are about to be demarcated upon a map made by imperial Government Officers, and which is by consent and usage regarded as important evidence in cases of boundary dispute: they are invited to co-operate and to point out to the Survey Officers what they admit to be true boundaries between their estates (2). If they or their agents point out the boundaries and the boundaries so pointed out are demarcated on the survey map, which is then signed by them, this map is good evidence of an admission as to the correctness of the boundaries shown thereon (3). If the proprietors or their agents do not actively point out the boundaries but afterwards sign the map it is still evidence of an admission though not of so strong a nature as in the case first put. If these Survey Officers without active assistance from those interested demarcate the boundaries and no objection is raised to their correctness, the reasonable supposition is that objections would have been raised if the boundaries were not correct, and we have here admission by conduct. If objections are raised and abandoned or if objections taken before the Survey Officer unsuccessfully are not persisted in, no attempt being made to have the survey map rectified by a suit brought for this purpose, we have again evidence of admission by conduct. If a suit has been brought for this purpose and the boundaries have been successfully rectified, the value of any particular survey map in evidence will vary according as the above circumstances are or are not brought out in evidence, and of course as time passes on and the production of living witnesses of what took place at the time of the survey proceedings becomes more or less impossible, the difficulty is increased of producing evidence which will enable the Court to weigh the value of a particular map in nice cases (4). Unless however it can be proved that a person

(1) *Joytara Dassie v Mahomed Mobarrick* 8 C 95 per Field J at p 983 see also *Radha Choudhram v Gireedhar Sahoo* (conduct of parties important) 20 W R 243 (1873) *Brojanath Choudhry v Lal Meah* 14 W R 391 (1870) (map not questioned) *Rohanath Roy v Kali Prashad* 18 W R 346 (1872) (map admitted to be correct) *Radhika Mohun v Gunga Varan* 21 W R 115 (1874) (map not objected to) and 5 C 212 ante *Satowari Ghosh v Secretary of State* 22 C 257 (1894) Ref to in *Choudhry Nazir Haq v Abdul Halab* 1 Pat 65 (1902)

(2) See remarks of Jackson J in *Col*

lector of Rajshahye v Doorga Soodaree 1 W R 211 (1865)

(3) *Id* at p 217. The map shows that at the time of the survey the plaintiff alone laid claim to the land and that no one disputed his claim. Such a public assertion of a right of ownership is also I think important evidence of his title. In the absence of direct title deed acts of ownership are the best proofs of title. In connection with the subject of this class of evidence see also (b) ante, should be kept in mind.

(4) *Noboo Choudhary v Gobind Chunder* 9 C 303 (1881) per Field J at pp 308 309

against whom a *thal* or survey is attempted to be used expressly consented to the delineation or admitted the correctness of such maps, they have no binding effect (1) This class of evidence has been said to be valuable because it is not within the power of the parties to manufacture and it comes from a public office (2) But a survey map is a piece of evidence like other evidence in a case and can be of no effect in determining the burden of proof (3) A *thakbust* map is in no sense a record of tenures subordinate to Government revenue paying estates, and is of no value as evidence in a suit in which the extent of interest of *shikmee talookdar* is matter for determination (4) In every case the question what lands are included in the Permanent Settlement of 1793 is a question of fact and not of law The onus of proving that the Government Revenue fixed in 1793 is assessed on any particular lands as being included in the Permanent Settlement is on those who affirm that such is the case Assuming lands not to be within the Permanent Settlement of 1793, the last survey made under the third section of Act IX of 1817 is to be taken as the starting point for deciding when the next survey is made whether lands are within the fifth and sixth sections of that Act But when the question is whether lands shown in a particular *thal* or survey map made since 1793 were or were not included in the lands charged with the assessment permanently fixed in 1793 the last *thal* or survey map cannot in all cases be acted upon or treated as decisive in the absence of evidence to the contrary (5)

Chittahs

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It may be otherwise when the *zemindar* and *rayats* are not amicable, but a *chittah* made when there is no dispute going on is valuable as an admission by the parties concerned (6) In the case

copies of chittahs and evidence (8) Bayley J remarking that these papers are the *primary* records out of which a survey map is made and are originally component parts of the map and evidence of the fact of demarcation of lands and properties measured and surveyed at or about the date of such map and for the purposes of the State and litigated questions respectively that notice of their being made is issued to the parties, so that these records cannot be said to be made in the absence of parties, for legally they were present when they had the opportunity of being present This was a decision under the 11th and 13th sections of Act II of 1855, but on the view there taken of the nature of *chittahs* they would also have been admissible under this section But whether admissible or not under this section as component parts of maps or as plans, "a *chittah* of the revenue survey is a public record, viz, the record of public work carried on by a public officer—the Superintendent of Survey—under the directions of the Government of

(1) *Kristo Moni v Secretary of State* 3 C W N 99 104 (1898) But in the absence of evidence to the contrary they may be judicially received in evidence as correct when made *Jagadindra Nath v Secretary of State* 30 C 291 (1903)

(2) *Gidadhur Banerjee v Tara Chand* 15 W R. 3 (1871)

(3) *Narain Singh v Nurendro Narain* 22 W R 297 (1874)

(4) *Mohi na Cl under v Wise* 22 W R 277 (18 6)

(5) *Jagadindra Nath v Secretary of State* 30 C 291 (1903)

(6) Field Ev 737 4th Ed Appendix

(7) 8 W R 167 (1867)

(8) In the following cases also survey *chittahs* were received as evidence *Sudu l h na Cl or drain v Rajmohan Bose* 3 B L R (A C) 381 (1869) *Mahomed Fedje v O coood deen* 10 W R 340 (1868) *S rrossit v Dossee v Umb ca vund* 24 W R 192 (1875) *Taru knath Mookerjee v Mohendranath Ghose* 13 W R 56 (1870) *Moocheeram Majhee v Bissu bilur Roy* 24 W R 410 (1875) *Ari an Bibi v Ari ranissa* (No 1294 of 1871 decided on 28th Feb 1872 by the Calcutta High Court cited in Field Ev p 227 ib 6th Ed 168)

Bengal' (1), and is therefore admissible under the thirty-fifth section (2) Any *chittah* moreover, if made by the persons and under the circumstances mentioned in the 18th section, may be admissible under that section as documentary admissions or under the 13th section as an assertion of right (3) The Privy Council in the case of *Eckowrie Singh v Heeralall Seal* (4), speak of *chittahs* as no evidence of title in boundary disputes between rival proprietors when they are without further account, introduction or verification "By these words said Hobhouse, J, "it seems to me, their Lordships held that, if *chittahs* are relied upon without any account given or verification made of them, then they are not to be considered as evidence, but here an account was given of the *chittahs* and they were properly introduced and verified and therefore that remark of their Lordships does not seem to me to apply to the *chittahs* now before us They were therefore I think, properly used as evidence in this case' (5) 'It may here be observed' says Mr Field, that the reports do not always show what was the precise nature of the *chittahs* offered in evidence in each particular case, and to this may be attributable some of the difference of opinion which seems to prevail upon the subject in question There is and ought to be a wide distinction as regards both weight and admissibility between the *chittah* and other measurement papers of the revenue survey of the country designed and carried out as an executive act of State, the similar paper of a decennial survey made under the provisions of Act IX of 1847 (*v ante*) the *chittahs* of a measurement of a particular *khas mehal* made by Government as *zemindar* (6) the *chittahs* of a measurement made by a private *zemindar* (7) at a time when the relations between him and his *rayats* were friendly, and the *chittahs* of a measurement made by the same *zemindar* when disputes had arisen as to enhancement of rents If the original records of the reported cases were examined with reference to this distinction it is more than probable that any seeming difference of opinion may be found reconcilable with sound and uniform principle" (8) Where *chittahs* were produced by the plaintiff as evidence of certain lands being *mal*, it was held that they were sufficiently attested by the deposition of the village *gomastah* that they were the *chittahs* of the village while he was *gomastah*, and that he had been present when, with their assistance, a *puttal* (new, revised) measurement had been carried out in the village (9)

37. When the Court has to form an opinion as to the existence of any fact of a public nature, any statement of it, made in a recital contained in any Act of Parliament or in any Act of the Governor General of India in Council, or of any other legislative authority in British India constituted for the time being under the Indian Councils Act, 1861, the Indian Councils Acts, 1861 and 1892, or the Indian Councils Acts, 1861 to 1909" (10), or in a

Relevancy of state ment as to fact of public nature contained in certain Acts or Notifications

(1) *Per Jackson J in Surroosuty Dossee v U b ca Nurd* 24 W R. 192 (1875)

(2) See *Girindra Clandra v Nages dro nath Chatterjee* 1 C W N 530 533 (1897)

(3) See remarks of Jackson J in *Collector of Rajshahye v Doorga Soonduree* 2 W R 211 212 (1865) (*v post*) Taylor Ev § 1770 C

(4) 2 B L R (P C) 4 (1868) s c 11 W R (P C) 2

(5) *Sudukhina Choudrani v Rajmohan Bose* 3 B L R (A C) 381 (1869) See *Dinoroni Choudrani v Brojomoh ni Choudrani* 29 C 201 (1901)

(6) See *Junmajoy Mull ch v Duarka rail Mylee* 5 C 287 (1875) *Ra Ch nder v Binsceditr Naik* 9 C 741 (1883) *Taruchath Mookerjee v Mohen drurath Glose* 13 W R 56 (18 0

() As to *chittahs* other than those of the surve see *Gopal Chu der v Madhub Ch der* 21 W R 79 (1874) *Krishna Cl der v Meer Sadfar* 22 W R 376 (18 4) *Shan Cl and v Rankristo Geurah* 19 W R 309 (1873)

(8) Field Ev 226 sb 6th Ed 168

(9) *Dabee Pershad v Ram Coomar* 10 W R 443 (1868)

(10) The portion quoted has been substituted by Act N of 1914 Sch. I

notification of the Government appearing in the *Gazette of India* or in the *Gazette* of any Local Government, or in any printed paper purporting to be the *London Gazette* or the *Government Gazette* of any colony or possession of the Queen, is a relevant fact (1)

Principle.—These documents are admissible on grounds similar to those on which entries in public records are received. They are documents of a public character made by the authorized agents of the public in the course of official duty and published under the authority and supervision of the State, and the facts recorded therein are of public interest and notoriety. Moreover, as the facts stated in them are of a public nature, it would often be difficult to prove them by means of sworn witnesses (2)

s 3 (Fact)

s 78 (Proof of Notifications)

s 3 (Relevant)

s 81 (Presumption as to Gazettes Newspapers and Private Acts)

s 57 (2) (Judicial notice of Acts)

Steph Dg Art 33 Tylor Ev § 1660 Starkie Ev 278 Posc e, N P Ev, 187 188 Phipson Ev 5th Ed 318 31 & 32 Vic Cap 37 (The Documentary Evidence Act 1868 amended by the Documentary Evidence Act 1887) Act XXXI of 1863 (*Gazette of India*) Act III of 1909 s 116

COMMENTARY.

The fact as to the existence of which the Court has to form an opinion must be one of a public nature. A similar expression occurs in section 42 *post* which speaks of matters of a public nature (3). The *Gazette of India* the organ of the Government of India was first published in 1863 only. Previous to that date the notifications of the Government of India were published in such of the *Gazettes* of the Local Governments as was necessary. By Act XXXI of 1863 publication in the *Gazette of India* was declared to have the effect of publication in any other Official Gazette in which publication was prescribed by the law in force at the date of the passing of the Act (1). In the case of *R v Amuruddin* (5) the *Gazette of India* and the *Calcutta Gazette* containing official letters on the subject of hostilities between the British Crown and Mahomedan fanatics on the frontier were held to have been rightly admitted in evidence under the sixth and eighth sections (6) of the repealed Act II of 1855 as proof of the commencement continuation and determination of hostilities. It was

documents should be interpreted properly for which they were put in evidence Wahabi conspirators at Patna for purpose (7). According to the law is in general *prima facie* but not conclusive in judgment of law every subject is privy to the making of it but a private Statute (though it contains a clause requiring it to be judicially noticed as a public one) is not evidence at all

(1) The last portion of this section which was added by s 2 Act V of 1899 has been removed by Act V of 1914 Sch II

(2) Taylor Ev § 1591 Starkie Ev 273 *et seq*

(3) v Notes to ss 13 32 (4) *ante* and 42 *post*

(4) Act XXXI of 1863 s 1

(5) 7 B L R 63 s c 15 W R Cr 75

(6) S 6 of Act II of 1855 corresponds generally to s 57 (judicial notice) and s 8 of the same Act to the present section

(7) Field Ev 6th Ed 172 for English cases v Taylor Ev § 1660 and Starkie Ev 278

against strangers either of notice, or of any of the facts recited (1) The present section draws no distinction between public and private Acts of Parliament, merely requiring that the fact spoken to in either case should be of a public nature but of course neither in the case of the Act nor of the Gazette in the section mentioned is any recital therein contained conclusive of the fact recited unless expressly declared to be so, and knowledge of a fact although it be of a public nature is not to be conclusively inferred from a notification in the *Ga etc*, it is a question of fact for the determination of the Court (2)

Thus by the Documentary Evidence Act(3) the *Ga etc* is made *prima facie* evidence of any proclamation order, or regulation issued by Her Majesty, the Privy Council or any of the principal departments of State So also by section 116 of the Presidency Towns Insolvency Act the production of the *Ga etc* containing the notice mentioned in the section is *conclusive evidence* of the order having been duly made and of its date (4)

By Statute the Gazette has been expressly rendered evidence of various matters

The Gazettes and Newspapers are often evidence as a medium to prove notice as of the dissolution of a partnership which is a fact usually notified in that manner But unless the case is governed by some special Act such evidence is very weak without proof that the party to be affected by the notice has probably read the particular *Ga etc* in which it is contained *eg* that he takes it in or attends a reading room where it is taken or has shown knowledge that it is a publication with the mere fact that the paper

Gazettes as medium to prove notice

Moreover in the case of those

who dissolve partnership it is incumbent upon them to give to old customers of the firm an express and specific notice by circular or otherwise (6) Under section 350 of the repealed Act VIII of 1839 (Civil Procedure) the Government *Ga etc* containing the advertisement of sale and a printed paper purporting to be the conditions of sale alluded to in the *Gazette* and issued from the Master's Office in the name of the Master were admitted in evidence to prove the actual conditions of the deed of sale (7) Notice of a resolution of winding up a Company voluntarily must also be given by advertisement in the Local Official *Ga etc*(8) in certain cases by the Presidency Towns Insolvency Act(9) and certain orders made thereunder will affect creditors after proof of notice given and the lapse of a certain time (10)

38. When the Court has to form an opinion as to a law of any country any statement of such law contained in a book purporting to be printed or published under the authority of the Government of such country and to contain any such law, and any report of a ruling of the Courts of such country contained in a book purporting to be a report of such rulings is relevant

Relevancy of statements as to any laws contained in law books

(1) Taylor Ev §§ 1660 1661 Steph Dg Art 33 Roscoe N P Ev 187 188 See *Baban Mjacia v Nagu Shrawucha* 2 B 38 (1876) *Ballard v Way* 5 L J Ex 207

(2) *Harratt v Wise* 9 B & C 712 Starkie Ev 280

(3) 31 & 32 Vic Cap 37 (1868) s 2 amended by the Documentary Evidence Act 1882 s 2

(4) Act III of 1909

(5) Starkie Ev 280 Taylor Ev §§ 1665 1666 Phypson Ev 5th Ed 131 319 Whart cited ib ss 671—675 see

s 14 ante and Notes thereto In rebuttal evidence may of course be given as that the party is unable to read etc

(6) *Clindze Clurn v Eduljee Coxas* 1 c 8 C 678 (1882)

(7) *Jotendro Mohun v Rance Brjo W* R 1864 50

(8) Act VII of 1913 s 206

(9) Act III of 1909 ss 70 69(4) Sch I ss 3 6 and the Insolvency Rules (Calcutta) ss 108 129 1) 138 147B and 147C

(10) *Ib* s 3

Principle—These statements in books of law and in Reports are admissible on grounds similar to those of the three preceding sections. Books containing the law of a country(1), whether in the form of Statute or case law, deal with matters which are of public notoriety and interest, and when published under the authority of Government have the further guarantee of that authority, while reports not published under the authority of Government or of the Courts,

s 3 ("Relevant")

s 57 (Judicial notice.)

s 45 (Proof of Foreign law)

s 84 (Genuineness of books here mentioned)

Taylor, Ev, §§ 1423—1425, Best, Ev, § 513, Roscoe, N P Ev, 119—121, Steph Dig, Arts. 49, 50, Phipson, Ev, 5th Ed, 367, Act XVIII of 1875, s 3 (Indian Law Reports) 6 & 7 Vic, Cap 94, s 3 22 & 23 Vic, Cap 63, 24 & 25 Vic, Cap 11 (Ascertainment of Foreign and Colonial law) Foreign Jurisdiction Act, 1890, 53 & 54 Vic, c, 37

COMMENTARY.

* Law
of any
country *

These words would by themselves include India as well as Great Britain and other Foreign Countries but the words "form an opinion" and the fact that Courts of this country must take judicial cognizance of the laws they administer(2) which, therefore, require no proof, indicate that the countries referred to in the section are countries other than British India. Though, however, the Court must take judicial notice of laws in force in British India and of the Acts of Parliament, it may refuse, if called upon by any person, to do so, until such person produces any such appropriate book or document of reference as it may consider necessary to enable it to do so (3). Statements of law other than those contained in Reports must purport to be printed or published under authority. So a statement contained in an unauthorized translation of the Code Napoleon as to what the French law was upon a particular matter was held not to be relevant under this section(4) but reports of rulings need not be so published, if only the book containing them purport to be a report of the rulings of such country. As to the presumption of genuineness of the books in this section mentioned, see s 84, post

skilled witnesses, or (in the case of foreign customs and usage)(6) by any witness, expert or not, who is acquainted with the fact and not by the production of the books in which it is contained (7). In India also Foreign law may (in addition to the method provided by this section) be proved by the opinions of persons specially skilled in such law (8). Further there exists a statutory procedure for the ascertainment of Foreign and Colonial law. By 22 and 23 Vic, Cap 63, a case may be stated for the opinion of a superior Court in any of Her Majesty's

(1) Where it is necessary to refer to a Statute judicially noticeable a copy is not given in evidence but merely referred to to refresh the memory—Starkie Ev 274

(2) S 57, post

(3) S 57, post

(4) *Christian v Delaney*, 26 C, 931 (1899) s c, 3 C W N, 614

(5) v definition of Foreign Court Civil Pr Code s 2 2nd Ed p 33

(6) *Lindo v Belisario* 1 Hagg C R 216 *Sussex Peerage Case* 11 C & F 114—117, *Vanderdonckt v Thelluson* 8 C B, 812

(7) *Sussex Peerage Case*, supra, *Mostyn v Fabrigas*, Cowp, 174, *Roscoe N P Ev* 119—121, *Bater v Bater* (1907) P. 333 (expert evidence required to prove the validity of foreign marriage)

(8) v c 45 post

donations to ascertain the law of that part(1) and by 24 and 25 Vic, Cap 11, a similar case may be stated for the opinion of a Court in any *Foreign State* with which Her Majesty may have entered into a Convention for the ascertainment of such law(2), and as to judicial notice of the territorial extent of the jurisdiction and sovereignty exercised *de facto* see The Foreign Jurisdiction Act, 1890 (3)

(1) *Legin v Princess Victoria* 1 Jur O S 109 in which the Court of Chancery in England forwarded a case on Hindu Law to the Supreme Court of Calcutta

(2) This Act is stated to be practically a dead letter as no Convention has ever

been made in pursuance of it Phipson 1 v 5th Ed 368 See also 6 & 7 Vic, Cap 94 § 3 and *R v Dossaj Gulam* 3 B 334 (1878)

(3) 53 & 54 Vict c 37

HOW MUCH OF A STATEMENT IS TO BE PROVED

While on the one hand, in the case of a statement in a civil or criminal proceeding by way of admission or confession read together, since thus alone can the statement intended to convey be clearly be obviously, unfair to take that only which is against the interest of the declarant, while the very next sentence might contain a material qualification, on the other hand, great prolixity, waste of time, and not seldom injustice, might occur if evidence of matters (often otherwise inadmissible) were allowed to be given simply on the ground that the whole of the documents or conversations must be before the Court. The latter is, therefore, constituted the judge of the amount which may be given in evidence of any document or conversation.

What evidence to be given when statement forms part of a conversation document book, or series of letters or papers

39 When any statement of which evidence is given forms part of a longer statement, or of a conversation or part of an isolated document, or is contained in a document which forms part of a book, or of a connected series of letters or papers, evidence shall be given of so much and no more of the statement, conversation, document, book, or series of letters or papers, as the Court considers necessary in that particular case to the full understanding of the nature and effect of the statement, and of the circumstances under which it was made

Principle: section (which is to the same added on the general grounds

s 21 23 (*Proof of Admissions*) (Examination Cross examination. Re examination)
ss 137, 138 & Chap X *passim*

Taylor, Ev., §§732—734, 14 4, Roscoe, V P Ev., 179

COMMENTARY.

Documents generally

“Though the whole of a document may, as a general rule, be read by the one party, when the other has already put in evidence a partial extract(1), this rule will not warrant the reading of distinct entries in an account book(2), or distinct paragraphs in a newspaper(3), unconnected with the particular entry or paragraph relied on by the opponent, nor will it render admissible bundles of proceedings in bankruptcy, entries in corporation books, or a series of copies of letters inserted in a letter book, merely because the adversary has read therefrom one or more papers or entries or letters (5). If, indeed, the extract

(1) Norton Ev 203 204 Taylor, Ev., §§ 732—734, 127—129 v ante

(2) R v Queens C J s, Re Fesham, 10 L. R. Ir 294 cited in Taylor, Ev., p 527

(3) Call v Howard 3 Stark, R. 6
Reeve v Whitmore 2 Drew, & Sm., 446

(4) Darby v Ousely 1 H & N 1

(5) Sturge v Buchanan, 10 A. & E. 598

put in expressly refer to other documents, these may be read also(1), but the mere fact that remaining portions of the papers or books may throw light on the parts selected by the opposite party will not be sufficient to warrant their admission, for such party is not bound to know whether they will or not, and moreover, the light may be a false one"(2) It may be inferred, it has been said, from this section, how much of a police diary may be seen by an accused person when it is used to refresh memory or to contradict the police officer. In such case the accused person is entitled to see only the particular entry and so much of the special diary as is, in the opinion of the Court, necessary in that particular matter to the full understanding of the particular entry, so used and no more (3)

"The same rule prevails in the case of a conversation in which several distinct matters have been discussed, and although it was at one time held, on high Conversation

of proceeding has induced the Courts, in later times, to adopt a stricter rule and if a part of a conversation is now relied on as an admission, the adverse

former time does not authorise proof by the party calling that witness of all that was said at the same time, but only of so much as can be in some way connected with the statement proved (6) Therefore where a witness has been cross examined as to what the plaintiff had said in a particular conversation it was held that he could not be re examined as to other assertions, made by the plaintiff in the same conversation, *that were not connected* with the assertions to which the cross examinations related, although they were connected with the subject matter of the suit (7)

"With regard to letters it has been held that a party may put in such as Letters were written by his opponent, without producing those to which they were answers, or calling for their production, because in such a case the letters to which those put in were answers are in the adversary's hands and he may produce them if he thinks them necessary to explain the transaction (8) But while this is the strict rule, yet in practice if a party reads a letter from his opponent and is in possession of a copy of his own letter to which the opponent's is an answer he is expected to read both. If a plaintiff puts in a letter by the defendant on the back of which is something written by himself, the defendant is entitled to have the whole read(9), and where a defendant laid before the Court several letters between himself and the plaintiff, he was allowed to read a reply of his own to the last letter of the plaintiff it being considered as a part of an entire correspondence (10)

(1) *Sturge v Buchanan* 10 A & E 600 605 The reference incorporates the two together *Johnson v Gibson* 4 Esp 21 *Falconer v Hanson* 1 Camp 171

(2) *Sturge v Buchanan* supra 600—605 Taylor Ev § 732

(3) *R v Mannu* 19 A 405 (1897) per Edge C J *Dal Singh v Emperor* 44 I A 137 (1917)

(4) *The Queen's case* 2 B & E 297 298 per Abbott C J

(5) *Prince v Samo* 7 A & E 627 634 635 Taylor Ev § 733

(6) *Prince v Samo* supra 627 *Sturge*

v Buchanan 10 A & E 605

(7) Taylor Ev § 1474 *Prince v Samo* supra 637 In this case the opinion of Lord Tenterden in *The Queen's Case* (2 B & E 298) that evidence of the whole conversation if connected with the suit, was admissible though it related to matters not touched in the cross examination was considered and overruled

(8) *Lord Barrymore v Taylor* 1 Esp 377 *De Med na v Owen* 3 C & Kir 72

(9) *Daglish v Dodd* 5 C & P 238

(10) Taylor Ev § 734 *Roe v Dey* 7 C & P 705

JUDGMENTS OF COURTS OF JUSTICE, WHEN RELEVANT

TRANSACTIONS unconnected with the facts in issue are, according to the general rule of relevancy inadmissible in evidence. Judgments in Courts of Justice on other occasions form however, in certain cases an exception to the exclusion of evidence of transactions not specifically connected with facts in issue (1). Sections 40—42 declare when and in what manner judgments orders and decrees are admissible. Judgments orders and decrees other than those mentioned in these sections are irrelevant unless the existence of such judgment order or decree is a fact in issue or is relevant under some other provision of this Act (2). Judgments are either domestic or foreign and either of these may be *in personam* or *in rem*.

The general rules relating to judgments are as follows

(a) In the first place all judgments are conclusive of their existence as

Thus if the object be merely to prove the existence or its legal consequences (and not the accuracy production of the record or of a certified copy facts against all the world (3). In other words

the law attributes unerring verity to the *substantive* as opposed to the *judicial* portions of the record. And the reason is that a judgment being a public transaction of a solemn nature must be presumed to be faithfully recorded. In the *substantive* portion of a record of a Court of Justice the Court records or attests its own proceedings and acts. *Quod per recordum probatum, non debet esse negatum*. In the *judicial* portion on the contrary the Court expresses its opinion, and that opinion is adduced before the Court for its consideration.

with the fact to any third person who was not a party to the proceedings in which it was pronounced. And hence the rule that it does not bind a third person who was not such party. In connection where the record is matter of inducement or merely introductory to other evidence (5).

(b) All judgments are conclusive of their truth in favour of the judge that is for the purpose of protecting him who pronounced it and the officers who enforced it (6).

(c) The admissibility and effect of judgments when tendered as evidence of their truth that is as evidence of the matters decided or of the grounds of the decision for the purpose of concluding an opponent upon the facts determined. It belongs to positive law to enact what judgments shall have such a character. Accordingly, the Act declares (7) that a judgment in order to have this effect

(1) Steph Introd 164

(2) S 43 post

(3) *Abhash Chandra v Poresh Nath* 9 C W N. 402 410 (1904)

(4) Taylor Ev § 1667 Best Ev § 590 Steph Dg Art 40 Phipson Ev 5th Ed 382—410 v s 43 post As to parties and privies see cases cited in re

cent decision *Secretary of State v Syed Ahmed* 44 M 778 (1921)

(5) See s 43 post

(6) Taylor Ev §§ 1669—1672 Steph Dg Art 45 Roscoe N P Ev 204 205 1194—1201 see Act XVIII of 1850

(7) S 41 post see Norton Ev 206

must have been pronounced by a competent Court in the exercise of Probate, Matrimonial, Admiralty, or Insolvency jurisdiction. Such a judgment is conclusive of certain matters against all the world and not against the parties and their privies only. On the other hand, the judgment *in personam* (or the ordinary judgment between parties as in cases of contract tort or crime) of a Court of competent jurisdiction is conclusive proof in subsequent proceedings between the same parties or their privies only of the matter actually decided (1) but is no evidence of the truth of the decision between strangers or a party and a stranger (2) except upon matters of a public nature in which case however they are not conclusive evidence of that which they state (3). The reasons of this rule are commonly stated to rest on the ground expressed in the maxim *res inter alios acta vel iudicata alteri nocere non debet* it being considered unjust that a man should be affected and still more that he should be bound by proceedings in which he could not make defence cross examine or appeal (4).

Foremost among the judgments orders and decrees which are declared to be admissible by the following sections are those which have the effect of barring a second suit or trial (5). Thus judgments orders and decrees may be relevant for the purpose of showing that there is a *lis pendens* (6) or that the matter is *res iudicata* (7) or that the claim advanced forms part of a former claim or that the remedy for which the plaintiff sues is one for which the plaintiff might have sued in a former suit in respect of the same cause of action (8). Next the judgments of certain Courts in the exercise of Probate Matrimonial Admiralty or Insolvency jurisdiction are declared to be relevant and conclusive proof of certain matters (9). The general nature of these the particular individuals *w* status generally as against rule is that public policy requires that matters of *status* should not be left in doubt and a decision *in rem* not merely declares *status* but *ipso facto* renders it such as it is declared (10). With the exception of such judgments there are no judgments conclusive in Indian Courts against persons other than the parties to the proceedings or their representatives (11) as to the facts which they declare or the rights which they confer. There are however such judgments namely those relating to matters of a public proof of what they state and not proceeding and their representative way of evidence as to the facts with which they are concerned. Thus in a suit in

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admissibility under the preceding sections the existence of a judgment order or decree may be a fact in issue in the case or a relevant fact under some of the other provisions of this Act as to relevancy (13). Thus where *A* sues *B*, because through *B*'s fault *A* has been sued and cast in damages the judgment

(1) See s 40 post

(2) *v ib* s 43 post *illusts* (a) (b)

(3) S 42 post where the reasons for this Except on are considered

(4) See *Physon Ev 511 Ed 405* where the grounds of this rule are considered

(5) S 40 post

(6) *Civ Pr Code Part I 10 2nd Ed p 95* see s 40 post

(7) *ib* Part I ss 11—14 d Ed

pp 99—101 Cr Pr Code see s 403
40 post *Furness Withy Co v Hall*
(1909) *Times L R V 25 p 233*

(8) *Woodroffe & A Al s Civ Pr Code O II r 2 2nd Ed p 573* see s 40 post

(9) S 41 post

(10) See note to s 41 post

(11) *Norton Ev 204 214*

(12) S 42 post

(13) See s 43 post

and decree by which such damages are given is a fact in issue, or where *B* is charged with the murder of *A*, the fact that *A* has obtained a decree of ejectment against *B* may be relevant as showing the motive in *B* for the murder of *A* (1). Lastly, as fraud is an act which vitiates the most solemn proceedings of Courts of Justice, and as a judgment delivered by an incompetent Court is a mere nullity, the Act provides that any party to a suit or other proceeding may show that any judgment, order or decree, which is relevant under sections 40—42, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion (2).

Relevancy of judgments orders and decrees as barring second suit or trial

40 The existence of any judgment, order or decree, which by law, prevents any Court from taking cognizance of a suit (3) or holding a trial, is a relevant fact when the question is whether such Court ought to take cognizance of such suit, or to hold such trial

Principle.—See Introduction *ante* and Notes, *post*

ss 41—43 (Judgments, orders, and decrees)

s 44 (Fraud—want of jurisdiction)

s 3 ("Court")

s 3 ("Relevant")

s 3 ("Fact")

ss 74, 76, 77 (Public document—certified copies)

Steph Dig, Arts 39—47, Taylor Ev, § 1684 *et seq*, Smith's L C Note to Duchess of Kingston's case, Field, Fv, 6th Ed 176—179, Estoppel by Matter of Record in Civil suits in India by L Broughton (1895), The Law of Estoppel in British India by A Caspersz (4th Ed., 1915), The Law of *Res Judicata* by Hakim Chand (1894)

COMMENTARY.

Previous judgments relevant to bar a second suit or trial

This section provides for the admission of evidence for the purpose of showing that a suit or matter in issue is the that the relief sought to sue in former suit, or was one of several remedies in respect of the same cause of action for which the plaintiff, in a former suit, omitted, without the leave of the Court, to sue (5), (c) that there is an estoppel by judgment, the matter in issue being *res judicata* (6). Under the first of the above mentioned grounds, the order admitting the plaint of the former suit, in the second and third the judgment, and in either, such other portions of the record as are material to show that the matter is without the cognizance of the Court, would be relevant and admissible evidence under this section. Each of the above mentioned grounds of objection to a second suit or trial forms a portion of the law of Procedure, and as such is dealt with by the Civil or Criminal Procedure Codes. question, ons which ince it is simply to provide the means by which parties to suits may prove any right to which the Legislature entitles them. The present section, accordingly, is so worded as to carry out whatever may be for the time the law of Procedure on

(1) Cunningham Ev 29—32, see s 43 *post* and *ilusts* (d) (e), (f), thereto

(2) S 44 *post*

(3) See *Ranchoddas Krishnadas v Bapu Narhar*, 10 B at p 443 (1886)

(4) Woodroffe and Ali's Civ Pr Code

Part I s 10 2nd Ed p 95

(5) Woodroffe and Ali's Civ Pr Code O II r 2 2nd Ed p 573

(6) *Ib* Part I s 11—14 2nd Ed pp 99—100 Cr Pr Code s 403

such questions (1) It is therefore not intended in this work to deal with these subjects, but merely to cite the provisions of the Codes relating thereto

The reception of this evidence is grounded upon the fact that unless it were admitted effect could not be given to the provisions of the law of Procedure which this section is intended to subserve If that law declares that a Court shall not in particular circumstances hold or take cognizance of a judicial proceeding it is plainly necessary to be able to show that these circumstances exist The present section accordingly enables such proof to be given

Except where a suit has been stayed under the Civil Procedure Code, Pending suits
a Court shall not try any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit for the same relief between the same parties or between parties under whom they or any of them claim pending in the same or any other Court whether superior or inferior in British India having jurisdiction to grant such relief or any Court beyond the limits of British India established by the Governor General in Council and having like jurisdiction or before Her Majesty in Council *Explanation*—The pendency of a suit in a foreign Court (2) does not preclude the Courts in British India from trying a suit founded on the same cause of action (3) This section only provides that no suit shall be tried if the same issues are involved in a previously instituted suit It does not dispense with the institution of a suit within the proper time when the law requires such institution (4)

In respect of relief or remedies for which the plaintiff in a former action omitted to sue the Civil Procedure Code enacts as follows — Omission to sue for relief or remedy

Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action (5) but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court

If a plaintiff omit to sue in respect of or intentionally relinquish any portion of his claim he shall not afterwards sue in respect of the portion so omitted or relinquished

A person entitled to more than one remedy in respect of the same cause of action may sue for all or any of his remedies but if he omits (except with the leave of the Court obtained before the first hearing) to sue for any of such remedies he shall not afterwards sue for the remedy so omitted For the purpose of this section an obligation and a collateral security for its performance shall be deemed to constitute but one cause of action (6)

The rule of estoppel by judgment or *res judicata* is that facts actually decided by an issue in one suit cannot be again litigated between the same parties and are conclusive between them for the purpose of terminating litigation (7) Res judicata

(1) Cunningham Ev 175 176
(2) See as to meaning of Civ Pr Code s 2

(3) Civ Pr Code Part I s 10 2nd Ed p 95 *Fakeer uddeen Mal on cd v Official Trustee* 7 C 82 (1881) *Balkishan v Kulan Lal* 11 A 148 (1888) *Bisses v Singh v Ganpit* 8 C L R 113 (1880) *Mekjee Keslu v Devachand* 4 C L R 282 (1879) *Ramalinga Chetty v Ragunatha Rao* 20 M 418 (1897) *Naappa Chetty v Chidambaram* 21 M 18 (1897) *Venkata Chandrappa v Venkatarama Redd* 22 M 256 (1898)

(4) *Nenaganda v Paresia* 22 B 640 (1897)

(5) *Venkatarama Ayyar v Venkata Subrahmanyan* 24 M 27 (1900)

(6) Civ Pr Code O II r 2 2nd Ed p 373

(7) *Boleau v Ruln* 2 Ex 665 681 per Park B and per Lord Hardwicke in *Gregory v Molesworth* 3 Atkyns 625 cited in *Soorjo nonce Dayee v Suddanund Molapaiter* 12 B L R 304 315 (1873)

Estoppel by judgment results from a matter having been directly and substantially in issue in a former suit and having been there heard and finally decided *Kali Krishna v Secretary of State* 16 C 173 (1888) *Poulton v Adjustable Cover and Boiler Block Co* C A (1908) 2 Ch 240 For an apparent exception to this rule in the case of a petition to revoke a patent which exception seems based on the ground that such a petition is on behalf

There is nothing technical or peculiar to the law of England in this rule which is recognised by the Civil law and has been held to be consistent with the Code of Civil Procedure (1) Independently of the provision in the Code of 1859 the Courts in India recognised the rule and applied it in a great number of cases and the re enactment of the provision in the Code of 1877 appears to have been made with the intention of embodying in the 12th and 13th sections of that Code the law then in force in India instead of the imperfect provision in the second section of Act VIII of 1859 (2) The provisions in the present Code (3) which embody the law of estoppel by judgment in civil suits in India (4) correspond very nearly with those in the Code of 1877 English text writers deal with this subject under the head of Evidence as it is a branch of the law of estoppel but the authors of the Indian Codes have regarded it as belonging more properly to the head of Procedure (5) Estoppel is regarded in these Codes as proceeding upon the equitable principle of altered situation and is distinguished from *res judicata* which is based on the principle that there must be an end to litigation (6) The principle of *res judicata* as remarked by West J in *Sridhar Rajalakshmi v. Narayan Lalad Babaji* (7) is simple in its statement but presents considerable difficulty in its application Very numerous cases have arisen in India upon the construction of the sections of the Code dealing with this subject and upon them Many of them turn upon the principles to be applied to the subject of this work. It would be unprofitable and lead to confusion to enter into an examination of many of these decisions (8) for a case may perhaps be a binding authority as to the conclusion arrived at where the facts are identical but not otherwise in any other case the tribunal must investigate the facts for itself and determine (9) referring to previous cases only for such propositions of law as are contained in them.

In a reported case in the Privy Council (10) it was said Their Lordships desire to emphasize that the rule of *Res Judicata* while founded on recent precedent is dictated by a wisdom which is for all time * * * * Though the rule of the Code may be traced to an English source it embodies a doctrine in no way opposed to the spirit of the law as expounded by the Hindoo com "

of the public see *n re Deely's Patent* (1895) 1 Ch 687 & Taylor § 1685 (a) For bar in suit by members of public see *Mlam ed An r v Sum tra Kiar* 36 A 424 (1914) (members of Mahomedan community)

(1) *Kluwolec Sngl v Hosse n Bux* 7 B L R 673 678 (1871) But while consistent it was not identical with it see *Hukum Chand Res Jud* 7

(2) *M s r Raghb r v Sheo Baksh* 9 C. 439 445 9 I A 197 202 204 (1882) *Kan eswar Pershad v Rajkumari Ruttun* 19 I A 238 20 C 79 (1892)

(3) Act V of 1908 ss 11—14 2nd Ed pp 99—101

(4) Cf as to the law on this subject *Estoppel by matter of record in civil suits in India* by L Broughton (1893) *The Law of Estoppel in British India* by A Caspersz (4th Ed 1915) *Feld s Ev* 6th

Ed 175—190 *The Law of Res Judicata* by Hukum Chand (1894)

(5) See remark of Mahmood J in *S to Ran An r Begum* 8 A 325 331 (1886) *follo ed n Ramchandra Dhondo v Mahkapa* 40 B 679 (1916)

(6) *Casamally Jaurajbhai v S r Currim bhoy Ebrah m* 36 B 214 (1912) *See shanker Nanabhai v Morarij Keshav* 36 B 283 (1912)

(7) 11 Bom H C R 228 (1874)

(8) See *Broughton op cit* 7

(9) *London Joint Stock Bank v S m ons App Cas* 1892 at p 222 *per Lord Herschell v b* at p 210 *per Lord Halsbury L C* I must make a protest that it is not a very profitable inquiry whether one case resembles another in its facts

(10) *Shooparsan Singh v Ramnandan Prasad Sngl* P C. 43 C 694 (1916) *per S r Lawrence Jenk ns*

of former judgment. And so the application of the rule by the Courts in India should be influenced by no technical considerations of forms but by matter of substance within the limits allowed by law.

With respect to the rule as applicable to Civil cases, the provisions of the present Code of Civil Procedure in regard to *res judicata* as contained in sections 11—14 are as follow —

No Court shall try any suit or issue (1) in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties (2) or between parties under whom they or any of them claim litigating under the same title in a Court of jurisdiction competent to try such subsequent suit, or the suit in which such issue has been subsequently raised and has been heard and finally decided by such Court.

Explanation I — The expression former suit shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

Explanation II — For the purpose of this section the competence of a Court shall be determined irrespective of any provision as to a right of appeal from the decision of such Court.

Explanation III — The matter above referred to must in the former suit have been alleged by one party and either denied or admitted expressly or impliedly by the other.

Explanation IV — Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V — Any relief claimed in the plaint which is not expressly granted by the decree shall for the purpose of this section be deemed to have been refused.

Explanation VI — Where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others all persons interested in such rights shall for the purpose of this section be deemed to claim under the persons so litigating (3).

The rule contained in this section applies equally to appeals and miscellaneous proceedings where a proceeding is not a suit, or to the decision of a question arising in it. The Madras High Court has held in two recent cases that the principle of constructive *res judicata* should not be applied to execution proceedings unless the decision of the subsequent question was either expressly given or necessarily implied (6).

Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action he shall not be entitled to institute a suit in respect of such cause of action in any Court to which the Code applies (7).

(1) As to the propriety of the extension or the doctrine to exclude the trial of an issue see *Rai Churn v. Kaurid Mohon* 2 C W N 287 301 (1898) s c 25 C 571 and see *Clandi Prasad v. Mahendra Singh* 23 A 5 8 11 (1900).

(2) See *Secretary of State v. Syed Ahmad* 44 M 778 (1921).

(3) Civ Pr Code s 11.

(4) *Balkrishnan v. Kishan Lal* 11 A 145 (1888).

(5) *Srish Chandra Pal Choudhry v. Triguna Prasad* 40 C 541 (1913).

(6) *So lasindara Pillai v. Chokkalinga Pillai* 40 M 780 (1917) *Lakshmi Narayana v. Pallamraju* 4 M L W 101 (1916). See on this point Woodroffe and Amcer Ali's Civil Procedure Code and *Kashinath Krishna Joshi v. Dhondshi* 40 B 675 (1916) and *Ajudhia v. Panda v. Inayatullah* 35 A 111 (1913).

(7) Civ Pr Code s 12.

A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties, or between parties under whom they or any of them claim, litigating under the same title, except—

- (a) where it has not been pronounced by a Court of competent jurisdiction,
- (b) where it has not been given on the merits of the case(1),
- (c) where it appears on the face of the proceedings to be founded on an incorrect view of international Law or a refusal to recognize the law of British India in cases in which such law is applicable,
- (d) where the proceedings in which the judgment was obtained are opposed to natural justice,
- (e) where it has been obtained by fraud,
- (f) where it sustains a claim founded in a breach of any law in force in British India (2)

The Court shall presume upon the production of any document purporting to be a certified copy of a foreign judgment that such judgment was pronounced by a Court of competent jurisdiction unless the contrary appears on the record, but such presumption may be displaced by proving want of jurisdiction (3)

These sections as also the present section of this Act, must be read as subject to any other enactments touching their subject matter. Thus an entry of a record prepared under section 108 of the Land Revenue Code, Bombay Act V of 1879 by the Survey Officer, describing certain lands as *Khoti*, is by force of the seventeenth section of the *Khoti Act* (Bombay Act I of 1880) conclusive and final evidence of the liability thereby established and shuts out the evidence of a prior decision under this section of the Evidence Act as proof of *res judicata* whereby a Civil Court adjudged the land to be *dhara* (4)

The rule with regard to previous judgments in Criminal cases is contained in the Criminal Procedure Code(5) and is as follows —

A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 236, or for which he might have been convicted under section 237

A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under section 255, first paragraph

A person convicted of any offence constituted by any act causing consequences which, together with such act constituted a different offence from that of which he was convicted may be afterwards tried for such last mentioned offence, if the consequences had not happened, or were not known to the Court to have happened, at the time when he was convicted

A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction be subsequently charged with, and tried for, any other offence constituted by the same acts which he

(1) *Keymer v Visianatham Reddi*
P C 40 M 112 (1917) 44 I A 6

(2) Cr. Pr. Code s 13

(3) Cr. Pr. Code s 14

(4) *Rai Chandra Bhaskar v Raghunath*
Buclaset 20 B 475 (1895) See also as to *Khoti Act* *Balaji Raghunath v Bulbin*

Rughoji 21 B 235 (1895) *Gopal v*
Dasarath Set 21 B 244 (1895), *Antaji*
Kashinath v Antaji Vadiat 21 B 480
(1896) *Gopal v Magheswar* 21 B 608
(1896)

(5) S 403

may have committed if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged

Explanation—The dismissal of a complaint the stopping of proceedings under section 219 the discharge of the accused or any entry made upon a charge under section 273 is not an acquittal for the purpose of this section

The rule as has been already seen is applicable in Criminal cases also and a person who has once been tried by a Court of competent jurisdiction and convicted or acquitted cannot be tried again for the same offence (1) The principle of the rule of *res judicata* is one that is well settled namely that a matter which has been put in issue tried and determined by a competent Civil or Criminal Court cannot be re opened between those who were parties to such adjudication The competency of the Court is essential (2) The test is not whether the decision was explicit but whether the issue was one upon which the judgment of the former suit was based (3) And the grounds for the decision may be *res judicata* as well as the decision itself (4) *Res judicata* should not be inferred from a judgment it must be clear from the pleadings and findings (5) The findings must be on points directly and substantially in issue (6) And a finding to be *res judicata* as between co plaintiffs must have been essential for the purpose of the relief (7) while the Courts are reluctant to enforce the principle as between co defendants (8) The grounds of same matter interest of *ut sit finis*

be twice vexed for the same cause (*quis debet bis vexari pro una eadem causa*) or twice punished for one and the same offence (*ne no debet bis puniri pro uno delicto*) (9) Inasmuch however as an estoppel shuts out enquiry into the truth it is necessary to see that the principle of *res judicata* is not unduly enlarged (10) Although the plea of *res judicata* may be taken at any state of a suit including first or second appeal an Appellate Court is not bound to entertain the plea if it cannot be decided upon the record before that Court and if its consideration involves the reference of fresh issues for determination by the Lower Court (11)

41 A final judgment order or decree of a competent Court, in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction which confers upon or takes away from any person

Relevancy of certain judgments in probate and jurisdiction

(1) Cr Pr Code s 403 as to the mode of proving a previous conviction or an acquittal see s 517 ib

(2) *Abdul Kadir v Doolanbibi* 37 B 563 (1913)

(3) *Sri Gopal v Parthi Sngi* P C 24 A 479 *Kali Kumar v Bahu Bhusan* 16 C L J 89 (1912) *Maharan Beni Pershad v Raj Kumar* 16 C L J 124 (1912)

(4) *Mutianmal v Secretary of State* 39 M 1202 (1916) *Krishna Belari Roy v Brojeswari Choudraee* 2 I A 283 (1875) *Kamarajon v Secretary of State* F B 11 M 309 (1888)

(5) *Rutimins v Dhondo Maladev* 36 B 207 (1912) *Baayyan Na du v Suryanarayana* F B 37 M 70 (1914) see *Baayyan Na du v Paradesi Na du* 35 M 716 (1912) *Mahomed Ibrahim v A bika Pershad* P C 39 C 527 (1912) and for other recent decisions on *Res Judicata* see

Mo a Holappa v Vithal Gopal 40 B 663 (1916) *Ba Devali v Umedbhai Bhilabhai* 40 B 614 (1916) *Ramchandra Dhole v Malkapa* 40 B 679 (1916) *Madhava rao v Anusujabai* 40 B 606 (1916)

(6) *Secretary of State v Samantla* 37 M 25 (1914)

(7) *Ramchandra Narayan v Narayan Maladev* 11 B 716 (1886)

(8) *Fakarcha Lalubha v Vagarchad Kalas* 40 B 211 (1916)

(9) *Lockyer Ferryma* 2 App Cas 519 *Phipson Ev* 5th Ed 390 cited in *Rachod Marar v Benaj Edulji* 20 B at p 91 (1894)

(10) *Rai Churn v Kumud Mohan* 2 C W N 297 301 (1893) s c. 25 C 51

(11) *Kanai Lal v Suaj Khur* 21 A 446 (1899)

difficulties on the subject, at any rate so far as domestic judgments *in rem* are concerned, are removed by this section, which greatly simplifies the law relating to these judgments. For the section declares what are the judgments which are alone to have a conclusive character, and one of the main difficulties has always been to ascertain some principle upon which to rest this class of judgments so as to determine what cases fall within it. And the section is exhaustive, for instance, it has been recently held in the Punjab High Court that a previous judgment in a compromise suit was not a judgment *in rem* not being included in the scope of this section and was therefore no bar to a subsequent suit. . . . and on a footing somewhat well as from that of foreign enforcement is still void of express legislative sanction, as while they are beyond the rule of *res judicata* enunciated in the Civil Procedure Code, there is nothing in this Act to directly indicate that its provisions relating to judgments *in rem* are to be construed so as to include foreign judgments. But it is apprehended that in analogy with the practice of the English Courts such judgments given in the exercise of or insolvency jurisdiction will receive in India the same force accorded to domestic judgments of the same

world. Prior to the passing of the Evidence Act, conclusive effect was not infrequently, but erroneously, given to decisions which were really binding only *inter partes*. . . . of an adoption in *Radha Churn* (5) *Nara* *Churn* (5) *in bo* *considera* *tion* *latter case* declares that a judgment, order, or decree in order to operate otherwise than *inter partes*, must be a final judgment of a competent Court made in the exercise of Probate, Matrimonial Admiralty or Insolvency Jurisdiction. Besides these, there are no other judgments of a conclusive character. Moreover, these judgments are conclusive proof of certain things only (6), namely

reference to this section the Select Committee on the Bill remarked in their Report as follows—For the sake of simplicity and in order to avoid the difficulty of defining or enumerating judgments *in rem* we have adopted the statement of the law by Sir Barnes Peacock in *Kanhya Lall v Radha Churn* 7 W R 339

(1) *Ramat Ali Khan v Musst Babu Zuhra* (1912) 47 P R 14 p 49

(2) See *Hukum Chand op cit* 603 *et seq* *Pigott, op cit* *Westlake op cit* *Wheaton op cit* *supra* note (1)

(3) As to the history and position of judgments *in rem* in India prior to this Act see *Yarakalamma v Annakala* 2 Mad H C R 276 (1864) *Kanhya Lall v Radha Churn* 7 W R 338 (1867) *Jogendra Deb v Funindro Deb* 14 M I A 373 (1871) *Ahmedbhoy v Vallebhoy* 6 B 703 (1882)

(4) 2 Mad H C R 276 (1864). The conclusion of Holloway J.—That a decision by a competent Court that a Hindu

family was joint and undivided or upon a question of legitimacy adoption partition of property rule of descent in a particular family or upon any other question in a suit *inter partes* or more correctly speaking in an action *in personam* is not a judgment *in rem* or binding upon strangers or in other words upon persons who were neither parties to the suit nor parties was approved of and confirmed by Peacock C J delivering the judgment of the Full Bench in the case of *Kanhya Lall v Radha Churn* 7 W R 338 *post* (5) 7 W R 338 (1867) B L R Sup Vol F B 662

(6) See *Kanhya Lall v Radha Churn* *supra* where it is said of a decree of divorce—It is conclusive upon all persons that the parties have been divorced and that the parties are no longer husband and wife but it is not conclusive nor even *pro mo facie* evidence against strangers that the cause for which the decree was pronounced existed. For instance if a

the legal character to which a person may be declared to be entitled, or to which a person may be declared not to be entitled, and the title which a person may be declared to possess in a specific thing. This section not only therefore but also enacts what their and less extensive than that *in rem* in English Courts(1)

whose present tendency is, however, to narrow the effect of such judgments making them binding for their proper purposes only, in accordance with the view which has been adopted by the Indian Legislature. For, according to the exception of the adjudication *in rem* against all persons and beyond the judgment on appeal(4). Under the provision

of the present section the judgments therein mentioned will operate *in rem* only in respect of those matters of which these judgments are declared to be conclusive proof. Beyond this only parties and privies will be within the estoppel. In English law a judgment *in rem* is strong *prima facie* evidence in a Criminal case on behalf of the person in whose favour such judgment was given but it is not conclusive(5), and a Criminal conviction is not in a subsequent proceeding conclusive of the facts necessary to be proved to obtain the conviction and is subject to the same rules of evidence as an ordinary judgment *inter partes*. Indeed, such a judgment would not seem to be a judgment *in rem* at all except in so far as a conviction for felony amounts to a judgment that

divorce between A and B were granted upon the ground of the adultery of B with C it would be conclusive as to the divorce but it would not be even *prima facie* evidence against C that he was guilty of adultery with B unless he were a party to the suit.

(1) According to English Law a domestic judgment *in rem* is conclusive *inter omnes* of the matters actually decided and also in prize cases of the grounds of the decision if these are plainly stated. A foreign judgment *in rem* is generally conclusive against strangers only upon questions of prize where the ground of condemnation is plainly stated or of marriage and divorce where the marriage was solemnised and the parties domiciled in the foreign country or of bankruptcy as to contracts made in such country or of probate administration and guardianship to a limited extent see Phipson Ev 5th Ed 386 387 where the authorities are cited.

(2) *De Mora v Concha* L R 29 Ch D 268 *Concha v Concha* L R, 11 App Cas 541.

(3) See *Bernardi v Motteux* Doug 574 580. All the world are parties to a sentence of a court of Admiralty per Lord Mansfield, *Hughes v Cornelius* 2 Sm L Ca. 9th Ed 825, 15 12th Ed Vol II p 764. *The Helena* 4 Rob Adm 3. Such adjudications have been held conclusive not only for their own proper purposes but for other purposes as well but it has been doubted whether, since the case of *Concha v Concha* supra the findings and grounds of the judgment as dis-

tinguished from the judgment itself would be deemed conclusive upon all the world. *Bigelow on Estoppel* 5th Ed 242. See *Caspersz op cit* (4th Ed pp 731 737-739) and following note.

(4) 'The Court of Appeal in *De Mora v Concha* L R 29 Ch D 268 plainly intimate that none of the generally accepted kinds of judgment *in rem* are such with the single exception of adjudication in prize causes in the admiralty in the sense that is to say that the findings and grounds of decision bind *inter omnes*. The judgment itself may operate *in rem* in a variety of cases but nothing else than the judgment except in the case mentioned. The result is that the discussion in regard to the distinction between judgments *in rem* and judgments *in personam* appears to have become for the greater part obsolete learning. If the two cases referred to point aright (*DeMora v Concha* supra *Brigha v Fayerweather*, 140 Mass 411) there is but one pure judgment *in rem* carrying that is to say in its broadly conclusive effect necessary findings and grounds of the decision other judgments operate only so far as they have perfectly and completely against all persons—established a right *in rem*. Beyond the judgment only parties and their privies are within the estoppel. Prize cases themselves are treated by both Courts English and American as exceptional possibly the foundations even of *Hughes v Cornelius* (a prize case *supra*) are no longer secure. M M Bigelow in the 'Law Quarterly Review', Vol II p 406 (1886).

(5) *Taylor* Ev § 1680.

the person convicted is a felon (1) But under this Act such a judgment will be conclusive in a Criminal, equally and to the same extent as in a Civil proceeding (2) In a recent case in the Calcutta High Court it has been held that a verdict of acquittal can only be conclusive as regards persons actually tried and not as regards persons named in a charge of conspiracy but not brought to trial, and it was said that the technicalities of English Law based on the sacred character of Trial

An order may be conclu

Thus an order upon a

evidence that the moneys ordered to be paid are due and all other pertinent matters stated in such order are to be taken to be truly stated as against all persons and in all proceedings whatsoever (4) As in the case of judgments *inter partes* a judgment *in rem* must be final and pronounced by a Court of competent jurisdiction (5) It has been held by the Punjab High Court that a plaintiff was estopped under this section from pleading in a suit filed in the Punjab that property he had unsuccessfully made a fraudulent dis

fact that the Bombay High Court was a Court of competent jurisdiction under section 16 of the Civil Procedure Code in which section property means property in British India (6)

The Courts exercise testamentary and intestate jurisdiction (7) under the Indian Succession Act (8) the Hindu Wills Act (9) and the Probate and Administration Act (10) This section is applicable to probates granted prior to the passing of the Hindu Wills Act (11) In the case now cited it was contended that as the testator died before the Hindu Wills Act came into force and as the executor of the will of a Hindu dying before that Act came into force was a mere manager having no title to the estate the probate of his will neither conferred a legal character nor declared the executor to be entitled to any legal character But the Court held as above mentioned and said —“ I have examined the cases which have been cited but I am of opinion that section 41 of the Evidence Act applies to this case It is quite true that a Hindu executor was at any rate until the passing of the Hindu Wills Act only

Probate Jurisdiction

(1) Taylor § 16 4 & see *Alderson v Collinson* (1901) 2 K B 107 an order made in affiliation proceedings is not a judgment *in rem* neither is an order to wind up a Company In re *Bowling & Welby's contract* 1895 1 Ch 663

(2) Field Ev 335 1b 6th Ed 181 see p 380 381 post notes (4) and (5)

(3) *Manindra Chandra Ghose v Emperor* 41 C 754 (1914) approving *Ramesh Chandra Bannerjee v Emperor* 41 C 350 (1913) per Woodroffe J

(4) *Indian Companies Act VII of 1913* s 198

(5) S 41 see s 44 post and s 40 ante And see *Toronto Railway Co v Corporation of Toronto* (1904) A C 809

(6) *Ram Narain v Durga Das* (1912) 47 P R 55 p 205

(7) As to the effect of probate and letters of administration see *De Mora v Concha* L R., 29 Ch D 268 *Whicker v Hume* 7 H L C A 124 *Concha v Concha* L R. 11 App Cas 541 and other cases cited in *Physon Ev* 5th Ed 411 412 Taylor Ev §§ 1759—1761 Roscoe

N P Ev 201 202 Coote's Probate 10th Ed 352—356 Williams on Executors 10th Ed 431—434 see also pp 341 472 492—493 1637—1638 *Hukm Chand op cit* 513 Act X of 1865 ss 242 188 191 Act V of 1881 ss 59 12 14 and post *Komol Lochun Dutt v Nilrutton Mundle* 4 C 360 (1878) Ref to in *Rakshab Mondol v Sm Tarangini Devi* 25 C W N 207 (1921) *Teen Cowree v Hureehur Mookerjee* 8 W R 308 (1867) *Hormusjee Novroji v Bai Dhanba see* 12 B 164 (1887) *Maylo v Willans* 2 N W P Rep 268 (1870) [ref to in *Rakshab Mondol v Sm Tarangini Devi* 25 C W N 207 (1921)]

(8) Act X of 1865 see Part XXXI ss 242 179 331 as to the High Court see Letters Patent 1865 I (34) In the matter of *Fackeroodeen Adam Saw* 11 W R 413 (1869)

(9) Act XXI of 18 0

(10) Act V of 1881

(11) *Gurish Chunder v Brogilton* 14 C 861 8 4—8 6 (1897)

a manager, but as such manager he had certain powers over the estate, and for many purposes he represented the testator. It may be that the probate did not confer upon the executor any legal character, but I think that the effect of probate is to declare the person to whom probate is granted to be entitled to the powers of an executor, whatever his powers as such may be. The words 'legal character' are not anywhere defined, but I think that it is quite clear that they are intended to include the case of an executor. The fact that this section has been frequently applied to cases of persons dying after the Hindu Wills Act came into force shows this. The only legal character which the Probate Act declares a person to be entitled to is that of executor. It confers the character of administrator. It does not declare it. So the section would be meaningless unless 'legal character' included the office of an executor. I do not think that the circumstance that in the particular case the powers of the executor may be limited makes any difference in the construction of the section"(1)

The judgment of a Court refusing probate, it has been said, is as much a judgment *in rem* as one which grants it, for such a judgment takes away from the executors named in the will the legal character of executors and from the legatees and beneficiaries their legal character, and this result is final as against all persons interested under the will (2). But in a recent Full Bench decision of the Bombay High Court it was held that this section did not apply to a judgment of an Appellate Court refusing probate(3) and it was said that the only kind of negative judgment contemplated in it is one which expressly takes away from a person a legal character which he has held till such judgment and that this cannot cover the case of a finding that an attempted proof of a right to such a character has failed (4). In this case a will produced in a conten

ed in the grant refused and
the widow of the deceased
party from the alleged exe

cutors of the rejected will. It was held that while this section did not apply, the judgment in the Probate proceedings operated as *res judicata* between the parties under section 83 of the Probate and Administration Act (V of 1881) and section 11 of the Civil Procedure Code (5). Every refusal to grant probate does not conclusively show that the will propounded is not the genuine will of the testator. From a refusal to grant probate it by no means necessarily follows, that, in the opinion of the Court, the will propounded is not the genuine will of the testator. It may be based upon entirely different grounds. To operate conclusively there must have been a prior final decision against

finding that sufficient evidence has not
will not preclude a fresh application for
when they are in a position to support it

with more complete proof (6). Where the genuineness of the will is not disputed and the applicant is not legally incapable, the Court has no discretion to refuse probate (7). The judgment of a Probate Court granting probate is a judgment *in rem*, and, therefore, the judgment of any other Court in a proceeding *inter partes* cannot be pleaded in bar of an investigation in the Probate Court as to the factum of the will propounded in that Court. The only judgment that can be put forward in a Court of Probate in support of

(1) *Girish Chunder v Broughton* 14 C P 875 *per Trevelyan J*

(2) *Chinnasani v Hariharabadra* 16 M 380 383 (1893)

(3) *Kalyanchand Lalchand v Sitabai*, F B, 38 B 309 (1914)

(4) *Ib per Scott C J*

(5) *Ib* and it was said that the contention that Probate proceedings are not

a suit had not been addressed in *M r a Kurachilain v Peara Sahib* P C 33 C 116 (1905) 32 I A 244 nor at any time in the Bombay High Court

(6) *Ganesh Jagganath v Ra chandra Ganesh* 21 B 563 (1896)

(7) *Hara Coomar v Doorgaonani* 21 C 195 (1892) *Pran Nath v Jadu Nath* 20 A 189 (1897)

the plea of *res judicata* is a judgment of a competent Court of Probate (1) In the undermentioned case (2) it was held that the order of a Judge was *ultra vires* which was passed under section 476 of the Criminal Procedure Code, so long as the probate of the will in respect of which forgery was charged was unrevoked; and that it was for the Civil Court to determine the genuineness of a will, and that it was not open to a Criminal Court to find the contrary or to convict any person of having forged a will which had been found to be genuine by a competent Court, and that this section provides that in such matters the finding of the Civil Court is conclusive A grant of letters of administration with the will annexed, does not make any question as to the title to property covered by, or as to the construction of the will, *res judicata* in a subsequent suit in which such title or construction comes in issue (3)

The Courts exercise matrimonial jurisdiction under the Indian Divorce Act of 1929 (3) of divorce jurisdiction is not confined to cases for which the decree was pronounced (4) but such a decree in common with others may be re opened on the ground of fraud or collusion (7) The general rule with regard to foreign judgments is that they are conclusive where the marriage was solemnized and the parties domiciled in the foreign country (8) Section 20 of the Indian Divorce Act (IV of 1869) does not make the proviso in the seventeenth section applicable to the confirmation by the High Court of a decree of nullity of marriage made by a District Judge and such a decree may therefore be confirmed before the expiration of six months from the pronouncement of the decree (9) but such a decree is not conclusive proof that the Court not competent to make it, within the meaning of sections 41 and 44 of the Evidence Act, and is therefore under section 11 conclusive proof that the marriage was null and void (9)

and Admiralty jurisdiction

Adm

(1) *Chinnasami v. Hartharabadra* 16 M pp 383 384

(2) *Manjalah Debi v. Ramdas Shome* 4 C W N clxxvi (1900)

(3) *Arunmozhi Dasi v. Mohendra Nath* 20 C 188 (1893) 'It has been held that in a proceeding upon an application for probate of a will the only question which the Court is called upon to determine is whether the will is true or not and that it is not the province of the Court to determine any question of title with reference to the property covered by the will' 1b 894 895 *Behari Lal v. Juggo Mohun* 4 C 1 *Brij Nath v. Chandar Mohan* 19 A 458 (1897) *Jagganath Prasad v. Ranjit Singh* 25 C 354 369 (1897) [*Shebaitships*] *Ochanram v. Dolatram* 6 Bom L R 966 (1904)

(4) Act IV of 1869 as to the matrimonial jurisdiction of the High Courts see Letters Patent 1865 cl (35)

(5) Acts XV of 1872 (Indian Christian Marriage) XV of 1865 as amended by Act XXXVIII of 1920 (*Parsee Marriage and Divorce*), XXI of 1866 (*Native Con*

ert's Marriage Dissolution) III of 1872 (relating to Marriage between persons not professing the Christian Jewish Hindu Mahomedan Parsi Buddhist Sikh or Jaina religions)

(6) *Kanhya Lal v. Radha Churn* 7 W R 338 (1867) As to the use of a decree in a previous suit see *Ruck v. Ruck* L R P D (1896) 152

(7) S 44 *post* see *Perry v. Meddorecroft* 10 Beav 138 139

(8) Westlake Private International Law §§ 6 321 see *Sinclair v. Sinclair* 1 Hagg 294 — *Roach v. Goran* 1 Ves Sr 157 *Shas v. Gould* 3 F & I App 25 *Harvey v. Fabrie* L R 8 App Cas 43 *Huker Chand* *op cit* 52

(9) *Caston v. Caston* 22 A 270 (1900) see s 44 *post* For a case of judgment without jurisdiction see *Abdul Adur v. Doolanbibi* 37 B 563 (1913)

(10) Letters Patent 1865 cl (32) (33)

(11) 53 & 54 Vict 32 See in the matter of the British sailing ship "Falls of Ettrick" 22 C 511 (1895)

is for the time being declared or which, if no such declaration is made, is unlimited civil jurisdiction, in this Act mentioned and may for the purpose of that jurisdiction exercise all the powers which it possesses for the purpose of its other civil jurisdiction and such Court in reference to the jurisdiction conferred by this Act in this Act referred to as a Colonial Court of Admiralty (1) It is with reference to vessels condemned as prizes that questions concerned with this jurisdiction usually arise and to such judgments of condemnation, the last paragraph of this section will be applicable

Insolvency
Juris
diction

The Presidency High Courts exercise this jurisdiction under their respective Charters(2), and Act III of 1909 and the Mofussil Courts under Act III of 1907

Relevancy
and effect of
judgments
orders or
decrees
other than
those men-
tioned in
section 41

42 Judgments, orders or decrees other than those mentioned in section 41, are relevant if they relate to matters of public(3) nature relevant to the inquiry, but such judgments, orders or decrees are not conclusive proof of that which the state

Illustration

A sues B for trespass on his land. B alleges the existence of a public right of way over the land which A denies

The existence of a decree in favour of the defendant in a suit by A against C for trespass on the same land in which C alleged the existence of the same right of way is relevant but it is not conclusive proof that the right of way exists.(4)

Principle.—This section also forms an exception to the general rule that no one shall be affected or prejudiced by judgments to which he is not party or privy (5) In matters of public right, however, the new party to the second proceeding as one of the public has been virtually a party to the former proceeding (6) Judgments of this character (which are regarded as a species of reputation) are said to be receivable on the same grounds as evidence of reputation which in matters of public or general interests is admissible (7) On account of the public nature of the rules which exclude *res inter* judgment is not conclusive, and the technical rule as to *res judicata* is narrowed, lose all their force when it is considered whether

(1) *Ib* s 2 see Broughton *op cit* 149—158

(2) See Letters Patent 1865 (Calcutta) cl 18 see Broughton *op cit* 158

(3) *Heiniger v Droz* 25 B 441 (1900)

(4) See *Petri v Nuttall* 11 Ex 569

(5) Judgments are relevant under this section not as *res judicata* but as evidence whether between the same parties or not *Gujju Lall v Fattah Lall* 6 C 174 491 *post* For recent case of relevancy as *res judicata* see *Muhammad Amir v Sumitra Kuar* 36 A 424 (1914) (suit by members of Mahomedan community)

(6) *Gujju Lall v Fattah Lall* 6 C 171 183 (1880) *per* Pontifex J

(7) *Taylor Ev* §§ 1682 1683 (*qv post*) *Norton Ev* 216 see s 32 1 (4) *ante* When juries were summoned *de vicineto* and assumed to be acquainted with the subject in controversy the verdicts were properly evidence of reputation but at the present day they are not so see *Taylor Ev* § 624 *Wills Ev* 2nd Ed 232—234

(8) See *Norton Ev* 216 *Madhub Chunder v Tomee Bewah* 7 W R 210 (1867) *Bai Bajji v Bai Santok* 20 B 53 57 58 (198) (1894)

value of timber carried away by Government, after being washed on to his estate, and to have his right declared as against Government, to all timbers that in the future may be washed on to his estate, it was held that it was not necessary for the plaintiff to produce in support of the right some decree or decision of competent authority establishing the custom (1) Where a custom alleged to be followed by any particular class of people is in dispute judicial

are very relevant as evidence of the existence of the same custom amongst the Jains of another place, unless it is shown that the customs are different, and oral evidence of the same kind is equally admissible There is nothing to limit the scope of the enquiry to the particular locality in which the persons setting up the custom reside (3) In a suit brought by the trustee of a temple to recover from the owners of certain lands in certain villages money claimed under an alleged right as due to the temple it was held that judgments in other suits against other persons in which claims under the same right had been decreed in favour of the trustees of the temple were relevant under this section as relating to matters of a public nature (4) A custom under which lands are held is a matter of public and general interest to all the villagers and a former decree is most cogent evidence against them of the existence and validity of the custom whose exercise a plaintiff seeks to enforce (5) The existence of customs of succession in particular communities is a matter of public interest and decrees of competent Courts are good evidence thereof (6) In a suit by the landlords to avoid the sale of an occupancy holding in their *mouza* and eject the purchaser thereof, one of the questions was as to the existence of a custom or usage under which that a judgment in an adjoining villa usage under this locutory orders nor awards, nor claims not prosecuted to judgment, are admissible under the rule which is contained in this section (8) Many matters may go to the weight of this class of evidence which will not, however, affect its admissibility. Thus it matters not with respect to the admissibility, though it may as to the weight

7 A 880 (1835) in the case of the Lower Provinces see Bengal Tenancy Act (VIII of 1885) ss 74 183

(1) *Chuttur Lall v The Government* 9 W R 97 (1868) [rights of Lords of Manors]

(2) *Shimbu Nath v Gyan Chand* 16 A 379 (1894) *Harnath Pershad v Mundul Dass* 27 C 379 (1899)

(3) *Harnath Pershad v Mundul Dass* 27 C 379 (1899)

(4) *Ramasami v Appavu* 12 M 9 (1887) the judgments were also held to be relevant under s 13 ante as being evidence of instances in which the right claimed had been ascertained See s 13 ante see also *Nallathambi Battar v Nellakumbaba Pillai* 7 Mad H C R. 306 (1873)

(5) *Venkatadasami Nayakkam v Subba Rao* 2 Mad H C R. 16 (1864) per Scotland C J as to judgment in regard to the nature of the interest of certain family and of a shrine in certain villages

see *Shri Ganesh v Keshavarav Govind* 15 B 625 635 (1890)

(6) *Bas Baiji v Bas Santok* 20 B 53 57 58 (1894)

(7) *Daighish v Guzaffer Hassan* 23 C 477 (1896)

(8) Taylor Ev § 626 the last mentioned claims though inadmissible as evidence of reputation may however be admissible as evidence of acts of ownership thus old Bills and Answers in Chancery have been admitted on the latter ground to show claims made to a public right and abandoned *Malcolmson v O'Dea* 10 H L C 593 on the same grounds it has been held that an indictment whether submitted to or prosecuted to conviction was admissible as evidence of the right in suit being exercised *R v Inhabitants of Brightside* 14 Q B 933 as to awards see *Etans v Rees* 10 A. & R 151 but see also *Tota Ram v Mohan Lal* 2 Agra 120 supra

of such evidence, that the judgment has been suffered by default, or, though of a very recent date, is not supported by any proof of execution or of the payment of damages (1). And judgments standing upon a different footing from ordinary declarations by private persons, the conditions as to *lis mota* do not, and indeed cannot, apply to them (2).

43 Judgments, orders or decrees, other than those mentioned in sections 40, 41 and 42, are irrelevant, unless the existence of such judgment, order or decree, is a fact in issue, or is relevant under some other provisions of this Act

Judgments, etc., other than those mentioned in ss. 40 to 42, when relevant

Illustrations

(a) A and B separately sue C for a libel which reflects upon each of them. C in each case says, that the matter alleged to be libellous is true and the circumstances are such that it is probably true in each case or in neither.

A obtains a decree against C for damages on the ground that C failed to make out his justification. The fact is irrelevant as between B and C (3).

(b) A prosecutes B for adultery with C, his wife.

B denies that C is his wife but the Court convicts B of adultery.

Afterwards C is prosecuted for bigamy in marrying B during A's lifetime. C says that she never was his wife.

The judgment against B is irrelevant as against C.

(c) A prosecutes B for stealing a cow from him. B is convicted.

A afterwards sues C for the cow which B had sold to him before his conviction.

As between A and C the judgment against B is irrelevant.

(d) A has obtained a decree for the possession of land against B. C, B's son, murders A in consequence.

The existence of the judgment is relevant as showing motive for a crime (4).

(e) A is charged with theft and with having been previously convicted of theft.

The previous conviction is relevant as a fact in issue (5).

(f) A is tried for the murder of B.

The fact that B prosecuted A for libel and that A was convicted and sentenced is relevant under section 8 as showing the motive for the fact in issue (6).

Principle—Judgments considered as judicial opinions are only relevant under sections 40-42 under the circumstances mentioned in those sections. Other judgments when tendered against strangers are sometimes said to be excluded as opinion evidence (7), sometimes as hearsay (8) but more commonly on the ground expressed in the maxims *res inter alios acta vel iudicata alteri nocere non debet* and *res inter alios iudicata nullum inter alios prejudicium facit* (9). Such judgments are said not to be evidence for a stranger even against

(1) Taylor Ev. § 624

(2) Starkie Ev. 190 note (c)

(3) Cf. *Doorga Churn v. Shoshee Bhoosun* 5 W. R. S. C. C. Ref. 23 (1866) in which it was held that the finding in a previous judgment was not evidence of fraud.

(4) *Gujju Lal v. Fatteh Lal* 6 C. 181

(5) Illusts. (e) and (f) have been added by s. 5 Act III of 1891. See also *Lakshman v. Amrit* 24 B. 591-593 (1900).

(6) *R. v. Fontaine Moreau* 11 Q. B. 1028-1035 per Lord Denman C. J. *Krishnasami Ayyangar v. Rajagopala Ayyangar* 18 M. 77 (1893). *Gujju Lal v. Fatteh Lal* 6 C. at p. 188 per Garth C. J.

(7) Steph. Dig. Art. 14. Whart. s. 280 but see Phipson Ev. 5th Ed. 405.

(8) Phipson Ev. 5th Ed. 405 where the grounds of this rule are considered. *Gujju Lal v. Fatteh Lal* 6 C. at p. 189, Taylor Ev. § 1682.

(9) *Id.*

a party, because their operation would thus not be mutual. The propriety of this last ground has however been questioned.⁽¹⁾ But if the *existence* of the judgment is a fact in issue, or relevant under some other provision of this Act the judgment is not excluded (2)

Steph Dig, Arts, 40, 42, 44, Phipson, Ev 5th Ed. 382—410, Taylor, Ev, §§ 1667 1668, 1682, 1694, Best, Ev, § 590, Roscoe, N P Ev, 190 192

COMMENTARY.

Judgments,
orders and
decrees
other than
those
already
mentioned

It has been seen that section 40 deals with the effect of judgments as barring suits or trials, by reason amongst others, of their being *res judicata*; that section 41 deals with the effect of the so called judgments *in rem* and section 42 with the admissibility of judgments relating to matters of a public nature. This section declares that judgments, orders, and decrees, other than those mentioned in those sections, are of themselves irrelevant, that is, in the sense that they can have any such effect or operation as mentioned in those sections *qua* judgments, orders and decrees, that is, as adjudications upon and

decide (7)
relating to
sequent

or as proof of the particular point which it decides (7), unless between the same parties or those claiming under them (8). But the present section expressly contemplates cases in which judgments would be admissible either as facts in issue or as relevant facts under other sections of the Act. And as to this Garth, C J, in the case last cited, said "This is quite true. But then I take it that the cases so contemplated by section 43 are those where a judgment is used not as a *res judicata*, as evidence more or less binding upon an opponent by reason of the adjudication which it contains (because judgments of that kind had already been dealt with under one or other of the immediately preceding sections). But the cases referred to in section 43 are such, I conceive, as the section itself illustrates, viz, when the fact of any particular judgment having been given is a matter to be proved in the case. As for instance, if A sued B for slander, in saying that he had been convicted of forgery, and B justified upon the ground that the alleged slander was true, the conviction of A for forgery would be a fact to be proved by B like any other fact in the case, and quite irrespective of whether A had been actually guilty of the forgery or not. This, I conceive, would be one of the many cases alluded to in the fourth section (9). And though judgments, other than those mentioned in sections 40-42 are irrelevant *qua* judgments, this section does not make them absolutely inadmissible when they are the best evidence of something that may

(1) Taylor, Ev, § 1682, as to bankruptcy, administration and divorce proceedings, see Phipson, Ev, 5th Ed., 406 407

(2) See Notes to s 13, ante

(3) Collector of Gorakhpore v Palak dhar Singh 12 A (F B), 1, 25 (1889). As to order of Board of Revenue, see Manno Choudhury v Munshi Chowdhury, 3 Pat L J 188

(4) Under s 41 ante

(5) Under s 42, ante

(6) Under s 40, ante

(7) S 43 in effect declares that for such purpose they are irrelevant see R v Parbhudas 11 Bom H C R, 90, 96 (1874)

The sole object for which it was sought to use the former judgment in Gujju Lall v Fatteh Lall (v post) was to show that in another suit against another defendant the plaintiff had obtained an adjudication in his favour on the same right, and it was held that the opinion expressed in the former judgment was not a relevant fact within the meaning of the Evidence Act. Krishnasami Ayyangar v Rajagopala Ayyangar, 18 M, 77 (1895)

(8) Gujju Lall v Fatteh Lall 6 C. (F B) 171 see ss 13, 40 ante and Notes thereto

(9) Gujju Lall v Fatteh Lall, 6 C. at p 192

be proved *aliunde* (1) The existence of such judgment may be a fact in issue (2) or it may be a relevant fact (3) otherwise than in its character of a judgment

With regard to the existence of the judgment its date or its legal consequences, the production of the record or of a certified copy is conclusive evidence of the facts against all the world the reason being that a judgment as a public transaction of a solemn nature must be presumed to be faithfully recorded (4) 'Therefore if a party indicted for any offence has been acquitted, and sues the prosecutor for malicious prosecution the record is conclusive evidence for the plaintiff to establish the *fact of acquittal* although the parties are necessarily not the same in the action as in the indictment (5) but it is no evidence whatever that the defendant was the prosecutor, even though his name appear on the back of the bill (6) or of his malice or of want of probable cause (7), and the defendant
 to prove the plaintiff's guilt (8) 11 at liberty
 for the negligence of his servant or principal
 servant or agent of the fact that the master or principal has been compelled to pay the amount of damages awarded but it is not evidence of the fact upon which it was founded namely the misconduct of the servant or agent (9) So a judgment recovered against a surety will be evidence for him to prove the amount which he has been compelled to pay for the principal debtor but it furnishes no proof whatever of the principal's default through the principal's default where the party has a remedy action against a surety where the defence was that the plaintiff had received

to him by the principal in the way of fraudulent preference but as showing that he had actually repaid the money to the assignees and as generally ex-
discredit a witness by proving the judgment in that trial the judgment in that case will be admissible for the purpose of impeaching the witness (13) Judgments are of contradicting the testimony

1
 testimony though not to prove the bastardy or date of birth (14) Upon an

(1) *Collector of Gorakhpore v Palak dhar Singh* 12 A. (F B) 1 25 (1889)

(2) See s 43 ill (c)

(3) See s 43 ill (d) & (f) and s 54 explanation (2)

(4) v ante Introduction to ss 40-44
Abnash Chandra v Pares Nath 9 C W N 407 410 (1904) Taylor Ev s 1667 Phpson Ev 5th Ed 382 as to certified copies see s 76 post

(5) *Legatt v Tollervey* 14 East 302

(6) B N P 14

(7) *Parcell v Macnamara* 9 East 361
Incedon v Berry 1 Camp 203 n a
 See *Keramutoollah Chowdhry v Gholam Hosse* 9 W R 77 (1868) *Aghore Nath v Radhca Pershad* 14 W R 339 (1870) the fact that the plaintiff has been convicted even though acquitted in

appeal is evidence of reasonable and probable cause *Jadbar Singh v Sheo Sara* 21 A 26 (1898)

(8) B N P 15

(9) *Gree v New River Co* 4 T R 589 *Prichard v Hitchcock* 6 M & Gr 165 per Crosswell J

(10) *King v Norman* 4 C B 884 898

(11) *Powell v Layton* 7 N R 371
Kip v Brigan 6 Johns 158 7 Johns 168 *Griffin v Brown* 2 Pck 304

(12) *Prichard v Hitchcock* 6 M & Gr 151 see Taylor E § 1667

(13) *Clarges v Sherrin* 12 Mod 343
Foster v Sherrin 7 Serg & R 156

(14) *Batson v Little* 5 H & N 472
 see also *R v McCue* Jebb C C 120

indictment for perjury committed in a trial, the record will be evidence to show that such a trial was bad(1) and if a party be indicted for aiding the escape of a felon from prison the production of the record of conviction from the proper custody will be conclusive evidence that the prisoner was convicted of the crime stated therein (2) So where the judgment constitutes one of the muniments of the party's title to land or goods,—as where a deed was made under a decree in Chancery(3) or goods were purchased at a sale made by a sheriff upon an execution(4), the record may be given in evidence against a party who is a stranger to it So, in an action to recover lands, a decree in a suit between the defendant's father and other persons unconnected with the plaintiff which directed that the father should be let into possession of the estate as his own property, has been held admissible on behalf of the defendant not as proof of any of the facts therein stated, but for the purpose of explaining in what character the father, through whom the defendant claimed had afterwards taken actual possession of the estate (5) Many other instances might be given of the admissibility of judgments *inter alios* where the record is matter of inducement or merely introductory to other evidence, but those cited will suffice to illustrate the principle (6) A judgment may be relevant as between strangers if it is an admission, being received in favour of a stranger against one of the parties as an admission by such party in a judicial proceeding with respect to a certain fact (7) This is no exception to the rule which requires mutuality, since the record is not received as a judgment conclusively establishing the fact but merely as the declaration of the party that the fact was so Thus not appealing against an adverse judgment may operate as an admission by the party of its correctness (8) And a stranger to a judgment may also be estopped thereby, not directly but by his acquiescence therein (9) So if A pleads guilty to a crime and is convicted the record of judgment upon this plea is admissible against him in a Civil action as a solemn judicial confession of the fact (10) But if A pleads not guilty to a crime, but is convicted, the record of judgment upon

with the prosecution as an action to establish the truth

ment in a Civil action, or an award, cannot be given in evidence for such a purpose in a Criminal prosecution (14) Technically, the judgments are inadmissible

(1) *R v Hles* Cas Temp Hardz 118 B N P 243 *R v Hanmond* Page 2 Esp 649n see Penal Code s 193

(2) *R v Slat* R & R. 526 Taylor Ev § 1668 see Penal Code ss 222 223

(3) *Barr v Gratz* 4 Wheat 213

(4) St Ev 255 *Wistner v Schlatter* 2 Rayle 359 *Jackson v Wood* 3 Wind 25 34 *Fowler v Savage* 3 Conn 90 96

(5) *Daries v Lowndes* 6 M & Gr 471 520

(6) Taylor Ev § 1688 see s 13 ante

(7) Steph Dig Art 4 Taylor Ev § 1694 *Phipson* Ev 5th Ed 406 407 *Krisi nasami Ayyangar v Rajagopala Ayyangar* 18 M 73 77 78 (1895)

(8) *Eaton v Swansea Waterworks* 17 Q B 267

(9) *Re Last* 1896 2 Ch 788

(10) *R v Fontaine Moreau* 11 Q B

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Why does what a man says of himself cease to be evidence by being said in Court? As to a plea of guilty being evidence of an admission see *Shumboo Clunder v Madhoo Koybert* 10 W R 56 (1868) A plea of guilty in the Criminal Court may but a verdict of convict on cannot be considered in evidence in a civil case Taylor Ev § 1694

(11) *R v Warden of the Fleet* 12 Mod 339 and v post

(12) S 12 ante Taylor Ev §§ 1693 674

(13) Taylor Ev § 1693

(14) Taylor Ev § 1693 and cases there cited *Castrique v Imrie* L R. 4 E & I 434 *Keramutoolah Chowdhry v Gholam Hosse n* 9 W R 77 (1868) [A proceeding of a Criminal Court is not admissible as evidence a Civil Court is

as not being between the same parties, the parties in the prosecution being the King Emperor on the one hand, and the prisoner on the other, and in the civil suit the prisoner and some third party, and substantially, because the issues in a civil and criminal proceeding are not the same, and the burden of proof rests in each case on different shoulders (1) Thus *A* is convicted of forging *B*'s signature to a bill of exchange *B* is afterwards sued by *C* to whom *A* has transferred the bill *A*'s conviction is not admissible to prove the forgery (2) So again a certificate of acquittal on a charge of rape is not admissible to disprove the rape in a divorce suit founded thereon (3) A mother murdering her son is not beneficially entitled to take his estate by inheritance, but the fact of her having been acquitted or convicted is not relevant in a Civil Court upon the question whether she has committed the wrongful act imputed to her and, if so, whether by such act she has forfeited her rights of inheritance (4) A stranger to a judgment may also be bound by it, if he has so contracted. Thus, if *A* contract to indemnify *B* against any damages recoverable against the latter by *C*, and *B* has *bond fide* defended the action and paid the amount the judgment will be conclusive of *A*'s liability. But this does not apply where *B* has no contract with, but merely a claim against *A* for such indemnity (5) In the absence of special agreement a judgment or an award against a principal debtor is not binding on the surety and is not evidence against him in an action by the creditor but the surety is entitled to have the liability proved as against him in the same way as against the principal debtor (6) As to decrees considered as evidence of the necessity of alienation, see authorities cited below (7)

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fraud or collusion in obtaining judgment or incompetency of Court may be proved

bound to find the facts itself] *Bishonath Neogi v. Huro Gobind* 5 W R 27 (1866) [The conviction in a criminal case is not conclusive in a civil suit for damages in respect of the same act] *A. Ramiah Surmah v. Kash Nath Nyalan* 10 W R 26 (1866) [A Civil Court is not bound to adopt the view of a Magistrate as to the genuineness or other value of a document] *Doorga Dass v. Dooraa Churn* 6 W R Civ Ref 26 (1866) [A suit for money forcibly taken from the plaintiff by the defendant is maintainable in Civil Court notwithstanding defendants acquittal in the Criminal Court on the charge of robbery], *Ali Buksh v. Shaikh Samiruddin* 4 B L R A C 13 (1869) 1 W R 477 In a suit for damages for an assault the previous conviction of the defendant in a Criminal Court is no evidence of the assault. The facts of the assault must be tried in the Civil Court *R v. Hedger* (1852) at p 133 *Aghorenaith Roy v. Radhika Pershad* 14 W R 339 (1870) *Gogun Chunder v. R* 6 C 247 (1880) *Ram Lal v. Tulla Ra* 4 A 97 (1880) See *Raj Kumari v. Ba a Sundari* 23 C 610 (1896) in which however Ghose J observed that he was not prepared to say that the decision in a Civil suit would not be admissible in evidence in a Criminal case if the parties were substantially the same and the issues in the two cases identical

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For a case in which a Civil judgment was rejected in a Criminal proceeding see *R v. Fontaine Moreau* 11 Q B 1028 And for a case in which a Civil judgment was admitted in a Criminal proceeding see *Markur (in re)* 41 B 1 (1917) Here the former plaintiff was the complainant with former defendant the accused and the issue substantially the same and the Civil judgment in certain points now included in the Criminal charge was admitted in evidence of breach of trust

(1) *Gogun Chunder v. R* 6 C 247 (1880) per White J

(2) *Castrique v. Inrie* L R 4 E & I 234 *Parsons v. London County Council* 9 T L R 619

(3) *Virgo v. Virgo* 69 L T 460 So also in the trial of *A* as accessory to a felony committed by *R* the conviction of *B* though admissible to prove that fact is no evidence of *B*'s guilt See Phipson Ev. 5th Ed 407 et ibi casus

(4) *Vedanajagar Mudaliar v. Vedaum*, 14 Mad L J 297

(5) *Parker v. Lewis* 8 Ch App 1035 1058 1059

(6) *Ex parte Young* In re *Kitchin* 17 Ch D 668

(7) *Field* Ev. 6th Ed 184—185 *Maynes Hindu Law* §§ 323 324 and cases there cited

indictment for perjury committed in a trial, the record will be evidence to show that such a trial was bad (1) and if a party be indicted for aiding the escape of a felon from prison, the production of the record of conviction from the proper custody will be conclusive evidence that the prisoner was convicted of the crime stated therein (2) So where the judgment constitutes one of the muniments of the party's title to land or goods,—as where a deed was made under a decree in Chancery (3) or goods were purchased at a sale made by a sheriff upon an execution (4), the record may be given in evidence against a party who is a stranger to it So, in an action to recover lands, a decree in a suit between the defendant's father and other persons unconnected with the plaintiff which directed that the father should be let into possession of the estate as his own property, has been held admissible on behalf of the defendant, not as proof of any of the facts therein stated, but for the purpose of explaining in what character the father, through whom the defendant claimed, had afterwards taken actual possession of the estate (5) Many other instances might be given of the admissibility of judgments *inter alios*, where the record is matter of inducement, or merely introductory to other evidence, but those cited will suffice to illustrate the principle (6) A judgment may be relevant as between strangers if it is an admission, being received in favour of a stranger against one of the parties as an admission by such party in a judicial proceeding with respect to a certain fact (7) This is no exception to the rule which requires mutuality, since the record is not received as a judgment conclusively establishing the fact but merely as the declaration of the party that the fact was so Thus not appealing against an adverse judgment may operate as an admission by the party of its correctness (8) And a stranger to a judgment may also be estopped thereby, not directly but by his acquiescence therein (9) So if *A* pleads guilty to a crime and is convicted, the record of judgment upon this plea is admissible against him in a Civil action, as a solemn judicial confession of the fact (10) But if *A* pleads not guilty to a crime, but is convicted, the record of judgment upon this plea is not receivable against *A* in a Civil action as an admission to prove his guilt (11) For the judgment contains no admission and in conformity with the rule which rejects judgments to prove the facts :—

admissible as evidence with the prosecution in an action to establish the judgment in a Civil action, or an award, cannot be given in evidence for such a purpose in a Criminal prosecution (14) Technically, the judgments are inadmissible

(1) *R v Hles Cas Temp Hardz* 118, B N P 243 *R v Hammond* Page 2 Esp, 649n see Penal Code s 193

(2) *R v Stat* R & R 576 Taylor Ev § 1668 see Penal Code ss 222 223

(3) *Barr v Gratz* 4 Wheat 213

(4) *St Ev* 255 *Wimer v Schlatter*, 2 Rawle 359 *Jackson v Wood* 3 Wind 25 34 *Fowler v Savage* 3 Conn 90 96

(5) *Davies v Lowndes*, 6 M & Gr 471 520

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is not being between the same parties, the parties in the prosecution being the King-Emperor on the one hand, and the prisoner on the other, and in the civil suit the prisoner and some third party; and substantially, because the issues in the civil suit are different from those in the criminal suit, the burden of proof rests in the civil suit on the prisoner of forging *B's* signature. *A* has transferred the property (2) So again a

she has committed the wrongful act imputed to her and, if so, whether by such act she has forfeited her rights of inheritance (4) A stranger to a judgment may also be bound by it, if he has so contracted. Thus, if *A* contract to indemnify *B* against any damages recoverable against the latter by *C*, and *B* has *bond fide* defended the action and paid the amount, the judgment will be conclusive of *A's* liability. But this does not apply where *B* has no contract with, but merely a claim against *A* for such indemnity (5) In the absence of special agreement, a judgment or an award against a principal debtor is not binding on the surety, and is not evidence against him in an action by the creditor, but the surety is entitled to have the liability proved as against him in the same way as against the principal debtor (6) As to decrees considered as evidence of the necessity of alienation, see authorities cited below (7)

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(7) *Field* Ev 6th Ed, 184—186 *Maynes Hindu Law* §§ 323 324 and cases there cited

party, was delivered by a Court not competent to deliver it or was obtained by fraud or collusion

Principle—A judgment delivered by a Court not competent (1) to deliver it as by a Court which had no jurisdiction over the parties or the subject matter of the suit is a mere nullity (2) And though the maxim is stringent that no man shall be permitted to aver against a record yet when fraud can be shewn this maxim does not apply (3) nor in the case of collusion when a decree is passed between parties who were really not in consent with each other (4) *Fraus et jura nunquam cohabitant* Fraud avoids all judicial acts ecclesiastical or temporal It is an extrinsic collateral act, which vitiates the most solemn proceedings of Courts of Justice which upon being satisfied of such fraud have a power to vacate and should vacate their own judgments (5) In the application of this rule it makes no difference whether the judgment impugned has been pronounced by an inferior or by the highest tribunal but in all cases alike it is competent for every Court whether superior or inferior to treat as a nullity any judgment which can be clearly shown to have been obtained by manifest fraud (6)

ss 40—42 (*Judgments orders and decrees*) s 3 (*Court*)
s 3 (*Relevant*)

Steph Dig Art 46 Taylor Ev §§ 1713—1717 Phipson Ev 5th Ed 384 Best Ev § 595 Field Ev 6th Ed 186—190 Norton Ev 218 219 Wharton Law Lex con (1899) 1b 12th Ed (1916) Hukm Chand s *Res Judicata* 484

COMMENTARY

When one of the parties to a suit tenders or has put in evidence (7) a judgment order or decree under the fortieth forty first, or forty second section (8) it is open to the other party under this section to avoid its effect on any of the three grounds (a) want of jurisdiction in the Court which delivered the judgment (b) that the judgment was obtained through fraud or (c) collusion (9)

A judgment delivered by a Court not competent to deliver it is a mere nullity and cannot have any probative force whatever between the parties (10)

(1) See *Kettilamma v Kelappa* 12 M 228 (1887) *Sardarmal v Aranvazal Sabhapati* 21 B 205 212 (1896)

(2) See cases cited post

(3) *Rogers v Hadley* 2 H & C 247 see *Huffer v Allen* L R 2 Ex 18

(4) *Brandon v Becker* 3 C & F 510

(5) *Duchess of Kingston's Case* 2 Sm L C per Lord de Grey C J *Phipson v The Earl of Egremont* 6 A. & E 587 605 *Paranjpe v Kanade* 6 B 148 (1882)

(6) *Sladden v Patrick* 1 Macq H L 535 as to the procedure to be taken to set aside a decree obtained by fraud and collusion see *Mewa Lal v Bhujun Jha* 13 B L R App 11 (1874) *Ashootosh Chandra v Tara Prasanna* 10 C 612 (1884) *Eshan Chandra v Nandamoni Dassee* 10 C 357 (1884) *Karamah Ralmbhoy Rahmbhoy Habbhoy* 13 B 137 (1888) *Bans Lal v Ranj Lal* 20 A 370 374 (1898) *Nistarn Dass v Nundo Lal* 26 C 907 (1899) See

also Act IX of 1908 Sch 1 Art. 95

(7) See *Nistarn Dass v Nundo Lal* 30 C 369 382 (1902) where it was objected that the decree had not been proved by the adverse party

(8) In *Norton Ev* 218 it is suggested that the same rule ought to apply in the case of a judgment order or decree tendered under s 43

(9) 1b See *Amedbhoy Habbhoy v Vileedbhoy Cassumbhoy* 6 B 716 (1882) it was suggested that the word may be read as equivalent to fraud and collusion *sed quare* see post

(10) See *Kalka Parshad v Kanhaiya Singh* 7 N W P 99 (1875) *Sookram Misser v Crowdy* 19 W R 284 (1873) *Gnesh Pattro v Ram Nidlee* 22 W R 361 (1874) *R v Hussein Gabb* 8 B 307 (1884) Where an offence is tried by a Court without jurisdiction the proceedings are void and the offender if acquitted is liable to be tried

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(1) Incom
petency

The words 'not competent' in this section refer to a Court acting without jurisdiction (1). And although one Court cannot set aside the proceedings of

into (2). By the law both of this country and of England anybody whether party may dictate

depend on whether a point which it decides has been raised or argued by a party or counsel. It cannot be said that whenever a decision is wrong in law or violates a rule of procedure the Court must be held incompetent to deliver it. It has never been and could not be held, that a Court which erroneously decrees a suit which it should have dismissed as time barred or as barred by the rule of *res judicata* acts without jurisdiction and is not competent to deliver its decree. This and section 41 recognise that given the competency of the Court even error or irregularity in the decision is a less evil than the total absence of finality which would be the only alternative (4). There is a distinction between an order which a Court is not competent to pass and an order which even if erroneous in law or in fact, is within the Court's competency (5). But a decision afterwards found to be erroneous in law cannot have effect as *res judicata* in a later execution proceeding for a different relief (6).

The Act contains no definition of the term fraud for the purposes (ii) Fraud of this section. It was held in one case that the fraud must not consist in the fact of a fraudulent defence having been set up, it must be fraud in procuring the judgment, such as collusion or the like between the parties or fraud in the Court itself (7). In a subsequent case it was said that the fraud must be actual fraud, such that there is on the part of the person chargeable with it the *malus animus* putting itself in motion and acting in order to take an undue advantage of some other person for the purpose of actually and knowingly defrauding him. The fraud must be such as can be explained and defined on the face of a decree and mere irregularity or the insisting upon rights which upon a due investigation of these rights might be found to be overstated or over estimated is not the kind of fraud which will authorise the Court to set aside a decree (8).

(1) *Kettilamma v Kelappa* 12 M 228 (1887). Competency is here synonymous with jurisdiction. *Sardarmal v Anarvayal Sabhapathy* 21 B 205 212 (1896). See the same matter reported in 21 B 297 (1897) see *Abdul Kader v Doolanbibi* 37 B 563 (1913) (incompetence and *res judicata*).

(2) *Gunnesh Pattiro v Ram Nidhee* 22 W R 361 (1874).

(3) *Rajib Panda v Lakhnan Senah* 27 C 11 21 (1899). Steph Dig Art 46 Taylor Ev § 1714. According to English Law while in the case of fraud or collusion on strangers alone may show their existence want of jurisdiction may be shown by anybody. As to fraud and collusion in this country *vide post*.

(4) This passage was cited with approval in *Nathu Ram v Kalyan Das* 1 All L J 21 222 (1904) s c 26 A 522. *Caston v Caston* 22 A 270 281 (1899) see s 41 ante.

(5) *Sardarmal v Anarvayal Sabhapathy* 21 B 205 211 (1896).

(6) *Baj Nath Goenka v Padmanand Singh* 39 C 848 (1912).

(7) *Cammell v Sewell* 4 Jur N S 978 (1858) s c 3 H & N 617 5 H & N 728 see Story Eq Jur 258 § 252a as to enquiries in the Bankruptcy Court guarding against fraud with regard to the consideration for a judgment debt see Ex parte Revell In re Tollemache 13 Q B D 720 Ex parte Lennox 16 Q B D 315 Ex parte Platau 2 Q B D 83 Ex parte Bonham 14 Q B D 605 Ex parte Official Receiver Re Miller 67 L T 601 Re Fraser (1892) 2 Q B 633 Re Hawks Ex parte Troup (1895) 1 Q B 404. As to the effect of fraud in judgments see *Hukm Chand op cit* 484.

(8) *Patch v Ward* L R 3 Ch D 203 cited in *Mahomed Golab v Mahomed Sullman* 21 C 617 (1894) and recently followed in *Nanda Kumar Houladar v Ram Jiban Houladar* 41 C 990 (1914) 19 C L J 457 which has been followed in *Janki Kuar v Lachmi Narain* 37 A, 535 (1915).

In a subsequent case(1) an action was brought for infringement of a patent, and judgment was recovered by the plaintiff, which was reversed by the Court of Appeal on the ground that the facts shewed no infringement. Subsequently the plaintiff brought an action to impeach the judgment on the ground that when an expert sent down by the Court, and whose evidence was the only material evidence before the Court as to the nature of the defendant's process, examined the defendant's works, the defendant fraudulently concealed from him certain parts of the process, so that he had no opportunity

of the plaintiff. On the judgment was set aside

(James, Baggallay and reversed on the ground

d the following observations,

in which Thesiger, L. J., concurred, Baggallay, L. J., dissenting. As summing all the alleged falsehood and fraud to have been substantiated, is such a suit as the present sustainable? That question would require very grave consideration indeed before it is answered in the affirmative. Where is litigation to end if a judgment obtained in an action fought out adversely between two litigants *sui juris* and at arm's length could be set aside by a fresh action on the ground that perjury had been committed in the first action or that false answers had been given to interrogatories, or a misleading production of documents or of a machine, or of a process, had been given? There are hundreds of actions tried every year, in which the evidence is irreconcilably conflicting and must be on one side or the other wilfully and corruptly perjured. In this case, if the

favour, the present

judgment aside on

ion of perjury, and

observations, which

were *obiter dicta*, were cited by Ketheram, C. J., in the case undernoted(3), where the plaintiff alleged that he was induced by the fraud of the defendant not to defend the action and in which the following observations (which were also *obiter*, as fraud was negatived) were made.—The principle upon which these

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by James L. J.,

in the passage I have quoted. " Since the English decision cited there have been several cases where the Court has under similar circumstances

(1) *Flower v. Lloyd*, 6 Ch. D. 297 (1877) cited in *Austrian v. Dassee v. Nundo* 1 All. 26 C. 891 (1899)

(2) *Flower v. Lloyd* 10 Ch. D. 327 (1888) see *Abuloff v. Oppenheimer*, 10 Q. B. D. 295 307 308 (1882), in which

this decision was criticized and *Joshi v. Kuar v. Lachmi Narain* 37 A. 535 (1915), in which it was stated to be no longer law

(3) *Mahomed Golab v. Mahomed Sull* 21 C. 612 619 (1894)

exercised jurisdiction. In the undermentioned case(1), *B* in an action brought in the Probate Division had propounded a will, and *A* had propounded the substance of a later will alleging that the earlier will had been obtained by undue influence. A compromise was effected under which the alleged earlier will was admitted to probate. Afterwards *A* discovered that the last mentioned alleged will was a forgery and that *B* was a party or privy to the forgery and brought an action to set aside the compromise as having been procured by fraud, and obtained judgment in that action. In another case (2) the plaintiff alleged that a judgment was procured by the fraud of the defendant, in that the latter fraudulently exhibited to the Court and jury certain false and counterfeit documents and certain memorandum books containing false and fraudulent entries touching the matters in issue in the action and the judgment so fraudulently obtained was set aside. But in another where the plaintiff having obtained letters of administration to the estate of a deceased landlold sued a tenant for rent, and the latter in his written statement objected that the letters of administration had been obtained upon a misrepresentation by the plaintiff as to his relationship with the intestate it was held that assuming that the letters of administration could be regarded as in order within the meaning of this section, the allegations of the defendant were not such as would entitle him to go into evidence for the purpose of proving that the letters of administration were invalid in law, and also that such a defence could not be successfully raised so long as the letters of administration were not revoked by a competent Court (3). And in a recent case it has been held that a suit to set aside a decree on the ground that it had been procured by perjured evidence is not maintainable for the fraud must be actual and positive, a meditated intentional contrivance to keep the parties and the Court in ignorance of the facts of the case and an obtaining of the decree by such contrivance (4).

With regard to the parties who may show fraud it is clear that a stranger

no way privy to the fraud and not by a party since if the latter were innocent he might have applied to vacate the judgment and if guilty he cannot escape the consequence of his own wrong. But the language of the section is wide enough to allow a party to the suit in which the judgment was obtained to aver and prove that it was obtained by the fraud of his antagonist though the judgment stands unreversed (7). And it has been accordingly held that a party to a previous suit in which a judgment was obtained may in a subsequent suit aver and prove that it was obtained by fraud though the judgment remains unreversed (8). So in a suit brought by *A* against *B* for *khas* possession of a tank.

(1) *Priestson v Thomas* 9 P D 210 (1884) Ref to in *Rakshab Mondal v Sm Tarangni Debi* 25 C W N 207 (1921)

(2) *Cole v Langford* 2 Q B (1898) 36 cited in *Sri Rangammal* 23 M 216 219 (1899)

(3) *Ambica Charan Das v Kala Chandra Das* 10 C W N 422 Ref to in *Rakshab Mondal v Sm Tarangni Debi* 25 C W N 207 (1921)

(4) *Janki Kuar v Lachmi Narain* 37 A 535 (1915) following *Nanda Kumar Houladar v Ram Jiban Houladar* 41 C 990 (1914) per Jenkins C J which dissenting from *Venkatapa Nath v Sabha Nath*, 29 M 179 (1905) and see *Munshi*

Mosaful Huq v Surendra Nath Ray 16 C W N 1002 (1912) and *Chandra v Jaisana* 38 M 203 (1915)

(5) Taylor Ev § 1113 Steph Dig Art 46 Below s Estoppel 208 *Huffer v Allen L R* 7 Exch 15 See *Asims Kaur v Saadard* 21 C W N 594

(6) This view is by no means a clearly settled and accepted one the rule with regard to innocent parties being treated as open to some doubt *Rajib Panda v Lahan Sindh* 27 C 23 (1899)

(7) *Ahmedbhai Hubibhai v Vallabhai Cassumbhai* 6 B 703 715 (1882)

(8) *Rajib Panda v Lahan Sindh* 27 C 1 (1899) s c 3 C W N 660 *Visarim Dassie v Vundo Lal* 26 C

the plaintiff put in a decree based on a compromise in a previous suit between him and the defendant to prove his right to *has* possession. The defence *inter alia* was that the decree was a fraudulent one. It was objected by the plaintiff that the former decree, which was unreversed, it was procured by fraud, but it was held

so (1) A party to a proceeding is never disabled from showing that a judgment or order has been obtained by the adverse party by fraud (2), and if it can be proved that the decree in the former suit was obtained by fraud there can be no question of *res judicata* (3). In the case of *A* mortgaged certain property to *B*, who obtained a decree therein. Subsequently *B* having attempted to transfer the property in the hands of *C*, the latter instituted a suit for the purpose of having it declared that the property was mortgaged to *A*, because the mortgage transaction was a fraudulent one, and the decree had been obtained by fraud and collusion. In such suit *B* contended that *C* having purchased subsequent to the decree was absolutely bound by it. But it was held that, having regard to the terms of this section, it was perfectly open to *C* to prove that the decree had been obtained by fraud and collusion (4). The words of the section "any party to a suit, &c." are wide enough to include parties to the first suit, both innocent and guilty. But there can be no doubt that the benefit conferred by the section is given only to an innocent party not privy to the fraud. For though the words of the section would, by themselves and independent of the general law, allow a party to set up his own fraud in procuring the decree to defeat it (which has been characterised as a star-guilty party would not be permitted to obtaining it he had practised an imposition on the plaintiff, the plaintiff is precluded from obtaining justice which for the nephew of a party to the fraud (8). It is no

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party is precluded from obtaining justice which for the nephew of a party to the fraud (8). It is no

time of the grant but had refrained because the executor had promised him a payment which had since been withheld, his application was refused on the ground that on his own showing he had been a party to the fraud (8). It is no

891 (1899), s. c., 3 C. W. N. 670. In appeal 30 C. 369, s. c., 7 C. W. N. 353, it was held that the High Court had original jurisdiction to entertain a suit to set aside a decree of a Mofussil Court on the ground of fraud and that even if this were not so, inasmuch as admittedly the Court had jurisdiction to entertain the suit so far as it was one for administration if the decree was relied upon by the defendant the plaintiff might show that it was obtained by fraud [approved in *Sri Rangammal v Sandammal* 23 M. 216, 218 (1899)], *Bansi Lal v Dhapa*, 24 A. 242 (1902) in which cases this matter and prior decisions thereon will be found fully discussed. These three cases are supported by *dicta* in *Ahmedbhoy Hubibhoy v Vullerbhoy* supra, *Manchharam v Kalidas*, 19 B. 821, 826 (1894), *Nilmoney Mukhopadhyaya v Aimmunissa Bibee* 12 C. 156 (1885). The case of *Bansi Lal v Ramji Lal*, 20 A. 370 (1898), cannot be regarded as an authority as the present section was not consi-

dered nor even mentioned in that decision. See *Bansi Lal v Dhapa*, 24 A. 242, 245 (1902). As to foreign judgments see *Nistaram Dossee v Nundo Lal* 26 C. at p. 910 (1899).

(1) *Rajib Panda v Lakhan Sindh*, 27 C. 11 (1899).

(2) *Manchharam v Kalidas*, 19 B. 821 (1894).

(3) *Krishnabhupati v Ramamurti*, 16 M. 198 (1892).

(4) *Nilmoney Mukhopadhyaya v Aimmunissa Bibee*, 12 C. 156 (1885).

(5) *Ahmedbhoy Hubibhoy v Vullerbhoy Cassumbhoy*, 6 B. 703 (1882), at p. 716, per Latham J., having regard to the maxims *Allegans suam turpitudinem non est audiendus* and *Nemo ex dolo suo proprio reletatur aut auxilium capiat*.

(6) *Nistaram Dossee v Nundo Lal*, 26 C. 891, 907 (1899).

(7) *Rajib Panda v Lakhan Sindh*, 27 C. 11, 22, 23 (1899).

(8) *Kishorbhai Ravadas v Ranchodas Dhulia*, 38 B. 427 (1914).

doubt a general rule that a Court will not interfere actively in favour of a party who has been *particeps criminis* in an illegal or fraudulent transaction, and this rule ordinarily applies to persons who are privies in estate. But the rule that a privy in estate cannot set up — — — — — There are cases which form an

in which the parties concur is
In such cases the Court sees the necessity of supporting the public interest, how ever blameable the parties themselves may be. Another exception is where the collusive fraud has been on a provision of the law enacted for the benefit of the privies. The rule which prevents a person who is a party from pleading the illegality of his act does not hold good as against persons claiming through such party, if they are the parties sought to be defrauded. So where by means of a fraud practised on the Court the owner of considerable property caused a decree to be passed against himself as defendant in a collusive suit upholding a fictitious *wahf namah*, by which it was intended to tie up the property in perpetuity for the benefit of the direct descendants of the *uagif* to the exclusion of his collateral heirs, it was held in a suit by such heirs to recover possession of their share by inheritance of the property so dealt with (a) that a Court, which was otherwise competent to entertain the suit had jurisdiction on the finding that it had been obtained by means of fraud to treat the previous decree as a nullity, and (b) that the plaintiffs were not prevented from setting up the plea that the previous decree had been obtained by fraud by the fact that the person who practised such fraud was their predecessor in title (1)

As in the case of the term 'fraud,' the Act contains no definition of the word 'collusion,' for the purposes of this section. 'Collusion' is the uniting for the purposes of fraud or deception and has been defined to be a deceitful agreement or compact between two or more persons to do some act in order to prejudice a third person or for some improper purpose. Collusion in judicial proceedings is a secret agreement between two persons that the one should institute a suit against the other in order to obtain the decision of a judicial tribunal for some sinister purpose, and appears to be of two kinds (a) When the facts put forward as the foundation of the sentence of the Court do not exist, (b) when they exist but have been corruptly preconcerted for the express purpose of obtaining the sentence. In either case the judgment obtained by such collusion is a nullity (2)

It is clear that a stranger to a judgment can avoid its effect by proof of collusion. But a party who has himself procured the judgment by his collusion cannot — — — — — by a — — — — — or an — — — — — neither of them can escape its consequences (5). Strangers no doubt may falsify

(1) *Barkut un nissa v. Fali Haq* 26 A 277 (1904)

(2) Wharton's Law Lexicon (1892) *sub loco* Collusion n 151 16 12th Ed (1916) p 187 This definition is perhaps in some respects too limited. Proof of collusion in the sense that the parties even without fraud were not really in contest will vitiate the judgment. *Earl of Bandon v. Becher*, 3 C & F 510 *Girdlestone v. Brighton Aquarium Coy* 4 Ex D 107 [referred to in *Nustarini Dossee v. Nundo Lal* 26 C at p 909 (1899)] The former action in the case last cited was one brought not for the purpose of giving the person named as plaintiff the fruits of it or indeed any

benefit whatever from it but for the protection of the defendants. It was held that there was no fraud in procuring the former judgment but that it was no bar inasmuch as there had been collusion (deceit) and the defendants in the second action were in truth both plaintiff and defendants in the former action the judgment in which was pleaded as a bar. In *Sardarmal v. Aravajal Sabl apathy* 21 B 205 215 (1896) it was held that there was no collusion.

(3) *Chenvirappa v. Putappa* 11 B 708 713 (1887)

(4) In cases cited *ante*

(5) *Chenvirappa v. Putappa* *supra*.

a decree by charging collusion, but a party to a decree not complaining of any fraud practised upon himself cannot be allowed to question it. It is not competent to a party to a collusive decree to seek to have it set aside (1). A party to a collusive decree is bound by it, except possibly when some other interest is concerned that can be made good only through his (2). The distinction between fraud and collusion has been said (3) to lie in this, that a party alleging

with the principle of *res judicata* (4)

(iv) Generally

The question of fraud as affecting judgment and decree was considered by the Bombay High Court on general grounds of English law in the case of *Ahmedbhai Hubibbhai v. Vullerbhai Cassumbhai* (5) which must be read in conjunction with the previous observations. After a division of persons into three classes with reference to their position as affected by the judgment viz (a) privies, (b) persons who, though not claiming under the parties to the former suit were represented by them therein, (c) strangers, neither privies to, nor represented by, the parties to the former suit, the Court proceeded to consider the effect of a previous judgment on these three classes respectively with reference to their capacity to dispute it.

In the first place, the judgment may be an honest one obtained in a suit conducted with good faith on the part of both plaintiff and defendant. In such a case the previous judgment (a) and class (b), class (c) will be in no way affected *inter partes*, but if it be one in rem passed by and cannot controvert it (7). In the second place, the judgment may be passed in a suit really contested by the parties thereto, but may be obtained by the fraud of one of them as against the other. There has been a real battle, but

force, but it may be impeached for fraud and set aside if the fraud be proved. In this case there has been no real battle, but the judgment has been obtained by the fraud of one of the parties. In such a case, as to such a judgment, it is not binding on the privies of these parties (8) and on a provision of the law enacted for the benefit of such privies (9). Thus in the undermentioned case, A with the intention of defeating and defrauding his creditors made and delivered a

representative under Hindu law sued B to have the note and conveyance set aside and to have the defendant restrained by injunction from executing the decree, but it was held that the plaintiff was not entitled to relief in respect of

(1) *Varadarajulu Naidu v. Srinivasulu Naidu* 20 M. 333 (1897)

(2) *Chenvirappa v. Putappa* 11 B. 708 (1887)

(3) *Varadarajulu Naidu v. Srinivasulu Naidu* 20 M. at p. 338

(4) *Ib.* if it be proved that the decree was obtained by the collusion of others there can be no *res judicata* *Krishnabhai Patil v. Ramamurti* 16 M. 198 (1892)

(5) 6 B. 703 (1882)

(6) v. s. 41 ante

(7) *Ahmedbhai Hubibbhai v. Vullerbhai Cassumbhai* supra.

(8) *Ahmedbhai Hubibbhai v. Vullerbhai Cassumbhai* supra *Ranganimal v. Venkatachary* 18 M. 378 (1895)

(9) *Ahmedbhai Hubibbhai v. Vullerbhai Cassumbhai* supra.

the note and the decree, although she was not personally a party to the fraud, inasmuch as she claimed through A by whose contrivance and collusion the defendant was enabled to obtain the decree (1) But as regards class (b) and class may eat a pre-provided collusion (2)

It has been held, in the Calcutta High Court, that a consent decree cannot be set aside on motion on the ground that it was obtained by fraud and misrepresentation, but that a separate suit must be brought for that purpose (3) And in a recent case in the Allahabad High Court, where it was alleged that a compromise was obtained by undue influence, it was held that a decree obtained by consent or on a compromise can be attacked in a separate suit, not only upon the ground of fraud, but upon any ground which would be sufficient for invalidating the agreement upon which the decree was based (4) *Seemle* having regard to the wide terms of this section it is not possible to say that it is not open to a Court other than the Court from which a grant has issued, in cases of fraud or collusion, to deal with the matter and decide whether the grant has been obtained by fraud or collusion But the better course in such cases would be, when it is open to a party alleging fraud to apply to the Court from which the grant issued, to stay the suit to enable an application to be made to revoke the grant (5)

(1) *Rangammal v Venkatachari* 18 M 378 (1895)

(2) *Ahmedbhoy Huzibhoy v Vullee bhoy Cassumbhoy* 6 B at pp 710—714 and see *Baikanta Nath Roy Choudhry v Mohendra Nath Roy* 1 C L J 65

(3) *Foolcoomary Das v Woodoy Chunder* 2 S C 649 (1898)

(4) *Sham Nath Chaudri v Ravinas*

34 A 143 (1911) following *Huddersfield Banking Co v Henry Lister & Son Ltd* L R 2 Ch 273 (1895) and *v Musst Gulab Kuar v Badshah Bahadur* 13 C W N 1197 (1909) and *Sarbish Chandra Basu v Hari Dajal Singh* 14 C W N, 451 (1910)

(5) *Rakshab Mondal v S. Tarangini Devi* 25 C W N 207 (1921)

OPINIONS OF THIRD PERSONS, WHEN RELEVANT

THE opinions of any person, other than the Judge by whom the fact is to be decided, as to the existence of facts in issue or relevant fact, are, as a rule, irrelevant to the decision of the cases to which they relate. To show that such and such a person thought that a crime had been committed or a contract made, would either be to show nothing at all, or it would invest the person whose opinion was proved with the character of a Judge. The use of witnesses being to inform the tribunal respecting facts, their opinions are not in general receivable as evidence, though what is matter of opinion is sometimes a question of some difficulty. In some few cases, the reasons for which are self evident it is otherwise. They are specified in the following sections 45—51 (1). A distinction must, however, be drawn between the cases where an opinion may be admissible under sections 6—11 (independently of its correctness as such) as forming a link in the chain of relevant facts to be proved and those in which an opinion is tendered merely as such, and is sought to be made use of solely by reason of the correctness of its findings upon its subject matter. In the last mentioned case the opinion will be excluded, unless it be one of those which are permitted to be given in evidence under the above mentioned sections. That a man holds a certain opinion is a fact (section 3) and this fact when relevant must like others be proved by direct evidence. Subject to a proviso in favour of the opinions of experts who cannot be called as witnesses, oral evidence, if it refers to an opinion or to the grounds on which that opinion is held, must be the evidence of the person who holds that opinion on those grounds (section 60).

The weight of such evidence depends on the maxim *cuiuslibet in arte sua credentia* in the general rule admissible, when ever it persons are unlikely to prove capable of forming a correct judgment upon it without such assistance, in other words, when it so far partakes of the character of a science or art, as to require a course of previous habit or study in order to obtain a competent knowledge of its nature" (2). On the other hand, it is equally clear that the opinions of skilled witnesses cannot be received, when the inquiry relates to a subject which does not require any peculiar habits or course of study in order to qualify a man to understand it (3). Thus witnesses are not permitted to state their views on the construction of documents or on matters of moral or legal obligation, or on the manner in which other persons would probably have been influenced had the parties acted in one way rather than another, because on such points the Court is as capable of forming an opinion as the witnesses themselves (4).

(1) Steph Introd 167. Opinions in so far as they may be founded on no evidence or illegal evidence are worthless and in so far as they may be founded on legal evidence tend to usurp the functions of the tribunal whose province alone it is to draw conclusions of law or fact. Phipson Ev 5th Ed., 361 citing Best Ev § 511. Powell Ev 9th Ed 37—55. Lawson's Expert and Opinion Evidence, 1 Wigmore Ev § 1917 et seq.
(2) Taylor Ev § 1418 as to the mean-

ing of the term expert see Lawson's Expert and Opinion Evidence 1905

(3) Taylor Ev § 1419, see *Pranjivan Das v Moyaram* 1 Bom H C R & p 155 (1863). See remarks to Lord Bramwell in *G v W* 1 R 10 App Cas 171 200 and of Vaughan Williams J. in *R v Silverlock* L. R. 2 Q B D (1894) 766 769

(4) Taylor Ev § 1419, *Greenleaf Ev* § 441

The opinions of skilled witnesses are admissible in evidence, not only where they rest on the personal observation of the witnesses themselves, and on facts within their own knowledge, but even where they are merely founded on the case as proved by other witnesses at the trial. But here the witness cannot in strictness be asked his opinion respecting the very point which the Court or jury are to determine. So if the question be whether a particular act, for which a prisoner is tried, were an act of insanity a medical man conversant with that disease, who knows nothing of the prisoner but has simply heard the trial, can not be broadly asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, because such a question involves the determination of the truth of the facts deposed to as well as the scientific inference from those facts. He may, however, be asked what judgment he can form on the subject, assuming the facts stated in evidence to be true (1). An expert may refer to text books to refresh his memory or to correct or confirm his opinion (2) e.g., a doctor to medical treatises a valuer to price lists a foreign lawyer to codes, text writers, and reports. If he describe particular passages therein as accurate they may be read as part of his testimony, the opinion *per se* (3). The opinion of an expert is open and when the opinion is relevant the grounds upon which such opinion is based are also relevant (5). The evidence of experts is to be received with caution because they may often come with such a bias in their minds to support the cause in which they are embarked that their judgments become warped, and they themselves become even when conscientious. And thus the evidence on a forgery charge

Opinion when admissible

er of opinion is not a supposed state of mind but the judgment reached by the witness. It is therefore necessary to distinguish between the fact and the matter of opinion.

early involved in statement of fact. An instance erroneously supposed to be simply an 'opinion' is found in cases where the phenomena being too numerous or intangible to permit of correct or effective individual statement witnesses are permitted to give their opinion in their own minds. Thus, a witness can say, "The health of the prisoner was such that he seemed 'hostile' or 'friendly', or appeared 'intoxicated' or looked 'excited', or 'scared', 'old' or 'young' or was of a particular age, 'pleased', or 'agitated', or that two persons seemed to be attached,"

(1) Taylor Ev § 1421 *M. Roghun Singh v R* 9 C 455 461 (1882) *R v Meher Ali* 15 C 589 (1888) *McNaghten's Case* 10 C & F 200

(2) S 159 post

(3) Taylor Ev § 1422 *Sussex Peerage Case* 11 C & F 85 114 *Coller v Simpson* 5 C & F 74 *Nelson v Bridport* 8 Beav 527 *Concla v Murielita* 40 Ch D 543

(4) S 46 post

(5) S 51 post

(6) See Best Ev § 514 *et seq* and *per Lord Campbell Tracey Peerage Case* 10 C & F 191. See remarks of Jessel M R in *Abinger v Ashton* L R 17 Eq 373. An expert is not like an ordinary witness who hopes to get his expenses but he is employed and paid in the sense of gain being employed by per-

sons who call him. Undoubtedly there is a natural bias to do something serviceable for those who employed you and adequately remunerate you.—*Id* at p 374. See also *Goday Nara v Sri Ankata* 6 Mad H C R 85 87 88 (1871) *Hari Chintamani v Mora Lakshman* 11 B 101 (1886). And as to criminal cases see *Srikant v R* 2 All L J 444 (1904) *Panchu Mondal v R* 1 C L J 385 (1905).

(7) *Venkata Rao (a re)* 36 M 159 (1913)

(8) Best Ev 473 Amer Notes. See *Cornewall Lewis Influence of authority* 1 Sully's Illusions 328 *Wigmore Ev.* § 1919. It is of course not intended under the Act to exclude evidence of this description. See *Cunningham Ev* 190 and s 1 ante definition of fact."

to each other, or that a building or document was 'in good or bad preservation,' or the like. Such persons are not experts properly so called, though experts with the same facilities for observation, may, of course, testify in the same manner and to the same points. The obvious, and perhaps, the only, limitation placed on evidence of this nature, which may be described as the opinions of non-experts, is that the witness will not be allowed unnecessarily to invade the province of the Judge or Jury, substituting his opinion for theirs (1). But such evidence is admitted on the grounds that positive and direct testimony is unattainable (2). As all language embodies inferences of some sort, it is not possible to wholly dissociate statements of opinion from statements of fact. The evidentiary test has been said to be, that if the fact stated necessarily involves the component facts, it will be admissible as amounting to a mere abbreviation, if it does not necessarily involve them, but may be supported upon several distinct phases of fact the particulars only should be given and not the inference. Thus though a witness might, without objection, state that 'A shot B,' or 'A stabbed B' yet the statement that 'A killed B' would be improper, as involving a conclusion that might be remote and doubtful, and apply equally to a variety of different incidents (3). So it was held that a witness's statement that a party 'is in possession' is no evidence of that fact, that the question of possession is a mixed one of law and fact, and that the evidence produced must give the various acts of ownership which go to constitute possession, so that the Court may arrive at its own conclusion (4). In, however, a subsequent case it was laid down that a statement by a witness that a party is in possession, is, in point of law, admissible evidence of the fact that such party was in possession (5). Such general and vague statements are, however, as a rule of but little value (6). A common instance of such opinion evidence of non-experts is that which is given

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seen with the man you see at the trial. The same rule of comparison belongs to every species of identification" as for instance to the identification of

(1) Best Ev 473 474 § 517 Taylor Ev § 1416 Lawson's Expert and Opinion Evidence *post* see next note James Law of Experts 32 Wharton Ev § 502

(2) Taylor Ev § 1416 Such opinions have been described as opinions from necessity and the rule stated as follows the opinions of ordinary witnesses derived from observations are admissible in evidence when from the nature of the subject under investigation no better evidence can be obtained or in fact cannot otherwise be presented to the tribunal *e.g.* question relating to time quantity number dimensions height speed distance or the like and to the facts stated in the text Lawson's Expert and Opinion Evidence 460

(3) Phipson Ev 5th Ed 378 citing Best Ev Amer Notes to § 511 *supra* Whart §§ 15 509—513 Stephen J in 3 Southern Law Rep (Amer) 567 and see Taylor Ev § 1416 On some particular subjects positive and direct testimony is often unattainable. In such cases a witness is allowed to testify to his belief or opinions or even to draw inferences respecting the fact in question from other

facts which are within his personal knowledge see also Powell Ev, 9th Ed 54 Best Ev § 517

(4) *Ishan Chunder v Ram Lochun* 9 W R 79 (1868)

(5) *Maniram Deb v Dey Charan* 4 B L R (F B) 97 (1869)

(6) See notes to s 110 *post*

(7) Taylor Ev § 1416 Witnesses may not only state their belief as to the identity of persons present in Court or not but may identify them by photographs (*Frith v Frith* 1896 p. 74) produced and proved to be theirs. The same rule applies to the identification of things (*Fryer v Gathercole* 13 Jur 542) *e.g.*, opinion may be given as to the resemblance of an engraving to a picture not produced (*Lucas v Williams* 1892 2 Q B 113 116) or even of a portrait that is produced to one of the parties in Court (*Miles v Lamson* Times Oct. 29 1892 *McQueen v Phipps* Times July 1 1897) Phipson Ev 5th Ed 376 Wigmore Ev § 1917

(8) *et s* 4 *post*

(9) 13 Jur 547

handwriting (1) The opinions of witnesses are also admissible to prove the innuendoes of libel, where ordinary words are used in a peculiar sense, or where such was the nature of the question. The question is, whether the opinion of a witness is admissible in such cases. (2) A person may give evidence of his testimony being such as to be the

Witnesses may, however, as has been already observed, describe the apparent condition of people or of a building or document. Another case in which they are allowed to speak to character (3) value may also be proved by the opinion of any witness possessing knowledge of the subject. There are many things in almost universal use, the value of which any one may testify to it being a matter of common knowledge. In other cases the opinion of an ordinary witness would not be sufficient. The market value of land is not a question of science and skill upon which only an expert can give an opinion. Persons living in the neighbourhood may be presumed to have a sufficient knowledge of the market value of property from the location and character of the land in question and so also witnesses may express their opinions as to the value of goods and chattels. "Market value," said Mr Justice Story in an early case, "is necessarily a matter of opinion as well as of fact, or rather of opinions gathered from facts. How are we to arrive at it? Certainly not by the mere purchase made by a single person, or by purchases made by a few persons, for in either case they may have purchased above or below the market price or the market price may be fluctuating and the sales too few to justify any general conclusion. Buyers may refuse to buy at a particular price, sellers may refuse to sell at a lower price. In this state of things we must necessarily resort to opinions of merchants and others conversant in trade for opinions what under all the circumstances is the fair market price or value of the goods. In the next case the knowledge of their market price being thus, in fact a matter of skill judgment and opinion it is in no just sense mere hearsay, but is in the nature of the evidence of experts (7). In the case cited it was

(1) See Best Ev § 233 s 47 post. See Harris Law of identification (1892) [Treating of persons name *idem sonans* identity of prisoner photographs opinion evidence murder identification ancient records and documents handwriting identity of real estate identification of personal property view of premises by jury compulsory physical examination mistaken identity etc].
(2) Odgers on Libel 567. Starke on Libel 5th Ed 465. Wharton s 975. Phipson Ev 5th Ed 376. Daines v Hartley 3 Ex 200 referred to in Cunningham Ev 191. Burns v Harmer 3 C & K 10. Barnett v Allen 3 H & K 376. Simmons v Mitchell 6 App Cas 155. 163. Curtes v Peek 13 W R (Eng) 230.

(3) v ante p 197

(4) Wright v Tatham 7 A & E 313,

R v Newell Cr & Dix Ab Cas 96. Greenslade v Dare 20 Beav 284 nor under this Act Field Ev 346 note.

(5) v Phipson Ev 5th Ed 376—378

(6) Phipson Ev 5th Ed 378 see Notes to s 55 post

(7) *Alonso v United States* 2 Story 421 (1843) (Amer). *Lawson's Expert Evidence* 431—456 439 it is no objection to the evidence of a witness testifying as to market value that such evidence rests on hearsay. Wharton Ev 449. Wigmore Ev § 1940. See as to market rate *Narain Chunder v Cohen* 10 C. 56 (1884) and as to market value under Municipal and Land Acquisition Acts see *Manindra Chandra Nandi v Secretary of State* 41 C 967 (1914) and *Harish Chunder Neogy v Secretary of State*, 11 C W N 875 (1907)

said that the market-value of land may be roughly defined as the price which a vendor, willing but not compelled to sell, might reasonably expect to obtain from a willing purchaser (1)

Summary

The rule upon evidence in matter of opinion has been thus summarised.(2) The general rule is that a witness must only state facts and his mere personal opinion is not evidence. But this rule is subject to the following exceptions namely—(a) On questions of identification a witness is allowed to speak as to his opinion or belief (b) A witness's opinion is receivable in evidence to prove the apparent condition or state of a person or thing (c) The opinions of skilled or scientific witnesses are admissible evidence to elucidate matters which are of a strictly professional or scientific character. Sections 45, 46, 51 of this Act deal with the last exception and sections 47, 51 with the first in so far as it bears on the question of identification of handwriting. Sections 48-50 add further exceptions relating to opinions on general customs and rights(3) to usages, tenets, and the like(4), and to opinions on relationship, provided such opinions are expressed by conduct (5)

Opinion of experts

45 When the Court has to form an opinion upon a point of foreign law, or of science or art, or as to identity of hand writing [or finger-impressions](6), the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity of handwriting [or finger impressions](7) are relevant facts

Such persons are called experts

Illustrations

(a) The question is whether the death of A was caused by poison.

The opinions of experts as to the symptoms produced by the poison by which A is supposed to have died are relevant.

(b) The question is whether A at the time of doing a certain act, was by reason of unsoundness of mind incapable of knowing the nature of the act or that he was doing what was either wrong or contrary to law

The opinions of experts upon the question whether the symptoms exhibited by A commonly show unsoundness of mind and whether such unsoundness of mind usually renders persons incapable of knowing the nature of the acts which they do or of knowing that what they do is either wrong or contrary to law are relevant

(c) The question is whether a certain document was written by A. Another document is produced which is proved or admitted to have been written by A

The opinions of experts on the question whether the two documents were written by the same person or by different persons are relevant.

Facts bearing upon opinion of experts

46 Facts, not otherwise relevant, are relevant if they support or are inconsistent with the opinions of experts, when such opinions are relevant

(1) *Kailas Chandra Mitra v Secretary of State* 17 C. L. J. 34 (1913)

(2) *Powell v. 111 et seq*

(3) S. 48 post

(4) S. 49 post

(5) S. 50 post

(6) The portion in brackets was added by s. 3 Act V of 1899

(7) *Id.* finger impressions of course include thumb impressions. See Report of Select Committee cited 3 C. W. N., xc.

Illustrations

- (a) The question is whether A was poisoned by a certain poison

The fact that other persons who were poisoned by that poison exhibited certain symptoms which experts affirm or deny to be the symptoms of that poison is relevant

- (b) The question is whether an obstruction to a harbour is caused by a certain sea wall

The fact that other harbours similarly situated in other respects but where there were no such sea walls began to be obstructed at about the same time is relevant (1)

Principle—The use of witnesses being to inform the tribunal respecting facts, their opinions are not in general receivable as evidence. Facts should be stated and not inferences. The rule however is not without its exceptions. Being based on the presumption that the tribunal is as capable of forming a presumptive opinion as the opinions of specially skilled persons are, the opinion of an expert is admissible on which expert testimony rests is the supposed superior knowledge or experience of the expert in relation to the subject matter upon which he is permitted to give an opinion as evidence (3)

- * 3 ("Court")
 * 3 ("Preliminary")
 * 3 (That a man holds a certain opinion as a fact)
 * 3 ("Fact")
 * 60 (Evidence of opinion must be direct)
 * 60 (Proviso (Opinion of expert who cannot be called as a witness))

- * 74 (Opinion as to handwriting)
 * 51 (Grounds of opinion)
 * 73 (Comparison of handwriting)
 * 159 (Expert refreshing memory)
 * 57 (Preference by Court to books of experts)

Steph. Dig. Arts. 49 & 50 Taylor Fr §§ 1423—1425 1417—1419 1420 1445 337
 Phipson Ev 5th Ed. 363—376 Norton Fr 225 Field Ev 6th Ed. 191—193 Best
 Ev 111 *et seq.*, Powell Ev 9th Ed. 40—50 Roscoe N P Ev, 84 175 176 Rogers on
 Expert Testimony (1883) 2nd Ed. 1891 Lawson on Expert and Opinion Evidence (1886)
 James Ohio Law of Opinion Evidence (1889) Wigmore Ev § 1917, *et seq.*, Harris Law
 of Identification (1892) Hagan on Disputed Handwriting (1894)

COMMENTARY.

The phrase "expert" testimony is not applicable to all species of opinion evidence. A witness is not giving expert testimony who without any special personal fitness or special intelligence simply testifies as to the impressions produced in his mind or senses by that which he has seen or heard, and which can only be described to others by giving the impression produced upon the witness. Neither is he giving such testimony, strictly speaking when he is testifying as to matters which require no peculiar intelligence and concerning which any person is qualified to judge according to his opportunities of observation. Expert testimony properly begins with testimony (4) concerning those branches where some intelligence is requisite for judgment and when opportunities and habits of observation must be combined with some practical experience. An expert is one who is skilled in any particular art trade or profession being possessed of peculiar knowledge concerning the same (5). Many

Expert

(1) *Folkes v Chadd* 3 Dougl. 157
 (2) Best Ev §§ 511—513 See Intro
 duction *ante* and Notes *post*
 (3) Rogers on Expert Testimony 21
 (4) As to the relative value of testimony

and extracts from scientific treatises see
Sileo Bahadur Singh v Beni Bahadur
Singh 6 O L J 178 s. c. 51 I C,
 419
 (5) Rogers *op cit* § 1

Court may construe it for itself (1) In India such law may not only be proved under this section by the evidence of persons specially skilled in it, but also, under section 38, by the production of a book printed or published under the authority of the Foreign Government (2) Foreign customs and usages may be proved by any witness, whether expert or not, who is acquainted with the fact (3)

Science and
Art

"The opinions of medical men are admissible upon questions within their own province, *e g*, insanity, the causes of disease or death or injuries, the effects of injuries, medicines, poisons, the consequence of wounds, the conditions of gestation, the effects of hospitals upon the health of a neighbourhood the likelihood of recovery, those of actuaries as to the average duration of life with respect to the value of annuities, those of naturalists as to the ability of fish to overcome obstacles in a river, those of chemists as to the value of a particular kind of guano as a fertiliser, the safety of a 'non explosive camphene and fluid lamp,' the constituent effects of a particular poison, fern as to the existence of coal seams, those coke ovens upon trees in the neighbourhood, those of persons specially skilled in insurance matters, such as the opinion of an insurance agent and examiner that a partition in a room increased the risk in a fire policy, and so with other branches of science

The opinions of artists are admissible as to the genuineness and value of a work of art, the opinion of a photographer as to the good execution of a photograph, though a non expert might speak to its being a good likeness, the opinion of an engraver or professional examiner of writings as to erasure in a document, those of engineers as to the cause of obstruction to a harbour, that the erection of a dam would not cause the adjoining land to be overflowed by back water, that certain drains do not lessen the quantity or flow of water, that a contract for doing a piece of work or building a vessel did not call for connecting the engines by a centre shaft, that a bridge built of wood should have been built of stone in order to withstand a flood and the like, those of seal engravers as to the impressions from a seal, those of officers of a fire brigade as to the cause of a fire, those of military men as to a question of military practice, those of post office clerks as to post marks, those of ship builders, marine surveyors and engineers as to the strength and construction of a ship and (when the Court is not sitting with assessors) those of nautical men as to the proper navigation of a vessel" (4)

Trade

Mechanics, artizans, and workmen are experts as to matters of technical skill in their trades, and their opinions in such cases are admissible. So the opinion of a mason as to how long it takes to dry the walls of a house, of a miner as to the cause of the settling of the walls of a mine, of a blacksmith as to whether a horse was properly shod, of the foreman of a mill as to the running order of the machinery, of a road builder as to the necessity of a railing along an elevated part of a road, of a railroad man as to questions of railroad management, such as whether a rail was properly laid, as to the

(1) *Concha v Muriel* C. A. (1889), 40 Ch D p 543

(2) *v* Notes to s 38 *ante*, *et seq*, and as to s 60 *v post*

(3) *Ganes v Lanesborough* 1 Peake R, 18 *Sussex Peerage Case*, 11 C. & F, 124 *Moslyn v Fabrigas* 1 Comp 174 *Yander Doncht v Thellusson* 8 C. B 812, *Lindo v Belisario* 1 Hagg C. R 216, *see s 49 post* As to the construction of foreign documents *see D. Sora v Phil*

Iipps 10 H. L. C 624 *Phipson Ev.* 5th Ed 367—368, *Taylor Ev* § 1424

(4) *Lawson's Expert and Opinion Evidence* See *passim* Index, *Wharton Ev.* §§ 441 446, *Phipson Ev.* 5th Ed. 366—367, *Taylor Ev* §§ 1417, 1418 *et seq.* and cases there cited. As to evidence of medical witnesses and reports of chemical examinations *see Cr Pr Code* ss 509 510

cause of a train being thrown from the track as to the distance within which a train can be stopped, whether the boiler of an engine was safe whether coupling appliances were defectively constructed have been held to be admissible. So also are the opinions of farmers and agriculturists on matters peculiarly within their knowledge as that of a grazier on the effect of disturbance in the value of cattle of a farmer as to the quality of the soil of a farm. So also a banker may speak as to the genuineness of a bank note a merchant may depose to the value of goods in which he deals and so forth. According to English decisions the opinions of shop keepers are admissible to prove the average waste resulting from the retail sale of goods those of persons conversant with a market to prove a market value and those of business men to prove the meaning of trade terms and the like (1)

Experts may give their opinions upon the genuineness of a disputed hand writing after having compared it with specimens proved to the satisfaction of the Judge to be genuine (2). In a recent case in the Calcutta High Court it has been held that while the writing with which the comparison is made must first be admitted or proved to be that of the person alleged the comparison must be made in open Court and in the presence of such person. This decision was based on the ground that though these conditions are not expressly laid down in this section they are indicated by Illustration (C) (3). But independent of all cases in which handwriting is sought to be proved by actual comparison the testimony of skilled witness will be admissible for the purpose of throwing light upon the document in dispute as upon the question whether a writing is in a feigned or natural hand or the probable date of an ancient writing or as to whether interlineations were written contemporaneously with the rest of a document or whether the writing is cramped or one document exhibits greater ease or facility than another or whether a writing has been touched by the pen a second time as if done by some one attempting to imitate or whether the writing has been made over pencil marks or whether a document could have been made with a pen or whether two documents were written with the same pen and ink, and at the same time or whether two parts of a writing were written by the same person or the like (4). But opinion as to handwriting is not confined to experts but may be given by any person who is duly acquainted with it (5).

By nature and habit individuals contract a system of forming letters which give a character to their writing as distinct as that of the human face (6). The general rule which admits of proof of handwriting of a party is founded on the reason that in every person's manner of handwriting there is a peculiar prevailing character which distinguishes it from the handwriting

(1) *Phipson v. Evans* 10 and see last note and s. 49 post.

(2) *v. s. 73 post* for a case in which a judge was held to have wrongly called expert testimony see *Bendessuree Ditt v. Doma Singh* 9 W. R. 88 (1868).

(3) *Suresh Chandra Sanjay v. R.* (1912) 39 C. 606 and see *Sreemitt Phoodee Bibi v. Gobind Chander Roy* (184) 27 W. R. 212 and *Cresswell v. Jackson* (1860) 2 F. & F. 24 and *Cobbett v. Kiminster* (1860) 2 F. & F. 490.

(4) *Taylor v. Evans* 31 1877 1417 Best Ev. § 246 See notes to s. 47 post.

(5) See notes s. 47 post and *Surendra Narayan Adhikary v. R.* (1911) 39 C. 597.

(6) *Lavson's Expert Ev.* 277. Men are distinguished by their handwriting as well as by their faces for the seldom that the shape of the letters agree any more than the shape of the bodies. *Buller's N. S. P. 236* 2 Evans Poth. on Obligations. The handwriting of every man has something peculiar and distinct from that of every other man and is easily known by those who have been accustomed to see it. *Peakes v. Evans* 67. Almost everybody's usual handwriting possesses a peculiarity in it and distinguishes it from other people's writing. *Ram on Facts* 68. See at p. 69 citation from Cowper's work (Letters Vol. V. 217 Ed. 1836).

of every other person (1) In the Tichborne trial, Cockburn, C J, in his charge to the jury said "Manifold as are the parts of difference in the infinite variety of nature in which one man differs from another, there is nothing in which men differ more than in handwriting, and when a man comes forward and says, 'you believe that such a person is dead and gone, he is not, I am the man,' if I knew the handwriting of the man supposed to be dead, the first thing I would do would be to say 'Sit down and write, that I may judge whether your handwriting is of the man you assert yourself to be', if I had writing of the man with whom identity was claimed, I should proceed at once, to compare with it the handwriting of the party claiming it For that reason I shall ask you carefully to look at and consider the handwriting of the defendant and to compare it with that of the undoubted Roger Tichborne and with that of Arthur Orton"(2) "Calligraphic experts have for years asserted the possibility of investigating handwriting upon scientific principles, and the Courts have consequently admitted such persons to testify in cases of disputed handwriting It is claimed that experiment and observation have disclosed the fact that there are certain general principles which may be relied upon in questions pertaining to the genuineness of handwriting For instance, it is asserted that in every person's manner of writing, there is a certain distinct prevailing character which can be discovered by observation, and being once known can be afterwards applied as a standard to try other specimens of writing, the genuineness of which is disputed Handwriting, notwithstanding it may be artificial, is always, in some degree, the reflex of the nervous organisation of the writer Hence there is in each person's handwriting some distinctive characteristic, which, as being the reflex of his nervous organisation, is necessarily independent of his own will, and unconsciously forces the writer to stamp the writing as his own Those skilful in such matters affirm that it is impossible for a person to successfully disguise in a writing of any length this characteristic of his penmanship, that the tendencies to angles or curves developed in the analysis of this characteristic may be mechanically measured by placing a fine specimen within a coarser specimen, and that the strokes will be parallel if written by the same person, the nerves influencing the direction which he will give to the pen So too it is claimed that no two autograph signatures will be perfect fac similes Experts therefore, claim that if, upon superimposition against the light, they find that two signatures perfectly coincide, that they are perfect fac similes, that it is a probability amounting practically to a certainty that one of the signatures is a forgery"(3) In determining the question of authorship of a writing, the resemblance of characters is by no means the only test The use of capitals, abbreviations, punctuation mode of division into paragraphs, making erasures and interlineations, idiomatic expressions, orthography, underscoring(4), style of composition and

(1) *Strong v. Brewer* 17 Ala., 706—710 (Amer) cited in *Lawson op cit*, 278.

(2) *R v. Castor*, 762

(3) *Rogers op cit* 290 292 With reference to the last observation it is stated that in the *Howland Will Case* (4 Am Law Review 625 649) Prof Pierce Professor of Mathematics in Harvard University testified that the odds were just exactly 2 866 000 000 000 000 000 000 to 1 that an individual could not with a pen write his name three times so exactly alike as were the three alleged signatures of Sylvia Ann Howland the testatrix, to a will and two codicils *Hagan op cit*,

91, 92

(4) See following passage from Cowper's work (Letters) Vol V, p 217 1835

Hours and hours have I spent in endeavours altogether fruitless to trace the writer of the letter that I send by a minute examination of the character, and never did it strike me until this moment that your father wrote it. In the style I discover him in the scoring of the emphatic words—his never failing practice—in the formation of many of the letters and in the ad u at the bottom so plainly that I could hardly be more convinced had I seen him write it." Cited in *Ram on Facts* 69

the like, are all elements upon which to form the judgment (1) "Conclusions from dissimilitude between the disputed writing and authentic specimens are not always entitled to much consideration, such evidence is weak and deceptive, and is of little weight when opposed by evidence of similitude. The reason why dissimilitude is evidence inferior to similitude is that it requires great skill to imitate handwriting especially for several lines, so as to deceive persons well acquainted with the genuine character and who give the disputed writing a careful inspection, while, on the other hand dissimilitude may be occasioned by a variety of circumstances—by the state of the health and spirit of the writer, by his position by his hurry or care, by his material by the presence of a hair in nib of the pen or the more or less free discharge of ink from the pen which frequently varies the turn of the letters—circumstances which deserve still more consideration when witnesses rest their opinion on a fancied dissimilarity of individual letters' (2)

It being granted that there is such a thing as a science of handwriting it follows that the opinions of witnesses who are skilled in the science who by study, occupation and habit have been skilful in marking and distinguishing the characteristics of handwriting may be received in evidence. These may be experts in handwriting, strictly so called that is persons who have made the study of handwriting a speciality or others whose avocations and business-experience have been such as naturally qualify them to judge of handwriting. And so writing engravers lithographers tellers, cashiers and other officers of banks(3) post office officials book keepers, and cashiers of commercial houses writing masters(4) and a solicitor(5) who had for some years given considerable attention to the subject and had several times compared handwriting for purposes of evidence, though never before testified as an expert," have been admitted to give evidence on this subject (6)

The palms of the hands are covered with two totally distinct classes of marks. The most conspicuous are the creases or folds of the skin which interest the followers of palmistry and which show the lines of most frequent flexure and nothing more. The least conspicuous marks, but the most numerous by far, are the so called papillary ridges which produce finger impressions. These ridges form patterns considerable in size and of a curious variety of shape. It is said that they have the unique merit of retaining all their peculiarities unchanged through life and in consequence afford a surer criterion of identity than any other bodily feature. So far as the proportions of the patterns go they are not absolutely fixed even in the adult, inasmuch as they change with the shape of the finger. The measurements vary at different periods but, on the other hand the numerous 'bifurcations origins, islands and 'enclosures' in the ridges that compose the pattern are said to be almost beyond change. Practice is, however required before facility can be gained in reading and recognising finger prints (7)

Those who have made finger prints their special study have come to the conclusion that their similarity is, as a rule, evidence of personal identity and

(1) Lawson *op cit* 277 278 note

(2) Lawson *op cit* 278 279n citing *Young v Brown* 1 Hag. Ecc. R. 555 569 571 *Constable v Libel* 1 Hag. Ecc. R. 56 60 61 2 Phillips Ev (Cow and Hill's Notes) 608 and 482 and American cases. See also Hagan *op cit* 73

(3) As to the competency however of these see remarks in Hagan *op cit* 30

(4) *Ib* 33 where it is stated that these as a class furnish experts of the least ability

(5) *R v Silverlock* (1894) 2 Q. B. 766

(6) Rogers *op cit* 297 298 Phipson Ev. 5th Ed. 364 Best Ev. § 246 and as to expert evidence of writing in Criminal cases see *Srikant v R* 2 A. L. J. 444 (1904) *Panchu Mondal v R* 1 C. L. J. 385 (1905) and see *Venkata Rao* (in the matter of) 36 M. 159 (1913) (value of handwriting expert evidence discussed)

(7) Galton on Finger prints, Introduction *passim*

their dissimilarity will, therefore, as a rule, be evidence of the reverse (1) Therefore when in the case last cited, one of the main questions for determination was whether a document impugned was or was not presented before the Registrar by the complainant, one *N S*, a comparison of the thumb impression of the person who presented the document with that of *N S*, was held admissible under the 9th section of this Act, if the similarity of those impressions could establish the identity of that person with *N S*, or under the second clause of the 11th section of this Act if their dissimilarity made such identity improbable. It was, however, held that, though the comparison of thumb impressions was allowable, such comparison must be made by the Court itself, and that the opinion of an expert as to the similarity of such impression was not admissible under the present section (2) The words in brackets were accordingly added to the present sections by Act V of 1899, the Statement of Objects and Reasons of which Act contains the following paragraph—"The system of identification by means of such impressions is gaining ground and has been introduced with considerable success, especially in the Lower Provinces of Bengal. It seems desirable that expert evidence in connection with it should be admitted, and with that object it is proposed by the third clause of the Bill expressly to amend the law on the subject" (3) Evidence of a witness is now therefore admissible, but the evidence must be that of a person specially skilled in questions of identity of finger impressions. By the same Act, section 73, as amended, applies also, with any necessary modifications, to finger impressions. In order, therefore, to ascertain whether a finger impression is that of the person of whom it is said to be, any finger impression admitted or proved to the satisfaction of the Court to be the finger impression of that person may be compared with the former impression, although that impression has not been produced or proved for any other purpose. The Court may also direct any person present in Court to make a finger impression for the purpose of enabling the Court to compare the impression so made with any impression alleged to be the finger impression of such person.

The opinions of experts are not receivable upon the question of the construction of documents whether domestic or foreign, though it is otherwise
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The opinions of experts are admissible in evidence, not only where they rest on the personal observation of the witness himself, and on facts within his own knowledge, but even when they are merely founded on the case as proved by other witnesses at the trial. An expert may give his opinion upon facts proved either by himself (4) or by other witnesses at the trial (5), or upon

(1) *R v Fakir Mahomed* 1 C W N, 33 34 (1896)—*per* Banerjee J, citing Galton on Finger Prints Chs VI, VII [but see article on 'Expert Evidence on Finger Impressions' in 3 C W N iv] it may further be observed that inasmuch as the decision quoted ruled that expert evidence could not be given under s 45 it implied that the subject or knowledge of the identity of finger impressions did not constitute a 'science'

(2) *Id*

(3) Statement of Objects and Reasons cited in 3 C W N, xxiv, see also *ib*, pp iv & lxxxii

(4) *Bellefontaine etc Ry, Co v Bailey* 11 Ohio St 333 (Amer) cited in

Lawson's Expert Ev 221. In this case the question was whether a certain railroad train could have been stopped in time to avoid running over a team at a crossing. The opinion of the engineer of the train was held admissible, the Court saying that if an expert may give his opinion on facts testified to by others there was no reason why he might not do so on facts presumably with his own personal knowledge if his knowledge was defective the parties could show it by cross-examination or by testimony *alimude*

(5) e.g. the question is as to the value of a clock. A is a dealer in clocks but has never seen the clock in question which is described to him by other witnesses

hypotheses based upon the evidence, that is, the expert may give his opinion on facts put before him in the form of a hypothetical case (1) But his opinion is not admissible as to facts stated out of Court which are not before the Court en reported to him by hearsay (3) and purely having no foundation in the evidence are last mentioned rule is this In examining questions which did not bear upon the matters under inquiry or which were not fairly within the scope of any of the evidence The testimony must tend to establish the facts embraced in the question The Court should not how

which the evidence
used are not estab
is properly allow-
assumed, it will not
e the fact assumed.

So in a case involving the value to the plaintiff of a contract which the defendant had broken, a question which did not accurately state the terms of the contract was held inadmissible (5) A question may, however be allowed

His opinion is admissible *Histon v Snyder* 88 N. Y. 299 (1882) cited in *Lawson op cit* 221

(1) *Lawson's Expert Evidence* Rule 42 p. 221 The following is an example of a hypothetical question which was propounded by the defence to the experts in the trial of *Guiteau* charged with shooting President Garfield (cited in *Rogers Expert Testimony* 73) Assuming it to be a fact that there was a strong hereditary taint of insanity in the blood of the prisoner at the bar also that at or about the age of thirty four years his own mind was so much deranged that he was a fit subject to be sent to an insane asylum also that at different times after that date during the next succeeding five years he manifested such decided symptoms of insanity without stimulation that many different persons conversing with him and observing his conduct believed him to be insane also that in or about the month of June 1881 at or about the expiration of said term of five years he became demented by the idea that he was inspired of God to remove by death the President of the United States also that he acted on what he believed to be such inspiration and as he believed to be in accordance with the divine will in the preparation for and in the accomplishment of such a purpose also that he committed the act of shooting the President under what he believed to be a divine command which he was not at liberty to disobey and which belief made out a conviction which controlled his conscience and overpowered his will as to that act, so that he could not resist the mental pressure upon him also that immediately after the shooting he appeared calm and as if relieved by the performance of a great duty also that there was no other adequate motive for the act than the conviction that he was exe-

cuting the divine will for the good of his country—assuming all of these propositions to be true state whether in your opinion the prisoner was sane or insane at the time of shooting President Garfield The question propounded by the prosecution was too long to permit of its reproduction In *Hoodbury v Obeur* 7 Gray 467 (Amer.) Shaw C. J. said that the proper form of question was this if certain facts assumed by the question to be established should be found true by the jury what would be your opinion upon the facts thus found true as to etc But in a subsequent case it was said that this form was not to be regarded as an exclusive formula *Lawson's Expert Ev* 223 where at p. 222 another instance of the hypothetical question is given The question may be put in a great variety of forms *Rogers op cit* 62

(2) *Wharton Ev* § 452 *Phipson Ev* 5th Ed 365

(3) *Phipson Ev* 5th Ed, 365 citing *R v Staunton* Times Sept 26th 1877 *Tidy's Legal Medicine* 8 17 25 *Gardner Peckage Le Marchant* 73—80

(4) *Wharton Ev* § 452 *Best Ev* *American notes* (7) to § 511 *Phipson Ev* 5th Ed 365 *Rogers Expert Testimony* 67

(5) *Lawson's Expert Ev* 222 *Rogers Expert Testimony* 64—68 A hypothetical question is a question which assumes as a hypothesis the truth of the facts given in evidence by a particular party and embraced in the question Such a question may be asked either simply as to facts given in evidence or as to relevant hypotheses arising on these facts or facts given in evidence So in a salvage case where the evidence had shown that a steam vessel was lying at anchor in the month of September at the Sandheads at the mouth of the River Hooghly with

which assumes facts which the evidence already in the case neither proves nor tends to prove, provided Counsel in putting the question declares that they will by subsequent testimony supply the necessary evidence to warrant the facts so assumed. When this course is pursued if such testimony is not afterwards given, it would be the duty of the Court to strike out the answer to the question (1)

Questions should be so framed as not to call on the witness for a critical review of the testimony given by the other witnesses, compelling the expert to draw inferences or conclusions of fact from the testimony or to judge of the credibility of witnesses. A question which requires the witness to draw a conclusion of fact should be excluded. Such a witness is called not to determine the truth of the facts giving his opinion as to the effect of the evidence in establishing controverted facts, but to obtain his opinion on matters of science or skill in controversy (2). "A question should not be so framed as to permit the witness to roam through the evidence for himself, and gather the facts as he may consider them to be proved, and then state his conclusions concerning them" (3). Inasmuch as an expert is not allowed to draw inferences or conclusions of fact from the evidence, his opinion should generally be asked upon a hypothetical statement of facts. The question need not be hypothetical in two cases—(a) where the issue is substantially one of science or skill merely, the expert may, if he has himself observed the facts, be asked the very question which the Court or Jury have to decide (4), (b) possibly also according to the *dictum* in the celebrated *Macnaghten's Case* (5) where the issue is substantially one of science or skill, such a question may be put if no conflict of evidence exists upon the material facts, even in cases where the expert's opinion is based merely upon facts proved by others. In this case, however, the question can only be put as a matter of convenience and not of right the correct course being to put the facts to the witness hypothetically, asking him to assume one or more of them to be true and to state his opinion upon them.

It is always, however, improper where the facts are in dispute, and the opinion of the expert is based merely on facts proved by others, to put to the

a rudder which she had lost in a previous gale that the weather which had been bad prior to the anchoring of the vessel had calmed down at the time of the salvage service that cyclonic storms were likely to occur at that time of year and that the shore off which the vessel was anchored was a dangerous one a nautical expert was after objection allowed to be asked a question which after assuming the above mentioned facts proceeded 'what would have been the condition of such a vessel lying rudderless at that time of year at the Sandherds in the event of a cyclonic storm coming on before assistance could be procured. If closely examined the objection here appears fundamentally to have been not so much to the form of the question or the admissibility of expert testimony but to the relevancy of the evidence having regard to the facts of the case and the salvage law applicable, it being contended by the objectors but unsuccessfully that to earn salvage reward the danger from which a vessel has been rescued must have been actual present peril,

and that it was not sufficient that the ship was in a dangerous position in the sense that in certain events which did not actually happen she must have been in actual peril. It was however held that the term danger was not so limited (see *The Charlotte* 3 Wm. Rob. 71 "*The Albion* Lush 282) and that the hypothetical question which was relevant and based on the evidence was admissible. In the matter of the German steam ship *Drachensfels* *Retriever v Drachensfels* *Hugh v Drachensfels* 27 C. 860 (31st Jan 1900).

- (1) Rogers Expert Testimony 68
- (2) Rogers' Expert Testimony 60—64
- (3) *Dolz v Morris* 17 N Y Sup Ct. 202 (Amer) cited *ib*, 61
- (4) So where a medical expert had made a personal examination of the uterus of a deceased woman it was held proper to ask him what in your opinion caused the death of the person from whom the uterus was taken *State v Glass* 5 Oreg. 73 (Amer) See Rogers of *cit*, 75, 76
- (5) 10 C. & F., 200

witness the very question which the Court or Jury have to decide (1) since such a question practically asks him to determine the truth of the testimony as well as to give an opinion on it (2) So it was held that the evidence of a medical man who has seen and has made a *post mortem* examination of the corpse of the person touching whose death the inquiry is is admissible, *firstly*, to prove the nature of injuries which he observed and *secondly* as evidence of the opinion of an expert as to the manner in which those injuries were inflicted, and as to the cause of death A medical man who has not

ask the witness's opinions on those facts (3) So also a medical man who has not seen a corpse which has been subjected to a *post mortem* examination and who is called to corroborate the opinion of the medical man who has made such *post mortem* examination and who has stated what he considered was the cause of death is in a position to give evidence of his opinion as an expert The proper mode of eliciting such opinion is to put the signs observed at the *post mortem* to the witness and to ask what in his opinion was the cause of death on the hypothesis that those signs were really present and observed (4)

In order to obtain the opinion of the witness on matters not depending upon general knowledge but on facts not testified to by himself one of two modes is pursued either the witness is present and hears all the testimony, or the testimony is summed up in the question put to him and, in either case the question is put to him hypothetically whether if certain facts testified to are true he can form an opinion and what that opinion is The question may be based on the hypothesis of the truth of all the evidence or on an hypothesis especially framed on certain facts assumed to be proved for the purpose of the inquiry Inasmuch as it is no part of the expert to determine the truth of the evidence care must be taken in framing the questions not to involve so much or so many facts in them that the witness will be obliged in his own mind to settle other disputed facts in order to give his answer (5) The witness should ordinarily not be left to form an opinion on such facts as he (1) it is not entirely requires the expert was and upon (1)

(1) So on a question whether a particular act for which a prisoner is on his trial were an act of insanity a medical man conversant with that disease who knows nothing of the facts but has simply heard the trial cannot be broadly asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime The proper and usual form of question is to ask him whether assuming such and such facts the prisoner was sane or insane The Court or Jury are then left to say whether the assumed facts exist or not. *Macnaghten's Case* 10 C F 200 Taylor Ev § 1421

(2) Phipson Ev 5th Ed 369—370 and cases there cited Rogers op cit §

31 Taylor Ev § 1421 Wharton Ev § 452

(3) *Rogers v R* 9 C 455 461 (1882)

(4) *R v M'eler Al* 15 C 589 (1888) and see also Phipson Ev 5th Ed 369—371 where the authorities are collected and analysed.

(5) Rogers op cit 61—69

(6) *Ib* 0 71 [So in the matter of the German steamship *Drachenfels* 27 C 860 (31st Jan 1900) in which the evidence was very voluminous the Court required Counsel to read to the experts specific portions of the evidence in which the opinion was required even though they had heard the evidence being given.]

and accuracy of the witness, whether the facts assumed in such questions have been testified to by witnesses or not (1)

Grounds of, and corroboration and rebuttal of, opinion

Whenever the opinion of any living person is relevant, the grounds on which such opinion is based are also relevant (2) Thus an expert may give an account of experiments performed by him for the purpose of forming his opinion (3) When a skilled witness says that in the course of his duty he formed a particular opinion on certain facts, he may further be asked by examination in chief how he went on to act upon that opinion. For the acting on it is a strong corroboration of the truth of his opinion (4), and what a person does is usually better evidence of his opinion than what he says (5) Section 46 is but a roundabout way of stating that the opinion of an expert is open to corroboration or rebuttal The illustrations sufficiently exemplify the proposition that for this purpose evidence of *res inter alios acta* is receivable (6) This section is in accordance with the rule of English law (7)

Refreshing memory

An expert who is called as a witness may refresh his memory by reference to professional treatises (8), or to any other document made by himself at the time (9) So a medical man in giving evidence may refresh his memory by referring to a report which he has made of his *post mortem* examination but the report itself cannot be treated as evidence, and no facts can be taken therefrom (10)

Credit of experts

An expert witness like any other may on cross examination be asked questions to test his veracity to discover his position, and to shake his credit by injuring his character (11) Independent evidence may be given to show his conviction of a criminal offence or to impeach his impartiality (12) His credit may be impeached by the evidence of persons who testify that they believe him to be unworthy of credit and by proof that he has been corrupted or that he has expressed a different opinion at other times (13)

Opinion of expert not called as a witness

Section 60 enacts a proviso relating to the opinions of experts, to the general rule that oral evidence must be direct Under this proviso the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treatises if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable (14)

Opinion as to hand writing when relevant

47. When the Court has to form an opinion as to the person by whom any document was written or signed, the opinion

(1) *Ib* 79

(2) S 51 *post*

(3) *Ib* illust see *R v Hesselline* 12 Cox [404] on a charge of arson evidence of experiments made subsequently to the fire is admissible in order to show the way in which the building was set fire to Not only may pre-existing objects be inspected but the Court may order scientific experiments to be performed (*Bigby v Dickinson* 4 Ch D 24) artistic tests undertaken (*Bell v Laves* Times 1882) or specimens of hand writing executed (s 73) in its presence, Phipson Ev 3rd Ed 4 345 *ib*, 5th Ed. 4 369

(4) *Steuenson v Rizer Tyne Com missioner* 71 W R. (Eng), 390

(5) Field Ev 6th Ed 198 where it is said The evidence would doubtless be admissible under s 8 or under s 11

ante See Phipson Ev 3rd Ed. 94, *ib* 5th Ed 101

(6) Norton Ev 775 illust (b) is the case of *Folkes v Chadd*, 3 Dougl. 157 illust (a) is precisely like it in principle *ib* s 46 is analogous to s 11

(7) See Taylor Ev § 337 Field Ev 347 Steph Dig Art 50 See s 51 *post* see also ss 156, 157

(8) S 159 *post*

(9) *Ib*

(10) *Roghun Singh v R* 9 C. 455 (1882)

(11) Ss 146—152 *post*

(12) S 153 *post*

(13) S 155 *post* Taylor Ev § 1445

(14) S 60 *post* as to the inadmissibility of mere medical certificates see *R v Ran Rutton* 9 W R. Cr 21 (1865) as to the necessity of direct evidence *v post*

of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed, that it was or was not written or signed by that person, is a relevant fact.

Explanation—A person is said to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when, in the ordinary course of business, documents purporting to be written by that person, have been habitually submitted to him.

Illustration

The question is, whether a given letter is in the handwriting of A, a merchant in London. B is a merchant in Calcutta who has written letters addressed to A and received letters purporting to be written by him. C is B's clerk, whose duty it was to examine and file B's correspondence. D is B's broker, to whom B habitually submitted the letters purporting to be written by A for the purpose of advising with him thereon.

The opinions of B, C and D on the question whether the letter is in the handwriting of A are relevant though neither B, C, nor D ever saw A write.

Principle—The opinion or the belief of a witness is here admissible because all proof of handwriting, except when the witness either wrote the document himself, or saw it written, is in its nature comparison.—It being the belief which a witness entertains, upon comparing the writing in question with an exemplar formed in his mind from some previous knowledge.⁽¹⁾

§ 45 *Illust (c) (Opinion of experts as to identity of writing)*

§ 3 *(That a man holds a certain opinion is a fact)*

§ 51 *(Grounds of opinion)*

§ 3 *(“Court”)*

§ 73 *(Comparison of handwriting)*

§ 3 *(“Document”)*

§ 67 *(Proof of signature and handwriting)*

§ 3 *(“Relevant”)*

§ 3 *(“Fact”)*

Taylor, Ev. §§ 1862—1868, Lawson's Expert and Opinion Evidence, 277, Best, Ev., §§ 232—238, Rogers on Expert Testimony, 285, Steph Dig., Art 50, Phipson, Ev., 5th Ed., 376, Powell, Ev., 9th Ed., 54, Harris Law of Identification, 231

COMMENTARY

As to the general characteristics of handwriting, see commentary to section 45, *ante*. The word “handwriting” in the sentence “any person acquainted with the handwriting, etc,” presumably includes both handwriting in general and signature. One person's knowledge of the handwriting of another may be confined to his general style and may not extend to his signature. A signature may and very often does possess a great peculiarity. Although, therefore, a person can recognise another's general style, it may not follow that he can recognise his style of signature, thus he may have never seen. On the other hand, a person may be competent to recognise another's style of signature, although quite unable to recognise his general style of writing, for of his style beyond his signature he may be quite ignorant and the one may be very different from the other. Where the signature is in the ordinary style of writing, one not acquainted with that style except in the signature cannot recognise his style in any other writing unless he assumes

Proof of handwriting and signature.

(1) Taylor, Ev., § 1869, *Doe v Suckermore*, 5 A. & E., 731, and see *Fryer v*

Gathercole, 13 Jur., 542, *ante*, *Introd.* to ss 45—51, Powell, Ev., 9th Ed., 54

or it be conceded that the style in his signature is the style of his usual writing and supposing that assumption or concession to be made, it is obvious that one or even a hundred signatures may lead to mistake, the number of small and capital letters in the signature being few, and many letters which occur in the general handwriting not occurring in the signature. On the contrary if one is acquainted with the style of another's writing except his signature, if that style be in the signature he can as well recognise it in the signature as he can in any other words composed of the same letters (1)

In India a great number of persons are marksmen. In England a witness has been allowed to express his opinion that a mark on the document is the mark of a particular person (2). Handwriting ordinarily means whatever the party has written (i.e., formed into letters) with his hand (3), though Parke, B., in the case undermentioned (4), said "I think you may prove the identity of the party by showing that this mark was made in the book and that mark is in his handwriting," thereby including the affixing of a mark in the term 'handwriting'. It may, however, reasonably be doubted whether the term should be so extended, and though the words 'signed' and 'signature' have been defined for the purposes of other Acts as including marks (5) there is no such definition in this. Therefore, though proof of a mark may be given by calling the person who made it or a person who saw it affixed, opinion evidence would not appear to be admissible under this section, either with regard to mark or a seal which may similarly be proved by calling the person who affixed it or who saw the seal affixed (6) or by comparison with a seal already admitted

who knows the seal of another has been permitted to say that a seal appearing on a document submitted to him is the seal of that other, even though he was not present and saw the seal affixed. Such evidence is relevant to prove identity of the thing viz., the seal in question (8). In every question of identification, whether of a person's handwriting or other thing, the evidence of a witness is opinion evidence founded on a mental comparison of the person or thing which the witness has seen with the person or thing he sees at the trial (9). The Act has in the present section made special provision with respect to the subject of handwriting one of common occurrence requiring in many cases on the questions of difficulty, whether upon the identity or not strictly opinion

(1) *Ram on Facts* 72-73. That one is not acquainted with another's general writing does not disqualify him from proving his signature. *Lawson op cit* 298 and a witness may be acquainted with the signature of a firm without being able to identify the handwriting of either or any partner id and cases there cited.

(2) *A M* is sued on a bill of exchange which she had endorsed with her mark the writing "*A M* her mark" being in the plaintiff's handwriting. *W* testifies that he has frequently seen *A M* make her mark points out some peculiarity in it and expresses the opinion that the mark on the bill is hers. His opinion is admissible. *George v Surrey M & M* 516. See *Lawson op cit* 206 297. *Pearce v Decker*, 13 Jur 997. *S* to prove an obligation which is signed by *E B* in her handwriting and by *I B* her husband by his making a mark in the shape of a cross calls their son

who testifies to the handwriting of his mother that he knows the mark of his father and that the mark attached to the foot of the instrument he believes to be his father's mark. This was held sufficient. *Strong v Brecker*, 17 Ala. 710 (Amer). See Best Ev § 34.

(3) *Com v Webster* 5 Cush 301 (Amer).

(4) *Sayer v Glossop* 12 Jur 463.

(5) e.g., Civil Pro Code § 2. Registration Act (XVI of 1908) § 3. On the other hand the Succession Act (X of 1865) draws a distinction between a mark and a signature (s 30).

(6) *Moses v Thornton* 8 T R 307.

(7) *S* 73 post.

(8) See § 9 ante and § 3 definition of 'fact'.

(9) *v ante* Intro to ss 45-51.

(10) *v ante*, ib.

in the sense in which that term is used in the Act. Similar observations are applicable in the case of marks, the only difference between the two cases being that there is nearly always a distinguishing feature in a seal while the usual mark (a cross) is not generally distinguishable from a cross made by another, though a mark may and sometimes does contain a peculiar and distinctive feature (1). If there is something peculiar to identify the mark as being that of a particular person, it is impossible to distinguish the case from any other form of proof *ex visu scriptoris* (2) and as already stated such evidence has been admitted both in England and America (3). If there is nothing to identify the mark the evidence will be either inadmissible (4) or if admissible of no value whatever.

Section 67 enacts that if a document is alleged to be signed or to have been written wholly or in part by any person the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting. Handwriting may be proved or disproved in the following ways—(a) by calling the writer, or (b) any person *e.g.*, an attesting witness, who actually saw him write the document (5), or (c) by the evidence of the opinion of experts under the provisions of section 45, *ante*, which differs from the present in this that under its provisions the witness is required to be *skilled in the art of distinguishing writings* while under the present section he must be *acquainted with the handwriting of the person alleged to have written the document*, or (d) by the opinion evidence of non-experts namely, under the present section by the evidence of a person who has acquired a knowledge of the character of the handwriting in one of the ways specified in this section. A witness who has such knowledge may testify to his belief that a writing shown to him is in the hand of another person though he cannot swear positively thereto. Such knowledge may be acquired (a) *by living at any time seen the party write* (6). The frequency and recentness of the occasions and the attention paid to the matter by the witness will affect the value and not the admissibility of the evidence. Thus, in England, such evidence has been admitted though the witness had not seen the party write for twenty years and in another case had seen him write but once and then only his surname (7). The witness's knowledge must not however (it has been said) have been acquired for the express purpose of qualifying him to testify at the trial, because the party might through design write differently from his common mode of writing his name (8), and if it should appear that the belief rests on the probabilities of the case or on the character or conduct of the

(1) Thus in *Yashudabai v Ram chandra* 18 B at p 73 (1893) the mark was that of a plough.

(2) Best Ev, § 234

(3) *v. ante* p 438. However in *Currier v Hampton* 11 Fed 311 (Amer) Ruffin C J thought that it was only in some very extraordinary instances that the mark of an illiterate person may become so well known as to be susceptible of proof like hand writing and it has been held in two cases in *Pennsylvania* that a mark to a will cannot be proved by one who did not witness it but who testifies that he is acquainted with the mark on account of certain peculiarities. *Lawson op cit* 297. The correct view however is that stated in Best Ev § 234 and other cases above cited. As to wills in this country the attesting witnesses must affix their signature and not a mark. See notes to ss

68—72 *post*. In *Yeshudabai v Ram chandra* 18 B 73 (1893) a witness in cross-examination stated that his father could not write or sign his name but used to make a mark (the mark of a plough) and that the paper then shown to him was not his mark.

(4) Best Ev § 234

(5) Taylor Ev § 1862. For a case in which the writer was called and while denying the execution of the document admitted that the writing was exactly like his own see *Grish Chunder v Bhugwan Chunder* 13 W R 191 193 (1870).

(6) Taylor Ev § 1863. Best Ev § 233.

(7) *Ib* Field Ev 6th Ed 194

(8) *Ib* *Stranger v Seart* 1 Esp 15. Best Ev § 236. *R v Crouch* 4 Cox, 163 for exceptions see *Lawson op cit*, 307.

supposed writer, and not on the actual knowledge of the handwriting the testimony will be rejected (1) (b) *By the receipt of documents* purporting to be written by the party, in answer to documents written by the witness or under his authority and addressed to that party. This evidence will be strengthened by acquiescence by the parties in the matters, or some of them, to which these documents relate (2) (c) *By having observed in the ordinary course of business documents* purporting to be written by the person in question. Thus the clerk who has constantly read the letters, or the broker who has been consulted upon them, is as competent as the merchant to whom they were addressed, to judge whether another signature is that of the writer of the letters, and a servant who has habitually carried his master's letters to the post, has thereby had an opportunity of obtaining a knowledge of his writing, though he never saw him write or received a letter from him (3). In whichever of these two latter ways the witness has acquired his knowledge, proof must be given of the identity of the person whose writing is in dispute with the person whose hand is known to the witness (4). It has been held by the Bombay High Court, following the English rule, that a witness need not state in the first instance how he knows the handwriting, since it is the duty of the opposite party to explore in cross examination the sources of his knowledge, if he be dissatisfied with the testimony as it stands. It is, however, permissible and may often be expedient

For such a statement may be perfectly true, and yet within the knowledge of the witness, the paper may have been written by an utter stranger (6). The evidence, being primary and not secondary in its nature, will not become inadmissible because the writer himself or some one who saw the document written might have been called (7). And evidence is admissible though the disputed document cannot be produced, as where it is lost or incapable of removal (8). (d) Lastly, handwriting may be proved by comparison of two or more writings, as to which see section 73, *post* and as to comparison by experts, see section 45, *ante*, and *Illustration (c)* thereto.

Opinion as to existence of right or custom, when relevant

48 When the Court has to form an opinion as to the existence of any general custom or right (9), the opinions, as to the existence of such custom or right, of persons who would be likely to know (10) of its existence if it existed, are relevant

(1) *R v Murphy* 8 C & P 306
307, *DaCosta v Pym* Pea Add Cas, 144 Taylor Ev § 1863

(2) Taylor Ev §§ 1864—1866, see the *Illustration* to the section

(3) Taylor Ev § 1864 *Lawson op cit*, 288 *Smith v Sansbury* 5 C & P, 196 see the *Illustration* to the section and *Lalit Mohan v R*, 22 C. 322 323 (1874) see observations on evidence of handwriting by Sir Lawrence Peel, C J, in *R v Hedger*, *supra* at pp 133 134

(4) Taylor Ev § 1867, *Wills Ev*, 2nd Ed. 369 370

(5) *Shankar Rao v Ramjee* 28 B 53 (1903)

(6) Taylor Ev § 1868

(7) Taylor Ev § 1862 *Best Ev* § 232

(8) *Sayer v Glossop* 2 Ex 409 see *Lucas v Williams* 2 Q B (1892) 113 116 117

(9) As to the meaning of the term 'right' see *Gujju Lall v Fateh Lall* 6 C. 186 187, 180 (1880)

(10) See *Jugmohan Das v Sir Mangal das* 10 B, 542 543 (1886)

Explanation.—The expression 'general custom or right' includes customs or rights common to any considerable class of persons.

Illustration

The right of the villagers of a particular village to use the water of a particular well is a general right within the meaning of this section

Principle—Upon such questions the opinions of persons who would be likely to know of the existence of the custom or right are the best evidence. Such persons are, so to speak, the depositaries of customary law, just as the text books are the depositaries of the general law (1)

s. 3 (That a man holds a certain opinion is a fact)

ss. 60 (Evidence of opinion must be direct)

s. 3 ("Court")

s. 3 ("Relevant")

s. 13 (Facts relevant where right or custom is in question)

s. 51 (Grounds of opinion)

s. 33 Cl (4) (Opinion of witness as to public right or custom or matter of general interest)

s. 42 (Judgments relating to matters of a public nature)

s. 32 Cl (7) (Statements contained in certain documents)

Norton, Ev, 227 Field, 1 v 6th Ed, 195 196 Cunningham Ev 193 194

COMMENTARY

The thirteenth section applies to all rights and customs, public, general, and private, and refers to specific facts which may be given in evidence. Fourth clause of s. 32 refers to the reception of second hand opinion evidence in cases in which the declarant cannot be brought before the Court, whether in consequence of death or from some other cause upon the question of the existence of any public right or custom or matter of public or general interest made *ante litem motam* and the seventh clause to statements contained in certain documents. The present section also deals with opinion evidence, but refers to the evidence of a living witness produced before the Court, sworn and subject to cross-examination. For this section when read with section 60 *post*, requires that the person who holds the opinion should be called as a witness, the *Proviso* to the latter section applying only in the case of experts. It refers only to general rights and customs not public, the *Explanation* to the section is used by English text writers (2)

not provide for the admission of oral evidence of a public custom or right

It may perhaps be said that every public custom or right is a general custom or right, though the converse of this proposition would not hold good (3) or that having regard to the reasons for which these terms are used by English writers the distinction between them is not of importance in this country (4). The present section further differs from the fourth clause of section 32 inasmuch as it is not governed by the limitation *ante litem motam*.

Evidence as to usage will also be admissible under this section which is not limited to ancient custom (5). The word 'usage' would include what the

(1) v. ib. observations on Opinion Evidence and see *Luchian Rai v Akbar Khan* 1 A 441 (1887) *Bai Baiji v Bai Santok* 20 B 59 (1894). As to this and the next section and English law see *Thakur Garuradhuja v Kunwar Shapuradhuja* 4 C W N xxxvii (1900).

(2) See pp 167—170 *ante*.

(3) Field Ev 6th Ed 195 196,

Cunningham Ev 194

(4) See pp 169—170 *ante*.

(5) *Sariatullah Sarkar v Pran Nath* 26 C 184 187 (1898) following *Dalghush v Gurnuff Hassan* 23 C 427 (1896) *Fitzhardinge v Purcell* (1908) 2 Ch. 139, *Bayrang Singh v Manikarnika Baksh Singh* (1908) L. R. I A, 35

people are now or recently were in the habit of doing a particular thing. It may be that this particular habit is only one which has existed for a long time. If it is proved by the inhabitants of the place where it is used that it is a 'usage' within the meaning of the section (1)

Ordinarily speaking a witness must, in his examination in chief, speak to facts only, "but under this section he will be allowed to give his opinion as to the existence of the general right or custom. He will not be confined to instances in which he has personally known the right or custom exercised as a matter of fact. Custom is not a matter to be submitted to the senses. It is made up of an aggregated repetition of the same fact, whenever similar conditions arise, and though a bare opinion is worth nothing without we can ascertain the data on which it is founded, yet it is always to be remembered that section 51 is to be read with this section, and that the grounds for the witness's opinions are sure to be elicited in cross-examination even if they should not be elicited in the examination in chief, or demanded by the Judge. A boundary between villages, the limits of a village or town, a right to collect tolls, a right to trade to the exclusion of others, a right to pasturage of waste lands, liability to repair roads or plant trees, rights to water courses, tanks, ghauts for washing, rights of commons and the like, will be found the most ordinary in Mofussil practice. The *Explanation* excludes private rights from the operation of this section. Opinion or reputation evidence is not receivable to prove such rights. They must be proved by facts, such as acts of ownership. This kind of evidence is admissible to disprove as well as to prove a general right or custom" (2). *Hajib ul arz* or village papers made in pursuance of Regulation VII of 1822 regularly entered and kept in the office of the Collector and authenticated by the signatures of the officers who made them were held to be admissible, under section 35, in order to prove a custom. The Privy Council further put it as a query, whether they were not also admissible under the present section as the record of opinion as to the existence of such custom by the Privy Council mentioned.

pancy holding in their *mauza*, and eject the purchaser thereof, one of the questions was as to the existence of a custom or usage under which the riyat was

sought to obtain *and* possession of certain *jote* lands which had been conveyed by the *jotedars*, the first set of defendants, to the second set of defendants, although there was no custom or usage in the village recognizing the transferability of occupancy rights. Held that in order to establish usage under ss 178, 183, of the Bengal Tenancy Act, it was not necessary to require proof of its existence for any length of time. Held also that the statements

(1) *Id*. The distinction between custom and usage has been said to be that 'usage' is a fact and custom is a law. There can be usage without custom but not custom without usage. Usage is inductive based on consent of persons in a locality. Custom is deductive making established local usage a law. Wharton § 965. See notes to s 13 ante.

(2) Norton Ev 227. 'The opinions of persons likely to know about village rights to pasturage to use of paths water courses or ferries to collect fuel to use

tanks and bathing ghats mercantile usage and local customs would be relevant under this section. Cunningham Ev 193.

(3) *Lekraj Kuar v Bahadur Singh* 7 I A 63 71 (1879), 5 C 744.

(4) *Musammat Lall v Murlu Dhar*, 10 C. W. N 730.

(5) *Dalglisch v Guesser Hassan* 23 C 247 (1896) followed in *Sariatullah Sarkar v Pran Nath* 26 C. 184 (1898).

(6) *Sariatullah Sarkar v Pran Nath* 26 C 184 (1898).

made by the persons who were in a position to know the existence of a custom or usage in their locality were admissible under this section (1)

49. When the Court has to form an opinion as to—
- the usages and tenets of any body of men or family (2),
 - the constitution and government of any religious or charitable foundation, or
 - the meaning of words or terms used in particular districts or by particular classes of people,
 - the opinions of persons having special means of knowledge thereon, are relevant facts (3)

Opinion as to usages, tenets, etc., when relevant

Principle—On such questions the opinions of persons having special means of knowledge are the best evidence

- | | |
|--|---|
| s. 3 ('Court') | s. 91 Prov (5) (<i>Usage and custom in contracts</i>) |
| s. 3 ('Relevant') | s. 98 (<i>Evidence as to technical expressions, &c</i>) |
| s. 3 ('Fact') | s. 51 (<i>Grounds of opinion</i>) |
| s. 3 (<i>That a man holds a certain opinion is a "fact"</i>) | s. 60 (<i>Evidence of opinion must be direct</i>) |

Rogers' Expert Testimony, §§ 117, 118 Norton Ev., 228 Field Ev. 6th Ed., 196, Cunningham, Ev., 194

COMMENTARY.

Under this section a witness may give his 'opinion' upon—(a) *The usages of any body of men* This will include usages of trade and agriculture, mercantile usage, and any other usage common to a body of men, and the opinions of persons experienced therein will be received in evidence. "Usage is proved by witnesses testifying of its existence and uniformity from their knowledge obtained by observation of what is practised by themselves and others in the trade to which it relates. But their conclusion or inference as to its effect, either upon the contract or its legal title or rights of parties is, not competent to show the character or force of the usage."⁽¹⁾ The section only requires that the persons testifying should have "special means of knowledge." It does not in any way require that the witness should be a person who has been connected with such business (6). So it has been held that a London stockbroker is a competent witness as to the course of business of London Bankers (7). A person

Opinion as to usages, tenets, etc.

(1) For example a person who had been in the habit of writing out deeds of sale or one who had been seeing transfers frequently made would certainly be in a position to give his opinion whether there was a custom or usage in that particular locality and we think that the opinion of such persons would be admissible [under this section] 'ib., 187, 188

(2) See *Lekraj Kuar v Mahpal Singh* 7 I A 63 71 (1879) 5 C, 744, *Garura dhuaja Prasad v Suparundhuaja Prasad*

23 A 37 51 (1900) *Sarabjit Partab v Indarjit Partab*, 2 All L J, 720, 732 (1904)

(3) See also generally as to this section the *Notes* to s. 13, and Chapter VI, *post*

(4) *Haskins v Warren* 115 Mass 514 535 (Ames) cited in Rogers' Expert Testimony § 117

(5) *Rogers, op cit*

(6) *Ib*

(7) *Adams v Peters*, 2 C & K, 722

may be competent to testify as to the usage which prevails in a certain business, without himself being engaged in that business. So that when the question was as to the custom of the New York Banks in paying the cheques of dealers, it was held proper to call as witnesses persons who were not employed in Banks (1). On the issue whether an alleged commercial usage exists, a witness may be asked to describe how, under the usages in force, a transaction like the one in question would be conducted by all the parties thereto from its inception to its conclusion (2). Usage may annex incidents to a contract which are not repugnant to or inconsistent with its express terms (3). The testimony of those engaged in a particular business that they never heard of an usage is admissible (4). This section deals with 'opinion' specific facts as to usages are provable under the 13th section *ante*. (b) *Tenets of any body of men*. This will include any opinion, principle, dogma, or doctrine which is held or maintained as truth. It will apply to religion, politics, etc. (c) *Usages of a family*. Such for instance, as the custom of primogeniture in the families of ancient zemindars, any peculiar course of descent, the usages of native convert families and the like (5). Custom is of two kinds—*kulachar*, or family custom, and *desachar*, or local custom (6). (d) *Tenets of a family*. (e) *The noble foundation*. As to the note (7). (f) *The meaning particular classes of people*.

Under section 98, *post*, evidence may be given with reference to a document to show the meaning of 'technical, local, and provincial expressions, abbreviations and of words used in a peculiar sense'. For this purpose, as for others, the opinions of persons having special means of knowledge on the subject would be the best evidence (8). This portion of the section is particularly valuable in a country like India, in which there are so many different languages and in which justice is largely administered by Englishmen in languages other than English (9). A Judge may also consult a dictionary as to the meaning of a word as to which see the penultimate paragraph of section 57, *post*. This section like the others, must be read with section 51, *post*, for the opinion, with comparatively little value (10) the grounds on which that man who holds that opinion a living witness to state

his opinion on the existence of a family custom and to state as the grounds of that opinion information derived from deceased persons, and the weight of the evidence would depend on the position and character of the witness and of the persons on whose statements he has formed his opinion. But it must be the expression of the independent opinion based on hearsay and not mere repetition of hearsay (11).

(1) *Crippin v Rice* 1 Hilton 1 N. Y. 184 (Amer.) in which it was said—'Although not employed in banking business the witnesses were dealers with the banks and had knowledge of the ordinary course of dealing with them. There is no necessity for showing a man to be an expert in banking in order to prove a usage. He should know what the usage is and then he is competent to testify whether he be a banker or employed in a bank or a dealer with banks. There is no reason why a dealer should not have as much knowledge in such a subject as a person employed in a bank. Rogers *op cit* (Amer.)'
(2) *Kirshner v Wright*, 115 Mass. 361 (Amer.)

(3) S. 92 Proviso (5) *post*

(4) *Evansville etc. R. R. Co v Jones* 28 Ind. 516 (Amer.)

(5) See *Gururadhujaya Prasad v Super undhujaya Prasad* 23 A. 37 (1900), *v post*

(6) See Notes to s. 13 *ante*, Field Ev. 112-114 *ib id* 6th Ed. 503-505

(7) Beng. Reg. XX of 1810, Mad. Reg. VII of 1817, Act VII (Pom.) of 1865, Act XX of 1863

(8) *Cunningham v Norton Ex.* 228 See notes to s. 98 *post*

(9) Field Ev. 6th Ed. 186

(10) *Norton v Norton* 228

(11) *Gururadhujaya Prasad v Super undhujaya Prasad* 23 A. 37, 51-52 (1900) s. c. 5 C. W. N. 33

50. When the Court has to form an opinion as to the relationship(1) of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact :

Opinion on relationship when relevant

Provided that such opinion shall not be sufficient to prove a marriage in proceedings under the Indian Divorce Act(2) or in prosecutions under section 494, 495, 497, or 498 of the Indian Penal Code.(3)

Illustrations

(a) The question is whether A and B were married.

The fact that they were usually received and treated by their friends as husband and wife is relevant.

(b) The question is whether A was the legitimate son of B

The fact that A was always treated as such by members of the family is relevant

Principle—As the opinion in this case is to be evidence by the conduct of the witness, there is an additional guarantee for its trustworthiness, besides that of a special knowledge of the subject (4). The provision is enacted because strict proof is required in all criminal cases(5) as also in proceedings under the Divorce Act, in which marriage is the main act to be proved before jurisdiction can be shown or relief granted (6)

s. 3 ("Court")

s. 3 (That a man holds a certain opinion is a 'fact')

s. 3 ("Relevant")

s. 32 Cl (3) (Statement on relationship by non witness)

s. 32 Cl (6) (Statement relating to relationship in family document, etc.)

s. 51 (Grounds of opinion)

Taylor, Ev §§ 649, 578, Norton, Ev, 229, 230, Field, Ev, 6th Ed, 197, 140—143, Phipson, Ev, 5th Ed, 101, 362, Steph. Dig, Art 53, Act IV of 1869 (Indian Divorce), Penal Code, ss 494, 495, 497, 498

COMMENTARY.

specific Opinion on record-relationship duct," deo pinion ' same

(1) It will be noted that the words "by blood, marriage or adoption" have not been inserted after the word "relationship" by Act XVIII of 1872, as in the case of s 32, Cls (5) and (6). *Illustration* (a) refers to the case of marriage and *illustration* (b) to relationship by blood. Relationship by adoption is not expressly mentioned but is no doubt included within this section. See *Notes* to s 114, with reference to Hindu and Mahomedan Law

(2) Act IV of 1869

(3) Act XLV of 1860, *vide post*

(4) Norton, Ev, 229, and see Taylor,

Ev § 578 649 and notes *post*

(5) *R v Kallu* 5 A 233 (1882)

(6) See *R v Pitambur Singh*, 5 C. 566 (1897) Norton Ev 233. The proviso is inserted because in divorce and bigamy cases the marriage must be strictly proved that is by the evidence of a witness who was present at the marriage or by the production of the register or examined copy of the register or of such other record as the law of a country or custom of a class may provide —/b

basis as evidence of family tradition. For since the principal question in pedigree cases turns on the parentage or descent of an individual, it is obviously material in order to resolve this question to ascertain how he was treated and acknowledged by those who sustained towards him any relations of blood or of affinity. Thus in the *Berkeley Peerage Case* Sir James Mansfield remarked that if the father is proved to have brought up the party as his legitimate son this amounts to a daily assertion that the son is legitimate (1). So the concealment of the birth of a child from the husband (2), the subsequent treatment of such child by the person who, at the time of its conception was living in a state of adultery with the mother—and the fact that the child and its descendants assumed the name of the adulterer and had never been recognised in the family as the legitimate offspring of the husband—are circumstances that will go far to rebut the presumption of legitimacy, which the law raised in favour of the issue of a married woman (3). Again if the question be whether a person from whom the claimant traces his descent, was the son of a particular testator the fact that all the members of the family appear to have been mentioned in the will but that no notice is taken of such person is strong evidence to show either that he was not the son or at least that he had died without issue before the date of the will (4) and if the object be to prove that a man left no children the production of his will in which no notice is taken of his family and by which his property is bequeathed to strangers or collateral relations is cogent evidence of his having died childless (5). A person claiming as an illegitimate son must establish his alleged paternity like any other disputed question of relationship and can of course rely upon statements of deceased persons under the fifth clause of s. 32 upon opinion expressed by conduct under this section and also upon such presumptions of fact as may be warranted by the evidence (6). The section is not limited to the opinion of members of the family. The opinion may be of any person who as such member or otherwise has special means of knowledge on the subject. When the legitimacy of a person in possession has been acquiesced in for a considerable time and is afterwards impeached by a party who has a right to question the legitimacy the defendant in order to defend his status is allowed to invoke against the claimant every presumption which arises from long recognition of his legitimacy by members of his family (7). That portion of section 60 which provides that the person who holds an opinion must be called does not apply to the evidence dealt with by this section namely opinion expressed

(1) 4 Camp 416 *Wharton Ev* § 211. As to treatment and acknowledgment under Mahomedan Law see *Amcer Ali's Mahomedan Law* II 215 2nd Ed (1894). *Baileys Digest of Mahomedan Law* (18 5) Part I 406 Part II 289 *Field Ev* 351 and cases cited therein at pp 161 162 and *Abdul Ra'ak v Aga Malomed* 21 C 666 (1893) s c 21 I A 56 (Acknowledgment in the sense meant by that law is required viz of

01
(3) *Goodright v Saul* 4 T R 356 per *Ashhurst J Morris v Daines* 5 Cl & Fin 163 21 cl seq *Banbury Peerage App n e to Le Marchants Rep of Gardner Peerage* 389 432 433 1 Sim & St 153 s c *R v Mansfield* 1 Q B, 444 *Townshend Peerage* 10 Cl & Fin. 228 *Atchley v Spring* 33 L J, Ch 345

This evidence will be admissible in India under ss 8 9 or 11 ante and under s 50 post *Field Ev* 6th Ed 140 143

(4) *Tracy Peerage* 10 Cl & Fin., 100 per Lord Campbell *Robson v Att Genl* 498 500 per Lord Cottenham See *Taylor Ev* § 620 ad fin.

(5) *Taylor Ev* § 649 *Hungate v Gascoigne* 2 Phill 25 2 Coop 414 s c *De Ross Peerage* 2 Coop 540 and see as examples of this class of evidence *Bajal Bahadur v Bhupendar Bahadur* 17 A 456 462 (1895) *Mutusaemy Jagarera v Venkataswara Yetaya* 12 M I A 203 (1868) s c 11 W R. P C. 67 B L R P C 15 *Rajendra Nath v Jogendra Nath* 14 M I A (1871) 67 s c 15 W R P C 41 *Maharajah Perta v Maharanee Sahbhai* 3 C 626 (1877) s c 1 C L R 113 4 I A 228

(6) *Gopalasami Chetti v Aruna Chelam* 27 M 32 34 35 (1903)

(7) *Rajendra Nath v Jogendra Nath* 14 M I A., 67 (1871)

by conduct, which, as an external perceptible fact, may be proved either by the testimony of the person himself whose opinion is so evidenced, or by that of some other person acquainted with the facts which evidence such opinion. As the testimony in both cases relates to such external facts and is given by persons personally acquainted with them, the testimony is in each case direct within the meaning of the earlier portion of that section (1). According to English law *general reputation* (except in petitions for damages by reason of adultery and in indictments for bigamy where strict proof of marriage is required) is admissible to establish the fact of parties being married (2). *Reputation in the neighbourhood*, even when actually contradicted by evidence of a contrary in proof of marriage (2). The present section is limited to opinion as expressed by *conduct*, and there appears to be no other provision in the Act under which such evidence of general reputation would be receivable. But it has been held by the Privy Council that where there is no direct proof of consent to a marriage in Burmah it may be inferred from the conduct of the parties or established by general reputation (3).

The proviso to the section enacts that opinion expressed by conduct is not sufficient to prove a marriage in proceedings under the Divorce Act or in prosecutions for certain offences under the Penal Code. The framers of the Evidence Act were subject exactly to follow the subject exactly to follow the bigamy the first marriage, age, must be proved with the same strictness as any other material fact. In the case of offences relating to marriage, the marriage of the woman is as essential an element of the crime as the charge. The section shows that adultery and that the evidence must be strictly proved (4). And this is so not only having regard to the provisions of this section, but to the principle that strict proof should be required in all criminal cases (5). "In the English Courts a marriage is usually proved by the production of the parish or other register, or a certain certified extract therefrom, but

Divorce or Criminal Proceedings

(1) In *R v Subbarayan* 9 M 9 11 (1883), it seems to be suggested by Hutchins J that proof of the opinion by other than the person holding it can only be given when the latter is dead or cannot be called. But if this be so, it is submitted that such a limitation is incorrect for amongst others the reason given above.

(2) Taylor, Ev § 578. So the uncorroborated statement of a single witness who did not appear to be related to the parties or to live near them or to know them intimately but who asserted that he had heard they were married was held sufficient *prima facie* to warrant the jury in finding the marriage the adverse party not having cross examined the witness, nor controverted the fact by proof. *Evans v Morgan* 2 C & J, 453.

(3) *Ma Me v Ma Mohue Ma* 39 C, 392 and s c (1912) 39 I A, 57.

(4) *R v Pitambar Singh* 5 C, 566, F B (1879), 5 C L R 597 [this case must be taken to have overruled *R v Wasira* 8 B L R, App 63 (1872).] followed in *R v Arshed Ali*, 13 C. L.

R 125 (1883), *R v Kaliu* 5 A, 233 (1882), discussed in *R v Subbarayan*, 9 M 9 (1885) in which Hutchins J. said that if the learned Judges meant to decide in the preceding cases that a husband or wife is precluded from proving his or her marriage he expressed his dissent. It is submitted that the learned Judges did not so decide but that a vague assertion by either to the effect 'I am married' or the like is insufficient proof, in fact the statement assumes the very question to be proved. The existence of a valid marriage is a mixed question of law and fact. A witness therefore must speak to the facts which are said to constitute the marriage so that the Court may determine whether what the witness states to have taken place did take place in fact and if so whether it constituted a marriage in point of law. In this country there is no statutory marriage law for natives and the validity of any particular marriage depends chiefly on the usages of the caste to which the parties belong. *Id.*, at p 11.

(5) *R v Kaliu*, 5 A, 233 (1882).

basis as evidence of family tradition. For since the principal question in pedigree cases turns on the parentage or descent of an individual it is obviously material in order to resolve this question to ascertain how he was treated

concealment of the birth of a child ^{the son is illegitimate} (1) Do the
 ment of such child by the person ^{the son is illegitimate} (1) Do the
 in a state of adultery with the m ^{the son is illegitimate} (1) Do the
 descendants assumed the name of the adulterer and had never been recognised
 in the family as the legitimate offspring of the husband—are circumstances
 that will go far to rebut the presumption of legitimacy which the law raises
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 a person from whom the claimant traces his descent was the son of a parti-
 cular testator the fact that all the members of the family appear to have been
 mentioned in the will but that no notice is taken of such person is strong
 evidence to show either that he was not the son or at least that he had died
 without issue before the date of the will (4) and if the object be to prove that a
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 which provides that the person who holds an opinion must be called does not
 apply to the evidence dealt with by this section namely opinion expressed

(1) 4 Camp 416 Wharton Ev §
 211 As to treatment and acknowl-
 edgment under Mahomedan Law see Am-
 Al's Mahomedan Law II 215 2nd Ed
 (1894) Bales Digest of Mahomedan
 Law (1875) Part I 406 Part II 289
 Field E 351 and cases cited at
 pp 161 16 and *Abdul Razak v Aga*
Mahomed 21 C 666 (1893) s c 21 I
 A 56 (Acknowledgment in the sense
 meant by that law is required viz of
 antecedent right and not a mere recogni-
 tion of paternity) *Alssa Koon*
Kari oon nusa Klatoon 23 C 130 (1895)
 (2) *Hargrave* *Hargrave* 2 C & K r
 701

(3) *Goodright v Saul* 4 T R 356
 per Ashurst J *Morris v Daves* 5 Cl
 & F n 163 21 et seq *Banbury Peerage*
App n e to Le Marchants Rep of
Gardner Peerage 389 432 433 1 S m &
 St 153 s c R v *Mansfield* 1 Q B
 444 *Townsend Peerage* 10 Cl & Fin
 298 *Atchley v Sprng* 33 L J Ch 345

This evidence will be admissible in India
 under ss 8 9 or 11 ante and under s 50
 post Field Ev 6th Ed 140 143

(4) *Tracy Peerage* 10 Cl & F n 100
 per Lord Campbell *Robson v Att Genl*
 d 498 500 per Lord Cottenham. See
Taylor Ev § 620 ad fin

(5) *Taylor* Ev § 649 *Hungate v*
Gascoigne 2 Phill 25 2 Coop 414 s c
De Ross Peerage 2 Coop 540 and see as
 examples of this class of evidence *Bahadur*
Bahadur v Bahadur 17 A
 456 462 (1895) *Mutusaamy Jagarera v*
Venkataswara Yetaya 12 M I A 203
 (1868) s c 11 W R P C. 62 B L
 R P C 15 *Raendro Nath Jogendro*
Nath 14 M I A (1871) 67 s c 15 W
 R P C 41 *Malayah Perib v Maha-*
rane Sabhao 3 C 626 (1877) s c 1
 C L R 113 4 I A 228

(6) *Gopalasami Chetti v Aruna Chellam*
 27 M 32 34 35 (1903)
 (7) *Rajendro Nath v Jogendro Nath*
 14 M I A 67 (1871)

by conduct, which, as an external perceptible fact, may be proved either by the testimony of the person himself whose opinion is so evidenced, or by that of some other person acquainted with the facts which evidence such opinion. As the testimony in both cases relates to such external facts and is given by persons personally acquainted with them, the testimony is in each case direct within the meaning of the earlier portion of that section (1). According to English law *general reputation* (except in petitions for damages by reason of adultery and in indictments for bigamy where strict proof of marriage is required) is admissible to establish the fact of parties being married *of reputation in the neighbourhood, even when virtually contradicted by evidence of a contrary in proof of marriage* (2). The present section is limited to opinion is express provision in the Act under receivable. But it has been no direct proof of consent to a marriage in Burmah it may be inferred from the conduct of the parties or established by general reputation (3).

The proviso to the section enacts that opinion expressed by conduct is not sufficient to prove a marriage in proceedings under the Divorce Act or in prosecutions for certain offences under the Penal Code. The framers of the Bill follow the marriage, proved with the same strictness as any other material fact. In the case of offences relating to marriage, the marriage of the woman is as essential an element of the crime charged as the illicit intercourse. And the provisions of this section show that where marriage is an ingredient in an offence, as in bigamy, adultery and the enticing of married women the fact of the marriage must be strictly proved (4). And this is so not only having regard to the provisions of this section, but to the principle that strict proof should be required in all criminal cases (5). "In the English Courts a marriage is usually proved by the production of the parish or other register, or a certain certified extract therefrom, but

Divorce or Criminal Proceedings

(1) In *R v Subbarayan* 9 M 9 11 (1883) it seems to be suggested by Hutchins J, that proof of the opinion by other than the person holding it can only be given when the latter is dead or cannot be called. But if this be so it is submitted that such a limitation is incorrect for amongst others the reason given above.

(2) Taylor, Ev § 578. So the uncorroborated statement of a single witness who did not appear to be related to the parties or to live near them or to know them intimately but who asserted that he had heard they were married was held sufficient *prima facie* to warrant the jury in finding the marriage the adverse party not having cross examined the witness nor controverted the fact by proof. *Evans v Morgan* 2 C & J 453.

(3) *Me v Me v Mohue Ma* 39 C. 392 and s c (1912) 39 I A 57.

(4) *R v Pitambar Singh* 5 C 566, F B (1879) 5 C L R 597 [this case must be taken to have overruled *R v Wasira* 8 B L R App 63 (1872)] followed in *R v Arshed Ali* 13 C. L.

R 125 (1883) *R v Kallu* 5 A 233 (1882) discussed in *R v Subbarayan* 9 M 9 (1885) in which Hutchins J said that if the learned Judges meant to decide in the preceding cases that a husband or wife is precluded from proving his or her marriage he expressed his dissent. It is submitted that the learned Judges did not so decide but that a vague assertion by either to the effect I am married or the like is insufficient proof in fact the statement assumes the very question to be proved. The existence of a valid marriage is a mixed question of law and fact. A witness therefore must speak to the facts which are said to constitute the marriage so that the Court may determine whether what the witness states to have taken place did take place in fact and if so whether it constituted a marriage in point of law. In this country there is no statutory marriage law for natives and the validity of any particular marriage depends chiefly on the usages of the caste to which the parties belong v id at p 11.

(5) *R v Kallu*, 5 A. 233 (1882)

if celebrated abroad it may be proved by any person who was present at it though circumstances should also be proved from which the jury may presume that it was a valid marriage according to the law of the country in which it was celebrated. Proof that the ceremony was performed by a person appearing and officiating as a priest and that it was understood by the parties to be the

(Archbold p 925 Bigamy 1b 20th Ed (1918) pp 1254 1255) *And* a marriage in England may be proved by any person who was actually present and saw the ceremony performed. It is not necessary to prove its registration or the license or publication of banns [*Ibid* quoting *R v Allison* (2) *R v Manuaring* (3)] (4)

Grounds of
opinion
when relevant

51 Whenever the opinion of any living person is relevant the grounds on which such opinion is based are also relevant

Illustration

An expert may give an account of experiments(5) performed by him for the purpose of forming his opinion

Principle—A test of the value of such evidence is thus provided. The correctness of the opinion or otherwise can better be estimated in many instances when the grounds upon which it is based are known. The value of the opinion may be greatly increased or diminished by the reasons on which it is founded (6)

ss 45 47 50 (Opinions when relevant) s 3 (Relevant)

Lawson's Expert Ev 231 Field Ev 6th Ed 198 Cunningham Ev 196

COMMENTARY

Grounds of
opinion

The present section applies to the opinions of any living persons whether those opinions be the opinion of experts under ss 45 46 or of others under ss 47 48 49. *Quare*—whether the section is applicable to opinion expressed by conduct under s 50. The section to some extent repeats the principles involved in s 46. The present section however deals with the subjective grounds upon which the opinion is held which can only generally be proved by the testimony of the person whose opinion is offered whereas s 46 deals with objective external facts provable either by that person or others which support or rebut the opinion of an expert. With regard to the latter it has been said(7) that the consideration that the opinions may be given on the assumption of

jury. This inquiry is perhaps more frequently made. It is also competent evidence in chief (8). In the same way when in Reference

- (1) 10 East 282
- (2) R & R 109
- (3) Dears & B 132 s c 26 L J (M C) 10
- (4) R v Sblarayan 9 M 9 11 (1885)
- (5) *ante* p 436
- (6) Field Ev 6th Ed 198 Cunningham

- ham Ev 196 Lawson's Expert Ev 231
- (7) *Dickson v Inhabitants of Fitchburg* 13 Gray 555 (Amer) cited in Lawson Ev 232 233
 - (8) *Ib* see also *Pherson Ev* 5th Ed 370 371

the Court has to consider the opinions of a divided jury, it should also consider their reasons, and for this purpose a Judge should note such reasons after telling the jury of his intention to refer the case. But even if the Judge has omitted to note such reasons, this will not warrant the Court in declining to go into the evidence (1)

(1) *R v Annada Charan Thakur*, 36 629, *R v Chellan* (1905) 29 M 91

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52. In civil cases the fact that the character of any person concerned is such as to render probable or improbable any conduct imputed to him is irrelevant, except in so far as such character appears from facts otherwise relevant

In civil cases character to prove conduct imputed irrelevant

Principle.—Evidence of character is excluded in civil cases as being too remote, and at the best affording but slight assistance towards the determination of the issue (1) Such evidence is foreign to the point in issue and only calculated to create prejudice (2)

- s 55 (Meaning of term 'character')
- s 140 (Witnesses to character may be cross examined and re examined)
- s 3 ILLUSTR (e) ("Fact")
- s 55 (Character as affecting damages)

Steph Dig Art 50, Taylor Ev, §§ 374 355, Wharton, Ev, §§ 47-56, Roscoe N P Ev 87, Best on Ev § 206, et seq, Norton Ev, 230

COMMENTARY

The meaning of the term "character," as used in this and the following section, is defined in the *Explanation* to section 55, *post*, which must be read in conjunction with the present section (3) The term "persons concerned" is vague, but this section, it is presumed, refers to the character of parties to

Character in civil cases

and evidence introduced with the sole object of exposing the character of a party to the view of the Court is excluded (6)

But under this section, as under section 54, a distinction must be drawn between cases (a) where the character of a party is in issue, and (b), where it is not in issue, but is tendered in support of some other issue (6)

In case (a), the party's general character being itself in issue proof must necessarily be received of what the general character is or is not (7) This section only excludes evidence of character for the purpose of rendering probable or improbable any conduct imputed to him So where the question in a suit was whether a governess was "competent, lady like and good tempered" while in her employer's service, witnesses were allowed to assert or deny her general competency, good manners and temper (8) And in such cases it is not only competent to give general evidence of the character of the party with reference to the issue raised, but even to enquire into particular facts tending to establish it (9) These cases, however can scarcely be deemed an exception to the rule of exclusion, for it is clear that, as in cumulative offences, such as treason, or a conspiracy to carry on the business of common cheats, many acts are given in evidence because such crimes can be proved in no other way, so where general behaviour of a party is impeached, it is only by general evidence that the charge can be rebutted (10)

In case (b), where character is not in issue but is tendered in support of some other issue, it is excluded as irrelevant, except so far as it affects the

(1) Taylor Ev § 354 v note, *post*
(2) Roscoe N P Ev 87
(3) v Notes to s 55 *post*
(4) Norton Ev 332
(5) Best Ev § 263, see as to witnesses ss 145 146 153 *post*
(6) Norton Ev, 230
(7) Taylor, Ev, 355 Best Ev., 258, Roscoe N P Ev 87
(8) *Fountain v Boodle* 3 Q B 5
And see *Brine v Bazalgette* 3 Ex. R 692
R v Weering 5 Esp 41
(9) Best Ev § 208 Wharton Ev § 48
(10) Taylor Ev § 305 and see Best Ev § 258

amount of damages (1) As evidence of general character, can, at best, afford only glimmering light where the question is whether a party has done a certain act or not, its admission for such a purpose is exclusively confined to criminal proceedings (2) in which it was originally received *in favorem vitæ* (3) So in an action of ejectment brought by the heir at law against a devisee where the defendant was charged with having imposed a fictitious will on the testator *in extremis*, he was not permitted to call witnesses to prove his general good character, and a similar rule was laid down in an action for slander where the words charged the plaintiff with stealing money from the defendant, though the latter, by pleading truth as a justification had put the character of the former directly in jeopardy (4) So also in a divorce case, the husband cannot in disproof of a particular act of cruelty, tender evidence of his general character for humanity (5)

* Except in so far as such character appears from facts otherwise relevant

That is to say when facts relevant otherwise than for the purpose of showing character, are proved, and those facts, in addition to their primary inferences raise others concerning the character of the parties to the suit they become relevant not only for the purposes for which they were directly tendered but also for the purpose of showing the character of the parties concerned The Court may, of course form its own conclusion as to the character of the parties or witnesses from their conduct as exhibited by the relevant facts proved in the case, and it is perfectly legitimate for a Court to draw, from the opinion which it has so formed of the character of a party or witness, the inference that he might probably enough have been guilty of the conduct imputed to him or that he is not worthy of credit (6)

In criminal cases previous good character relevant

53 In criminal proceedings the fact that the person accused is of a good character is relevant

Previous bad character not relevant except in reply

54 In criminal proceedings the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant

Explanation 1—This section does not apply to cases in which the bad character of any person is itself a fact in issue

Explanation 2—A previous conviction is relevant as evidence of bad character (7)

Principle—Evidence of good character is allowed to be given on grounds of humanity for the purpose of raising a presumption of innocence, and as tending to explain conduct (8), but evidence of bad character is in general excluded as being too remote (9), and as tending to prejudice (10) the accused whose guilt must be established by proof of the facts with which he is charged and not by presumptions to be raised from the character which he bears (11)

(1) See s 55 post

(2) S 53 post

(3) Taylor Ev § 354

(4) *Ib* and cases there cited

(5) *Naracott v Naracott* 33 L J P & M 61 and see *Jones v Jacobs* 18 L T N S 243

(6) Norton Ev 230

(7) This section was substituted for the original s 54 by Act III of 1891 s 6

(8) Taylor Ev § 352 Stephens General View of the Criminal Law of England pp 311 312

(9) Stephens *op cit* 399 310

(10) *R v Byk nt Nath* 10 W R Cr 17 (1868) *R v Kartch Cluider* 14 C 721 (1887)

(11) *R v Tuberville* 10 Cox 1 *Anrita Lal Ha ra v Emperor* 42 C 957 (1915)

The exceptions are, *firstly*, where the character is itself a fact in issue, as distinguished from cases where evidence of character is tendered in support of some other issue. Being a fact in issue, it must necessarily be proved. *Secondly*, where the accused has by giving evidence of good character challenged enquiry it is as fair that such evidence, like any other, should be open to rebuttal, as it is unjust that he should have the advantage of a character which in point of fact is undeserved (1)

s 3 ILLUSTR (c) ('Fact')

s 3 ("Relevant")

s 55 EXPLANATION (Meaning of term 'character')

s 155 CL (4) (Character of prosecutrix)

s 14 EXPLANATION (2) ILLUSTR (b) Relevancy of previous conviction)

s 3 ("Evidence.")

s 3 ('Fact in issue')

s 140 (Witness to character may be cross examined and re examined)

Taylor, Ev. §§ 349—353, Wharton, Cr Ev, §§ 57, 84, Poscoe, Cr Ev, 13th Ed, 86, Phipson Ev, 5th Ed, 172, Steph. Dig. Art 56, Best, Ev § 256 *et seq*, Wills, Ev, 2nd Ed, 84, Norton Ev, 231—233, Stephen's General view of the Criminal Law of England, *loc cit*, Cr Pr Code, ss 310, 311, 221, 511, Penal Code, s 75, Act VI of 1864, ss 3, 4, Act V of 1869 Art 117

COMMENTARY.

Section 53 is in accordance with the English rule "Though general evidence of bad character is not admitted against the prisoner, general evidence of good character is always admitted in his favour" This would, no doubt be an inconsistency justifiable, or at least intelligible on the ground of the humanity of English law, if such evidence were not often of great importance as tending to *explain conduct*. *A* loses his watch, *B* is found in possession of it and very and if he calls many respectable people, who have known him from childhood and say he is a perfectly honest man, the story becomes highly probable. If the same thing happened to a thoroughly respectable, well established inhabitant of the town, say, for instance, to the Rector of the Parish being a man of first-rate character and large fortune, no one would think twice of it. These illustrations give the true theory of evidence of character. Judges frequently tell juries that evidence of character cannot be of use where the case is clearly

Previous good character.

character would thus be superfluous in every case "The true distinction is that evidence of character may explain conduct, but cannot alter facts"(3)

(1) *v* notes *post* Wills Ev 2nd Ed 84

(2) 'When the point at issue is whether the accused has committed a particular criminal act evidence of his general good character is obviously entitled to little weight unless some reasonable doubt exist as to his guilt, and therefore in this event alone will the jury be advised to act upon such evidence Taylor Ev § 351 See also Norton Ev 231 in which the case is given of an Irish Judge who summed up thus Gentlemen of the Jury there

stands a boy of most excellent character who has stolen six pairs of silk stockings and see Hyde C J observation to the jury in *R v Turner* 6 How St Tr 613 *R v Nur Mahomed* 8 B 223 at p 227 (1883) [no importance can be attached to evidence of this kind when the case against the accused is clear]

(3) Stephen's General View of the Criminal Law of England pp 311 312 and see Best Ev § 262 Taylor Ev 351, Wharton Cr Ev § 66

Where the act done is in itself indifferent, or, in other words, where the act amounts to an offence only by reason of being done with a vicious intention, evidence of character is valuable as to the probability or otherwise of the existence of such an intention. Where, on the other hand the intention is not of the essence of the act, such evidence may be of use, only if it be doubtful whether the prisoner was the person who committed the act (1). Evidence of the good character of the accused may be given either by cross-examining the witnesses for the prosecution, or by calling separate witnesses on behalf of the accused (2). This section must be read in conjunction with the *Explanation* to section 55, *post*. According to English and American law, the character proved must be of the specific kind impeached, as honesty where dishonesty is charged, good character in other respects being irrelevant (3), and must relate to a period proximate to the date of the charge (4).

Previous
bad
character

By the provisions of section 54, evidence of bad character, except in reply

by the accused, that he was addicted to the commission of similar offences, was rejected as irrelevant (6). This section is in accordance with English law (7) and its provisions were followed in India even before the enactment of this Act (8). "A man's general bad character is a weak reason for believing that he was concerned in any particular criminal transaction, for it is a circumstance common to him and hundreds and thousands of other people, whereas the opportunity of committing the crime and facts immediately connected with it are marks which belong to very few, perhaps only to one or two persons. If general bad character is too remote, *a fortiori*, the particular transactions, of which that general bad character is the effect, are still further removed from proof, accordingly it is an inflexible rule of English Criminal Law to exclude evidence of such transactions" (9). And when in England a person charged with an offence is called as a witness in his own defence in pursuance of the Criminal Evidence Act, 1898, he can only be cross examined as to character subject to the provisions set out in that Act. It is sufficiently clear from this section that in criminal proceedings the fact that the accused person has a bad character is not relevant for the purpose of raising a general inference from such bad character that the accused person is likely to have committed the crime charged (10).

(1) Field Ev, 6th Ed 200

(2) Cf s 140 *post*

(3) Taylor, Ev, § 551, Wharton Cr Ev, § 60

(4) R v Swendsen 14 How St Tr, 596 "A man is not born a knave, there must be time to make him so nor is he presently discovered after he becomes one" — *ib per* Lord Holt

(5) *Amrita Lal Hazra v Emperor*, 42 C, 957 (1915)

(6) S 54 R v Ram Saran, 8 A, 304, 314 (1886), Norton, Ev, 232, R v Tuberville, 10 Cox, 1, Best, Ev § 257, as to evidence in rebuttal *see* Taylor, Ev, § 352, Best Ev, § 261, 91, the subject is fully considered in R v Rolton, 34 L. J M C, 57

(7) *v post*, and *see* also Taylor, Ev, § 352, to this general rule the Statute 32 & 33 Vic, cap. 99, s 11, which allows evi-

dence of previous convictions to be given in order to prove guilty knowledge in cases of receiving stolen goods forms an exception, Taylor, Ev § 353 *see* R v Karlisch Chunder, 14 C, 721 (1887)

(8) R v Gopal Thakoor, 6 W R, Cr, 72 (1866), R v Behary Dosadh, 7 W R, Cr (1867) R v Phoolchand, 8 W R, Cr 11 (1867), R v Bykunt Nath Banerjee, 10 W R, Cr, 17 (1868) [Evidence of character and previous conduct of a prisoner, being matters of prejudice and not direct evidence of facts relevant to the charge against the prisoner ought not to be allowed to go to the jury] R v Kulsum Sheikh 10 W R, Cr, 39 (1868)

(9) Stephens's General View of the Criminal Law of England pp 309, 310

(10) R v Alloomiya, 5 Bom L R, 805, 819 (1903), s c, 28 B, 129 (1903)

This section, as originally framed(1), allowed a previous conviction to be in all cases admissible in evidence against an accused person for the purpose of prejudicing him, and in so doing deliberately departed from the rule of English law already mentioned (2) The framers of the Act gave as their reason for such departure that they were unable to see why a prisoner should not be prejudiced by such evidence if it was true (3) In consequence of the decision of the Full Bench in the case of *R v Kartick Chunder Das*(4), the present section was amended by Act III of 1891, so as to bring it into more general accordance with the English law on the same subject (5) And now a previous conviction is not admissible against an accused person under this section, except where evidence of bad character is relevant(6), i.e., (a) when charac
a pre
and (b)
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iviction

may be admissible otherwise than under this section Thus, firstly a previous conviction is admissible in evidence in cases in which the accused is liable to enhanced punishment on account of having been previously convicted (9) Secondly, where, upon the trial of a person accused of an offence, the previous commission by the accused of an offence is relevant within the meaning of section 14, ante, the previous conviction of such person is also a relevant fact So it has been held that having regard to the character of the offence under s 400 of the Penal Code (punishment for belonging to a gang of dacoits) previous commissions of dacoity are relevant under the fourteenth section and

(1) The original section ran as follows —

In criminal proceedings the fact that the accused person has been previously convicted of any offence is relevant but the fact that he has a bad character is irrelevant unless evidence has been given that he has a good character in which case it becomes relevant Explanation—This section does not apply to cases in which the bad character of any person is itself a fact in issue

(2) See *R v Kartick Chunder* 14 C 721 (1887) Notwithstanding the express provisions in the original section the Calcutta High Court in the earlier case of *Roshun Dosadh v R* 5 C 768 (1880) refused to allow a previous conviction to be given in evidence

(3) See *First Report of the Select Committee on the Evidence Bill* p 239 cited in *R v Kartick Chunder*, supra at p 729 It was apparently also considered that in such cases the matter had been reduced to legal certainty by the conviction, see *R v Parbhudas* 11 Bom H C R 90 (1874) *R v Ram Saran* 8 A 304 314 (1886) but as pointed out in Norton Ev 231 the language of the original section was so wide as to include acts not relevant in any real sense of the word at all For what bearing would a previous conviction for theft have on a question of guilt on a charge of rape? And see 1 Phill Ev, 606 10th Ed, Best Ev § 259

(4) 14 C., 721 (1887) See as to the

effect of this decision *R v Naba Kumar* 1 C W N 146 148 (1897)

(5) *Ib s 14 ante* Explanation (2) and Illust (b) must be considered in dealing with the effect of this amendment which while removing the latitude relating to the introduction of evidence of previous convictions which prevailed under this section as it originally stood has yet not made such previous convictions wholly inadmissible v post

(6) S 54 Explanation (2) cf the following earlier cases as to previous convictions *R v Thakoordas Chootur* 7 W R Cr 7 (1867) *R v Phoolchand* 8 W R Cr 11 (1867) *R v Shiboo Mundie* 3 W R Cr 38 (1865) *Roshun Dosadh v R* 5 C 768 (1880)

(7) S 54 Norton Ev 232 in England previous conviction is allowed to be given in reply in certain cases only Roscoe Cr Fv 13th Ed 86 Phipson Ev 5th Ed 172, Steph Dig Art 56

(8) S 54 Explanation (1) v post

(9) See Cr Pr Code s 310 [Notwithstanding anything in this section evidence of the previous conviction may be given at the trial for the subsequent offence if the fact of the previous conviction is relevant under the provisions of the Indian Evidence Act 1872 Act III of 1872 s 9], Cr Pr Code s 221, Penal Code s 75, Act VI of 1864 ss 3 4 (Act) Act V of 1869 Art 117 (Articles of War) Cr Pr Code, (mode of proving previous

convictions previous to the time specified in the charge or to the framing of the charge are relevant under the second explanation to that section *aliter* as to subsequent convictions (1) *Thirdly*, a previous conviction may be admissible as a fact in issue or relevant otherwise than under section 14 or 54, as for example, under the eighth section as showing motive (2) In a recent case in the Calcutta High Court it was said that proof of previous convictions must always be strict (3) And it was held that a register produced from the Central Bureau and purporting to contain prisoner's thumb impressions and descriptive rolls and list of previous convictions was insufficient in the absence of evidence to show how it was made and lodged in the Central Bureau

Where, with a view of raising a presumption of innocence, witnesses to good character are called by the defence, the prosecution may rebut this presumption as to these witnesses (4) as to particular facts or by calling separate witnesses to prove the such evidence is seldom resorted to in when a prisoner elects to give evidence Evidence Act, 1898 he may be cross examined as to character if he has been put forward as a man whose character is unblemished (6)

The present section must be read in conjunction with the *Explanation* to section 55, *post* The words "unless evidence has been given" are ambiguous. They may refer either to the evidence of witnesses called for the defence or to evidence elicited in cross examination from the witnesses for the prosecution (7)

explanations

The section does not apply to cases in which the bad character of any person is itself a fact in issue (8) The first *Explanation* aims at that class of cases in which the charge itself implies the bad character of the accused (9) Under the second *Explanation* a previous conviction is made relevant as evidence of bad character Therefore whenever evidence of bad character is admissible a previous conviction will be admissible, namely, to rebut evidence which has been given of good character and in cases under the preceding *Explanation* where the bad character is itself a fact in issue (10) It has been

(1) *R v Naba Kumar* 1 C W N 146 (1897) s 14 *Explanation* (2) and *Illustr* (b) [added by Act III of 1891 s 1] see p 192 *ante* and note (5) p 455 *supra* For recent case where previous conviction was taken into consideration in awarding punishment see *Emperor v Ismail Ali Bhai* 39 B 326 (1915)

(2) S 43 *ante* see *Illustrations* (e) and (f) it cannot be said that these two illustrations are exhaustive and that in no other cases except those mentioned can a previous conviction be relevant this is shown by *Explanation* (2) to s 14 *R v Naba Kumar* 1 C W N 146 149 (1897) (3) *Emperor v Sheikh Abdul* 43 C 1128 (1916)

(4) S 140 *post*, Taylor Ev § 352

(5) Taylor Ev § 352 though in Best Ev § 262 criticising this practice it is said that witnesses to the characters of parties are in general treated with great indulgence—perhaps too much

(6) *R v Hollamby* (1903) C C C v 149 p 168

(7) It was held upon the repealed Statute 14 and 15 Vic c 19 that if a prisoner's counsel elicited on cross

examination from the witnesses for the prosecution that the prisoner has borne a good character a previous conviction might be put in evidence against him in like manner as if witnesses to character had been called *R v Gadbury* 8 C & P 676 it was giving evidence within the meaning of that Act *R v Shrimpton* 2 Den C C R 319 Roscoe Cr Ev 12th Ed 89

(8) *Explanation* (1)

(9) Norton Ev 233 Field Ev 6th Ed 201 *cf* Cr Pr Code Ch VIII relating to the taking of security from persons of bad character under s 117 *ib* the fact that a person is a habitual offender may be proved by evidence of general repute *Ras Isri v R* 23 C 621 (1895) See as to Evidence of general repute *Rup Singh v R* 1 All L J 616 (1904) See also Best Ev § 258 and *cf* Act XXVII of 1871 (Criminal Tribes) *Alep Pramanick v R* (1906) 11 C W N 413 & *Chintaman Singh v R* (1907) 35 C 243

(10) *v ante* p 452 the amended section clears up an obscurity which existed in the old section see Norton Ev 232

held that the character of the accused not being a fact in issue in the offence of belonging to a gang of persons associated for the purpose of habitually committing theft punishable under section 401 of the Indian Penal Code evidence of bad character whether by proof of previous conviction or otherwise is inadmissible (1) But this decision has been questioned in a later case in which it was held that when in a case under section 401 of the Penal Code the other evidence sufficed to establish association for the purpose of habitually committing theft then under section 14 of this Act evidence of previous conviction or of bad livelihood was admissible to prove the habit of such offences (2) And evidence of commission of offences other than dacoities brought against persons accused of belonging to a gang of dacoits has been held to be evidence of bad character and as such excluded by this section (3) A

applied to the cases to which it is expressly confined (5) Where a person is called upon to furnish security to keep the peace evidence of general repute cannot be made use of to show that such person is likely to commit a breach of the peace or disturb the public tranquillity [or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity] (6) Upon the objection that the evidence given before a Magistrate was not that of general repute but of specific acts spoken to by witnesses from mere

Criminal Procedure Code When there is direct evidence of any offence committed by a person the action taken against him by way of prosecution is one of a punitive character but when the object of the Legislature is simply to provide preventive measures evidence of repute though hearsay is admissible (7) The second *Explanation* does not say that a previous conviction is never relevant unless evidence of bad character is relevant or is itself a fact in issue Evidence that the accused had been previously convicted of the same offence is admissible to show guilty knowledge or intention (8)

Character of party prosecuting—See *Notes* to section 155 clause 4 *post*

55 In civil cases the fact that the character of any person is such as to affect the amount of damages which he ought to receive is relevant

Character as affecting damages

Explanation —In sections 52 53 54 and 55 the word “character” includes both reputation and disposition, but

(1) *Mankura Pars v R* 27 C 139 (1899) s c 4 C W N 957 sub nom *Duarka Bana v R* In this case the previous convictions were rejected as evidence of bad character it does not appear to have been argued or considered whether such convictions were admissible under s 14 (as was held in *R v Naba Patna k* 1 C W N 146 (1897) which was a trial for the commission of a cognate offence under s 400 of the Penal Code) or under other sections of the Act *vide ante*
(2) *Bhona v R* (1911) 38 C 408 &

R Naba Patna k (1897) 1 C W N 146

(3) *The Public Prosecutor v Bon g r Pot gad* (1908) 32 Mad 19

(4) *Kala Haidar R* 9 C 79 (1901) *alter now*

(5) *Mithu Pilla R* (1910) 34 M 255

(6) *R B dhjapa v A* 23 (1903)

(7) *P Raoji F Ichand v Bom L R* 34 (1903)

(8) *R v Alloomja* 5 Bom L R 80 819 821 (1903) *see ss 14 15 ante*

[except as provided in section 54](1) evidence may be given only of general reputation and general disposition, and not of particular acts by which reputation or disposition were shown.

Principle.—In suits in which damages are claimed, the amount of the damages is a fact in issue (2) Therefore, if the character of the plaintiff is such as to affect the amount of damages which he ought to receive such character becomes relevant for the purpose of the determination of that fact in issue As to the reasons for the definition given of the term 'character,' see Notes post

s 3 (Relevant)

amount of damages)

s 12 (Facts tending to determine the

s 140 (Witnesses to character)

Steph, Dig, Art 57, Taylor Ev §§ 356—362 Mayne on Damages 8th Ed, 536, 572 579 582 586, Roscoe, N P Ev 87, Wharton, Ev, §§ 47—56, Wignmore, Ev, § 1608 et seq

COMMENTARY

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he previous general character of the wife or
admissible in a petition by the husband for
or in an action by the father for seduction
evidence of general bad character admissible

in mitigation of damages, but the defendant may even prove particular acts of immorality or indecorum (4) But in such a suit for damages for adultery or seduction, evidence of the character of the wife or daughter will not be admissible under the present, though perhaps it may be so under the twelfth section of this act, because in such cases the character is that of a third person and the person who is to receive the damages is not the person whose character would affect the amount of damages to be recovered (5) Character may be admissible in mitigation of damages, in the following, amongst other, cases (a) *Breach of promise of marriage* (6) Promises must be kept to persons of bad character as well as to those of good character But when a woman claims that her character has been damaged, and her feelings crushed by such breach of promise, then in mitigation of damages it may be shown that she had no character to be hurt by the breach and no feelings that would be particularly shocked (b) *Defamation* It has been much discussed, whether in an action for defamation, evidence impeaching the plaintiff's previous general character, and showing that at the time of the publication, he laboured under a general suspicion

(1) The words and figures in brackets in the explanation to this section were inserted by Act III of 1891, s 7

(2) v ante

(3) Norton Ev 233, Taylor Ev § 356

(4) Taylor Ev § 356 and cases there cited Compensation in such cases is in reality sought for the pain which the defendant has caused the plaintiff to suffer by disgracing the latter's family and ruin

ing his domestic happiness The damages should therefore be commensurate with this pain which must vary according as the character of wife or daughter had been previously unblemished or otherwise 16

(5) Field Ev 6th Ed 202 The person whose character is in question is therein assumed to be the same as the person who claims damages

(6) Taylor Ev § 358 Wharton Ev. § 52

by the defendant, is admitted however, to be now plaintiff had before the publication to whether report has credited him with having committed the particular offence laid to his door by the defendant "In every case of slander or libel the defendant without justifying that the words published were true in substance and in fact, may say that whether they were or not the plaintiff had a bad reputation" (2) The English rule as gathered from the case law, has been stated to be that in civil cases the fact that a person's general reputation is bad, may, it seems be given in mitigation of damages. High

Court that evidence of bad character is admissible in mitigation of damages but that evidence of suspicions or rumours of bad character is not (1) The plaintiff's general character is in issue in this section and the defendant may show that the plaintiff's reputation has sustained no injury because he had no reputation to lose (c) *Petition for damages for adultery* The husband's general character for infidelity may be proved for in such a case he can hardly complain of the loss of that society upon which he has himself placed so little value (5)

In aggravation of damages the plaintiff cannot according to the English rule give evidence of general good character, unless counter proof has been first offered by the defendant, for until the contrary appear, the presumption of law is already in his favour (6)

The Act includes in the term 'character' both reputation and disposition and thus departs from the English law, according to which character is confined to reputation only. The subject is considered at length in *R v Bolton* (7) The Indian Legislature has adopted the opinion of Erle C J and Willes J, in that case who held that evidence of character extended to disposition as well as reputation, and of Taylor (8) who says that the ruling of the majority in this case rests more upon authority than reason (9)

There is a distinction between 'character' and 'reputation' character signifying the reality, and reputation what merely is reported, or understood from report to be the reality about a person (10) 'Reputation' means what is thought of a person by others and is constituted by public opinion it is the general credit which a man has obtained in that opinion (11) When a man swears that another has a good character in this sense he means that he has heard many people though he does not particularly recollect what people

(1) See Phipson *Ev* 5th Ed 176 177
Scott v Sampson L R 8 Q B D 491
Hood v Durham 21 Q B D 501 *Field*
Ev 356 *ib* 6th Ed 202

(2) *Per Manisty J* in *Hood v Earl of Durham* (1888) 21 Q B D 505 & Taylor § 359

(3) *Steph Dg Art* 57 see *Scott v Sampson* L R 8 Q B D 491 in which all the older cases are examined in the judgment of Cave J *Wharton Ev* § 53 followed in *Woods v Cox* (1888) 4 Times L R 655

(4) *The Englishman Ltd v Lajpat Rai* (1910) 37 C 760

(5) *Taylor Ev* § 358

(6) *Taylor Ev* § 362 *Jones v Jones* 18 L T N S 243 *Narracott v Narra*

cott 33 L J P & M 61 in *Field Ev* 6th Ed 203 it is suggested that it may be that this rule will be affected by the above section

(7) 1 L & C 520 10 Cox 25

(8) *Taylor Ev* § 350 see *Steph Dg* pp 78 179

(9) *Norton Ev* 334

(10) *Per Durfee C J* in *State v Wilson* 15 R I 180 1 All 415 (*Amer*) see *Wigmore Ev* § 1608 *et seq*

(11) *Taylor Ev* § 350 *Wharton Ev* § 49 It is possible for a man to have a fair reputation who has not in reality good character although men of really good character are not likely to have a bad reputation *Crabbe's Synonyms* See *Rat Isri v R* 23 C 621 (1895)

speaking well of him, though he does not recollect all that they said (1) One consequence of the view of the subject taken by English law is 'that a witness may with perfect truth swear that a man, who to his knowledge has been a receiver of stolen goods for years, has an excellent character for honesty, if he has had the good luck to conceal his crimes from his neighbours. It is the essence of successful hypocrisy to combine a good reputation with a bad disposition, and according to *R v Routon* the reputation is the important matter. The case is seldom if ever acted upon in practice. The question always put to a witness to character is,—What is the prisoner's character for honesty, morality or humanity? as the case may be nor is the witness ever warned that he is to confine his evidence to the prisoner's reputation. It would be no easy matter to make the common run of witnesses understand the distinction" (2)

Disposition 'Disposition' comprehends the springs and motives of actions is permanent and settled, and respects the whole frame and texture of the mind (3) When a man swears that another has a good character in this sense, he gives the result of his own personal experience and observation or his own individual opinion of the prisoner's character, as is done by a master who is asked by another for the character of his servant (4) From this section it thus appears that there are two forms in which a question as to character may be put to a witness. So if an accused be charged with theft a witness to character might be asked either—What was the general reputation of the accused for honesty? or he might be asked—Was the accused generally of an honest disposition? These two questions differ very widely. The witness would answer one from what was generally known about the accused in the neighbourhood where he lived, but he would, or might, answer the second from his own special knowledge of the accused (5)

Both must be general

In either case evidence may be given only of *general* reputation and *general* disposition. Both lie in the general habit of the man rather than in particular acts or manifestations. When it is said that the reputation must be general it is meant "that the community as a whole must be agreed on this opinion in order that it may be regarded as a reputation. If the estimates vary and public opinion has not reached the stage of definite harmony, the opinion cannot be treated as sufficiently trustworthy. On the other hand it must be impossible to exact unanimity, for there are always dissenters. To define precisely that quality of public opinion thus commonly described as general is therefore a difficult thing. there is on this subject often an attempt at nicety of phrase which amounts in effect to mere quibbling because the witness will not ordinarily appreciate the discriminations. Such requirements of definition should be avoided as unprofitable" (6) Where evidence of character is offered it must be confined, to general character, evidence of particular acts as of honesty, benevolence or the like, are not receivable. "For, although the common reputation in which a person is held in society may be undeserved and the evidence, in support of it must, from its very nature be indefinite, some inference varying in degree according to circumstances, may still fairly be drawn from it, since it is not probable that a man who has uniformly sustained a character for honesty or humanity will forfeit that character by the commission of a dishonest or a cruel act. But the mere proof of isolated facts can afford no such presumption. 'None are all evil' "

(1) Steph Dig p 181

(2) Steph Dig p 179

(3) Field Ev 357 citing Crabb's Synonyms 1b 6th Ed 203

(4) Taylor Ev § 350

(5) Markby Ev 45 46. In the leading case *R v Routon* 1 L & C 520 *supra*

there was as already stated a difference of opinion amongst the Judges as to which of these two was the proper form of question strong reasons are given in favour of both and no doubt this is why the Act admits both 1b

(6) Wigmore Ev § 1617

and the most consummate villain may be able to prove that on *some* occasion he has acted with humanity, fairness or honour,' (1) Negative evidence such as ' I never heard anything against the character of the man ' is cogent evidence of good character, because a man's character is not talked about till there is some fault to be found with it (2) The words and figures inserted in the *Explanation* by Act III of 1891 were so inserted because by section 54 in certain cases, a previous conviction which is a particular act by which character is shown, is made admissible And further, particular acts may be relevant when the bad character is itself a fact in issue (3)

(1) *Ib* § 351

(2) *R v Roulton* 1 L & C 520 535

536 Wigmore Ev § 1614

(3) *v ante* notes to ss 53 & 4

PART II.

ON PROOF

ONE of the main features in the Act consists in the distinction drawn by it between the *relevancy* of facts and the *mode of proving* facts⁽¹⁾ which is effected by the evidence of witnesses inspection, presumptions and judicial notice and which is subject to a few exceptions generally the same in civil and criminal cases Its first part deals with the relevancy of facts or with the answer to the question 'what facts may you prove?' while the present part proceeds to enact rules as to the manner in which a fact when relevant, is to be proved⁽²⁾ This introduces the question of proof It is obvious that whether an alleged fact is a fact in issue or a collateral fact, the Court can draw no inference from its existence till it believes it to exist, and it is also obvious that the belief of the Court in the existence of a given fact ought to proceed upon grounds altogether independent of the relation of the fact to the object and nature of the proceeding in which its existence is to be determined The question is whether *A* wrote a letter The letter may have contained the terms of a contract It may have been a libel It may have constituted the motive for the commission of a crime by *B* It may supply proof of an *alibi* in favour of *A* It may be an admission or a confession of crime, but whatever may be the relation of the fact to the proceedings the Court cannot act upon it unless it believes that *A* did write the letter and that belief must obviously be produced in each of the cases mentioned by the same or similar means If for instance the Court requires the production of the original when the writing of the letter is a crime there can be no reason why it should be satisfied with a copy when the writing of the letter is a motive for a crime In short the way in which a fact should be proved depends on the nature of the fact and not on the relation of the fact to the proceeding The instrument by which the Court is convinced of a fact is evidence It is often classified as being either direct or circumstantial evidence

reference to its essential qualities but with reference to the use to which it is put, as if paper were to be defined not by reference to its component elements but as being used for writing or for printing We have shown that the mode in which a fact must be proved depends on its nature and not on the use to be made of it Evidence therefore should be defined not with reference to the nature of the fact which it is to prove but with reference to its own nature Sometimes the distinction is stated thus direct evidence is a statement of what a man has actually seen or heard. Circumstantial evidence is something from which facts in issue are to be inferred If the phrase is thus used the word *evidence* in the two phrases (*direct evidence* and *circumstantial evidence*) opposed to each other, has two different meanings In the first, it means testimony, in the second, it means a fact which is to serve as the foundation for an inference It would indeed be quite correct, if this view is taken, to say circumstantial evidence must be proved by direct evidence This would be a most clumsy mode of expression but it shows the ambiguity of the word 'evidence' which means either—(a) words spoken or things produced in order

(1) See Proceedings in Council on the Evidence Bill 31st March 1871
(2) Draft Report of the Select Com-

mittee on the Evidence Bill. (Gazette of India July 1 1871)

to convince the Court of the existence of facts, or (b) facts of which the Court is so convinced which suggest some inference as to other facts. We use the word 'evidence' in the first of these senses only, and so used it may be reduced to three heads—(a) oral evidence, (b) documentary evidence, (c) material evidence.”(1)

In the first place, the fact to be proved may be one of so much notoriety that the Court will take judicial notice of it, or it may be admitted by the parties. In either of these cases no evidence of its existence need be given Chapter III, which relates to judicial notice, disposes of this subject. It is taken in part from Act II of 1855, in part from the Commissioner's draft bill and in part from the Commissioner's report. It may be so given by the Commissioner, or it may be so given by the parties. It may be so given by the parties in the following kinds of evidence:

With regard to oral evidence, it is provided that it must in all cases what ever, whether the fact to be proved is a fact in issue or collateral fact be direct. That is to say, if the fact to be proved is one that could be seen, it must be proved by some one who says he saw it. If it could be heard, by some one who says he heard it, and so with the other senses. It is also provided that, if the fact to be proved is the opinion of a living and producible person or the grounds on which such opinion is held, it must be proved by the person who holds that opinion on those grounds. If however, the fact to be proved is the opinion of an expert who cannot be called (which is the case in the majority of cases in this country), and if such opinion has been expressed in any published treatise, it may be proved by the production of the treatise. This provision taken in connection with the provisions on relevancy contained in Chapter II, sets the whole doctrine of hearsay in a perfectly plain light, for their joint effect is this —

- (a) the sayings and doings of third persons are, as a rule, irrelevant so that no proof of them can be admitted,
- (b) in some excepted cases they are relevant,
- (c) every act done, or word spoken, which is relevant on any ground, must (if proved by oral evidence) be proved by some one who saw it with his eyes, or heard it with his own ears

With regard to the Chapters which relate to the proof of facts by documentary evidence, and the cases in which secondary evidence may be admitted, the Act has followed with few alterations the previously existing law. The general rule is that primary evidence must if possible be given subject to certain exceptions in favour of 'public documents'. Chapter V further contains certain presumptions, which in almost every instance will be true—as to the genuineness of certified copies, gazettes, books purporting to be published at particular places, copies of depositions etc (2). Two sets of presumptions will sometimes apply to the same document. For instance what purports to be a certified copy of a record of evidence is produced. It must, by section 76, be presumed to be an accurate copy of the record of evidence. By section 80 the facts stated in the record itself as to the circumstances under which it was taken, *e g*, that it was read over to the witness in a language which he understood, must be presumed to be true (3). Lastly, Chapter VI deals with certain cases in which writings are exclusive evidence of the matters to which they relate (4).

(1) Draft Report of the Select Committee (Gazette of India July 1 1871) see as to material evidence *ante* pp 108 109

(2) Draft Report of the Select Committee (*Gazette of India* July 1 1871)

(3) Steph Introd	170	171
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(4) *Ib*

The rules
with regard
to proof
may be
thus sum-
marised

(a) *Judicial notice, facts admitted*—Certain facts are so notorious in themselves or are stated in so authentic a manner in well known and accessible publications, that they require no proof. The Court, if it does not know them, can inform itself upon them without formally taking evidence. These facts are said to be judicially noticed. Further, facts which are admitted need not be proved. (b) *Oral evidence*. All facts, except the contents of documents, may be proved by oral evidence which must, in all cases be direct. That is, it must consist of a declaration by the witness that he perceived by his own senses the fact to which he testifies. (c) *Documents*. The contents of documents must be proved either by the production of the document, which is called primary evidence, or by copies or oral accounts of the contents which are called secondary evidence. Primary evidence is required as a rule, but this is subject to seven important exceptions in which secondary evidence may be given. The most important of these are (a) cases in which the document is in the possession of the adverse party, in which case the adverse party must in general (though there are several exceptions) have notice to produce the document before secondary evidence of it can be given, and (b) cases in which certified copies of public documents are admissible in place of the documents themselves. (d) *Presumptions as to documents*. Many classes of documents which are defined in the Act are presumed to be what they purport to be but this presumption is liable to be rebutted. (e) *Writings when exclusive evidence*. When a contract grant, or other disposition of property is reduced to writing, the writing itself, or secondary evidence of its contents, is not only the best, but is the only admissible evidence of the matter which it contains. It cannot be varied by oral evidence, except in certain specified cases.

It is necessary in applying these general doctrines in practice to go into considerable detail and to introduce provisos, exceptions and qualifications which are mentioned in the following sections (1)

CHAPTER III.

FACTS WHICH NEED NOT BE PROVED.

ALL facts in issue and relevant facts must as a general rule, be proved by evidence that is by the statements of witnesses admissions or confessions of parties and production of documents (1) To this general rule there are two exceptions which are dealt with by this chapter viz (a) facts judicially noticeable (b) facts admitted Neither of these classes of facts need be proved (2)

Of the private and peculiar facts on which the cause depends the Judge is (as in trial by jury the jury are) bound to discard all previous knowledge, but it is in the nature of things that many general subjects to which an advocate calls attention should be of so universal a notoriety as to need no proof (3) Certain facts are so notorious in themselves or are stated in so authentic a manner in well known and accessible publications that they require no proof The Court if it does not know them can inform itself upon them with out for

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Still more must the limits vary (in reality) according to the extent of knowledge and power who had made chemistry his study would not of scientific chemists one to whom a foreign language was familiar would read a document without translations or comments one who had resided in India would hear and speak of the customs there as matters of course Other Judges might with proper diffidence require evidence on which they could rely but after all it is obvious that there are many subjects on which were it not for the learning of the Judge any quantity of evidence would fail of supplying the defect (5) The list of matters made judicially noticeable by section 57 is not complete (6) It may be doubted whether an absolutely complete list could be formed as it is practically impossible to enumerate every thing which is so notorious in itself or so distinctly recorded by public authority, that it would be superfluous to prove it (7)

The English Courts take judicial notice of numerous facts which it is therefore unnecessary to prove Theoretically all facts which are not judicially noticed must be proved but there is an increasing tendency on the part of Judges to import into cases heard by them their own general knowledge of matters which occur in daily life (8)

These need not be proved (9) And obviously so for a Court has to try the questions on which the parties are at issue not those on which they are

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| <p>(1) See p 112 ante
(2) Ss 56 58
(3) Gresley Ev 395 Wharton Ev § 276 et seq
(4) Steph Introd 120 See Wgmore Ev § 2565
(5) Gresley Ev 396 395 and v passim ib 395—420
(6) v notes to s 57 post</p> | <p>(7) Steph Dig p 179
(8) Po ell Ev 9th Ed 144 f. 579 Hla Bar v Mikharon 45 L C. 144 149 9 L B R 160 it was held that the judge was justified in taking notice of the experience of the plaintiff's agent
Court
(9) S 58 post</p> |
|---|--|

agreed (1) Facts may be so admitted (a) by agreement at the hearing or before the hearing, or (c) by the pleadings (2)

(a & b) It often happens that it is advisable for each party to waive the necessity of proof, and to admit certain facts insisted upon by the other, but insufficiently proved by the pleadings. This may be either for the purpose of mutually avoiding the expense and delay of a commission for examining witnesses, or for the sake of respectively purchasing advantages by concession, or of saving some expense to the estate, or there may be a mixture of the and other motives (3) Formal proof of a document, even when it is required to be proved in a certain way may be waived by the party whose interest it may affect although such waiver does not affect the legal character of the document or its validity (4) There is no provision in the Indian Law of Procedure in England, for enabling one party in a suit to call upon the other to admit a fact, other than the genuineness of a document (5), and in the event of the other party not doing so to throw upon him the expense of the proof. Such a provision might be a useful addition to the Code and a clause to that effect was proposed when the Code of 1877 was drafted. It was however probably, considered to be too much in advance of the general intelligence and section 117 of the Code now provides that at the first hearing the Court shall ascertain from the parties what facts they respectively admit or deny (6) There is however, nothing to prevent such a notice being given. And if the parties either upon such notice, or without such notice, agree in writing to admit a fact, the latter need not be proved (7) If the party to whom such a notice is given does not agree to admit the fact in question, the Court may, possibly, where the circumstances so warrant, take that matter into consideration in dealing with the costs of the suit or application.

(c) The function of admissions made on the pleadings is to limit the issues and therewith the scope of the evidence admissible (8) But the effect given in the English Courts to admissions on the pleadings has always been greater than that given to admissions in the less technical pleadings in the Courts in India (9) The function of pleadings in narrowing the issues and limiting the number of facts which it is necessary to prove is, in India, mainly fulfilled by the procedure which regulates the settlement of issues (10) Where however, by any rule of pleading in force at the time, a fact is deemed to be admitted by the pleadings it is unnecessary to prove such fact (11) The Court may, however, in all these cases, in its discretion require the fact to be proved otherwise than by such admissions (12)

56. No fact of which the Court will take judicial notice need be proved

s 3 (Fact) s 3 (Court) s 3 (Proof)

Principle—See Introduction, ante

COMMENTARY

According to the definition contained in the third section 'a fact is said to be proved when after considering the matters before it, the Court believes it to exist' Such matters are those brought before the Court by the parties

(1) *Burjorji, Cussetji v. Munchorji*,
Kuturji 5 B 152 (1880)

(2) S 58 post

(3) *Gresley* ¶ 4

(4) *Bajinath Singh v. Mt. Biraj Koer*,
2 Pat 52 (1921)

(5) As to which see Civ. Pr. Code
s 128

(6) *Cunningham* Ev 205

(7) S 58 post

(8) *Wills* Ev 2nd Ed 150

(9) v notes to s 58 post

(10) v notes to s 58 post

(11) S 58

(12) *Id*

Fact
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noticeable
need not be
proved

Need not
be proved

or otherwise appearing in the particular proceedings. In the case of the facts dealt with by this section, the Judge's belief in their existence is induced by the general knowledge acquired otherwise than in such proceedings and independently of the action of the parties therein. This section and the last two paragraphs of the next come to this.—With regard to the facts enumerated in section 57, if their existence comes into question, the parties who assert the existence or the contrary need not in the first instance produce any evidence in support of their assertions. They need only ask the Judge to say whether these facts exist or not, and if the Judge's own knowledge will not help him, then he must look to the parties to call upon the parties to whom the facts are imputed. This section is emancipated entirely from the

gation of facts in general. He may resort to any source of information which he finds handy, and which he thinks helps him. Thus, he might consult any book or obtain information from a bystander. Where there is a jury, not only the Judge, but the jury also, must be informed as to the existence or non-existence of any fact in question. In the cases mentioned in section 57, therefore, the Judge must not only inform himself, but he must communicate his information to the jury (1), and when he relies on any document or book of reference under this section he should also inform the parties during the trial and so give them a chance to contradict its authority (2).

57. The Court shall take judicial notice of the following facts:—

Facts of which Court must take judicial notice

- (1) All laws or rules having the force of law now or heretofore in force, or hereafter to be in force, in any part of British India (3)
- (2) All public Acts passed or hereafter to be passed by Parliament and all local and personal Acts directed by Parliament to be judicially noticed. (4)
- (3) Articles of War for Her Majesty's Army or Navy. (5)
- (4) The course of proceeding of Parliament (6) and of the Councils for the purpose of making Laws and Regulations established under the Indian Councils Act (7), or any other law for the time being relating thereto :

Explanation.—The word 'Parliament,' in clauses (2) and (4), includes—

- (1) the Parliament of the United Kingdom of Great Britain and Ireland ;
- (2) the Parliament of Great Britain ;
- (3) the Parliament of England ;

(1) Markby's Evidence Act 49. See generally as to Judicial Notice, Wharton Ev. §§ 276-340.

(2) *Weston v. Peary Mohan Das*, 40 C. 898 (1913), per Woodroffe J., see *Durga Prasad v. Ram Doyal Chaudhurs*, 38 C. 154 (1910).

(3) See Taylor Ev. § 5.

(4) Taylor Ev. §§ 7, 8, 1523.

(5) *Ib.*, § 5.

(6) *Ib.*, §§ 5, 18.

(7) Printed in the collection of Statutes relating to India.

it is apprehended, take judicial notice of matters appearing in its own proceedings (1) An enlargement of the field of judicial notice will further be in accordance with that tendency of modern practice of which mention has been already made (2)

Clause (1)

Under this provision by which the Courts are required to take judicial notice of all laws (3) or rules having the force of law, now or heretofore in force or thereafter to be in force, in any part of British India, notice will be taken of the Statute and Common Law and of all customs when settled by judicial determination or certified by proper authority to the Court, though not of all customs indiscriminately (4) Thus in a recent case it was held by the Privy Council that the Mahomedan law of pre-emption has long been judicially recognized as existing among the Hindus of Bihar (5) In other cases customs must ordinarily be proved So while the Courts will take judicial notice of the general recognised principles of Hindu law, the Court will not, it has been said take judicial notice of what the Hindu law is with regard to Hindu custom which must always be proved (6)

The judgment of the Privy Council in the case of the *Collector of Madura v Mootoo Ramalinga* (7) gives no countenance to the conclusion that in order to bring a case under any rule of law laid down by recognised authority for Hindus generally, evidence must be given of actual events to show that in point of fact the people subject to that general law, regulate their lives by it Special customs may be pleaded by way of exception which it is proper to prove by evidence of what is actually done But to put one who asserts a rule of law under the necessity of proving that the community living under the system of law which he asserts to exist, must defeat him by assertions that it has not, would go far to deny the existence of any general Hindu law, and to disregard the broad foundations which are common to all schools though divergencies have grown out of them (8) As by the Bengal Civil Courts Act (9) the Legislature has enacted that the Mahomedan law shall be administered with reference to all questions regarding any religious usage or institution, the Courts must take judicial cognisance of the Mahomedan Ecclesiastical Law, and the parties are relieved of the necessity of proving that law by specific evidence (10) To ascertain the law, the Courts may refer to appropriate books or documents of reference Sworn translations of little known Sanskrit works embodying Hindu law together with the *futuās*, or opinions, of pundits versed in that law, have thus been referred to (11) With regard to law reports under the provisions of the Indian Evidence Act, cited or to receive or treat as evidence, decided by any of the High Courts, the Act came into force, other than a report published under the authority of

(1) Taylor Ev § 5

(2) See Introduction ante Powell Ev 9th Ed, 146 and remarks in note ante

(3) See as to the law in force in India Field Ev 6th Ed 2 3 216 220

(4) Taylor Ev § 5 Goodeve Ev 310 as to mercantile custom see Taylor Ev § 5 *Shrikh Fazulla v Ramkamal Mitter* 2 B L R O C J 7 9 (1868)

(5) *Jadu Lal Sahu v Janki Koer* P C 39 C 915 (1912); see 35 C 575 (1908)

(6) *Juggut Mohinnee v Dnarka Nath* 8 C 587 587 (1882) per Garth C J the custom may be of such antiquity and so well known that the Court will take

judicial notice of it See *Gopal Prasad v Radha* 10 A 374 383 (1888) *Jadu Lal Sahu v Janki Koer* (1908) 35 C 575 as to the methods of ascertaining the general law see *Bhagwan Singh v Bhogwan Singh* 21 A 412 433 (1898)

(7) 12 Moo 1 A 437 (1868)

(8) *Bhagwan Singh v Bhagwan Singh* 21 A 412 423 424 (1898) P C.

(9) Act XII of 1857 s 37

(10) *R v Ranran* 7 A 461 (1885)

(11) *Collector of Madura v Mootoo Ramalinga* 12 Moo 1 A 397 (1885) see the penultimate paragraph of s 37 and post

(12) Act XVIII of 1875 s 3

the Governor General in Council. But the Act does not prevent a High Court from looking at an unreported judgment of other Judges of the same Court (1)

Statutes are either public or private. Public Statutes apply to the whole community, and are noticed judicially, though not formally set forth by a party claiming an advantage under them. They require no proof, being supposed to exist in the memories of all, though for certainty of recollection, reference may be had to a printed copy. Private or local and personal Acts operate upon particular persons and private concerns only. The Courts were formerly not bound to judicially notice them, unless as was customary, a clause was inserted that they should be so noticed. The effect of this clause was to dispense with the necessity of pleading the Act specially. Since, however, the commencement of the year 1851 this clause has been omitted the Legislature having enacted that every Act made after that date shall be deemed a public Act and be judicially noticed as such, unless the contrary be expressly declared (2). As to the presumptions which exist in the case of Gazettes, newspapers and private Acts of Parliament, *see* section 81, *post*

The Courts must judicially notice the Articles of War for His Majesty's Army or Navy. The Articles of War for the Government of the Native officers, soldiers and other persons in His Majesty's Indian Army, are contained in Act V of 1869. With regard to the Articles of War governing the British forces, whether in the naval, marine or the land service, including the auxiliary forces,—that is the militia, the yeomanry and the volunteers,—and also the reserve forces, *see note* below (3).

The course of proceeding of Parliament and of the Indian Councils is also the subject of judicial notice under this Act. The course of proceeding of Parliament may be proved by the Journals of the House of Commons, and that the Courts will notice the law and custom and course of proceedings of each branch of the Government, and of the stated days of general political elections, the of the Legislature, and, in short, "all public matters which affect the Government of the country" (6). So also both English and Indian tribunals notice the accession (as also in the case of English Courts the demise) of the Sovereign (7), the Royal sign manual and matters stated under it (8).

"The English Courts take judicial notice of the following seals—The great Seal of the United Kingdom, and the Great Seals of England, Ireland and Scotland respectively, the Queen's Privy Seal and Privy Signet, whether in England, Ireland, or Scotland, the Wafer Great Seal, and the Wafer Privy Seal, framed under the Crown Office Act, 1877, the Seal and Privy Seal of the Duchy of Lancaster, the Seal and the Privy Seal of the Duchy of Cornwall, the seals of the old superior Courts of Justice, and of the Supreme Court and its several divisions, the seals of the old High Court of Admiralty, whether for England or Ireland, of the Prerogative Court of Canterbury and of the Court of the Vice-Warden of the Stannaries, the seals of all Courts constituted by Act of Parliament if seals are given to them by the Act, amongst which are the seals of the Court for Divorce and Matrimonial Causes in England, of the Court for Matrimonial Causes and Matters in Ireland, of the Central

(1) *Mahomed Ali v. Nazar Ali* 28 C 289 (1901)

(2) *Taylor Ev.* §§ 1523-5

(3) *Taylor Ev.* § 5 and authorities there cited

(4) *The Englishman, Ltd v. Lajpat Rai* (1910), 37 C. 760

(5) *Ib.* as to proof of the proceedings of the Legislatures *see* s. 78 cl. (2), *post*

(6) *Ib.* § 18 *Taylor v. Barclay*, 2 Sim, 221

(7) *Taylor Ev.* § 18

(8) *Ib.* § 14, *Mighell v. Sultan of Johore* 1 Q. B. (1894), 149

office of the Royal Courts of Justice, and of its several departments, of the Principal Registry, and of the several District Registries of the Supreme Court of judicature, of the Principal Registry, and of the several District Registries of the old Court of Probate in England and of the present Court of Probate in Ireland, of the old and new Courts of Bankruptcy, of the Insolvent Debtor's Court, now abolished of the Court of Bankruptcy and Insolvency in Ireland (which since the 6th of August 1872, has been called 'The Court of Bankruptcy in Ireland'), of the Landed Estates Court, Ireland, of the Record of Title Office of that Court, and of the County Courts, Courts of law also judicially notice the seal of the Corporation of London Various Statutes(1) render different other seals admissible in evidence without proof of their genuineness' (2) Many bodies are by particular Statutes created corporations and given a seal, for instance County Councils, yet in each such case the seal must be formally proved in the absence of statutory provision that judicial notice shall be taken of it (3) According to English law, the seal of a foreign or colonial Notary Public will not generally be judicially noticed, although such a person is an officer recognised by the whole commercial world (4) The present clause however, draws no distinction between domestic and foreign Notaries Public And so the official seal of a British Notary Public has been judicially recognised (5) The other seals of which Indian Courts are required to take judicial notice will be found mentioned in this clause They will not, however, take notice of any seal which is not distinctly legible (6) In *Kristo Nath Koondoo v T F Broun*(7), a registered power of attorney was admitted under section 57 of this Act without proof, the Registering Officer being held to be a Court under the third section of the Act But this decision has been dissented from in a later case, in which it was pointed out that mere registration of a document is not in itself sufficient proof of its execution (8)

Clause (7)

The provisions of this clause are in advance of, and more extensive than those of the English law(9) according to which it has been said to be doubtful whether the Courts would recognise the signatures of the Lords of the Treasury to their official letters (10) So the Court, prior to the passing of this Act, took judicial notice of the fact that a person was a Justice of the Peace(11), and of the signature of a jailor under the 16th section, Act XV of 1869 (Prisoners Testimony Act) (12) But this clause requires that the facts of the appointment to be notified in the *Gazette* So where the Court was asked to presume that A was Kazi or Sudder Ameen of Chittagong in 1820, it was said—"there is no evidence that any person named A held such appointment in July 1820 We think that we cannot take judicial notice of this fact under the seventh clause section 57 of the Evidence Act, for there is nothing to show that A was gazetted to the appointment of Sudder Ameen in or about that year The *Gazette of India* was not in existence, and was not introduced until Act XXXI

(1) See Taylor Ev § 6 where these Statutes will be found collected

(2) *Ib* § 6

(3) *Ib* § 14

(4) *Ib* there have been decisions to a contrary effect *ib* a distinction must be drawn between cases of judicial notice of seals and those in which (whether the seal be or be not noticeable) the powers of the Notary Public with respect to the certification of documents are in question So according to the law of England the mere production of the certificate of a Notary Public stating that a deed had been executed before him would not in any way dispense with the proper evidence of the execution of the deed *Nye v Macdonald*

L R P C 331 343

(5) In the goods of *Henderson* 22 C. 491, 494 (1895), and see cases cited in s 82 post

(6) *Jahir Ali v Raj Chunder* 10 C. L R., 469 476 (1882)

(7) 14 C 176 180 (1886)

(8) *Salumatul Fatima v Koylaskhola Narain* 17 C 903 (1870)

(9) Field Ev 376 *ib* 6th Ed 220

(10) Taylor Ev § 14

(11) *R v Nabadurup Gostami* 1 B L R O Cr, 15 27, 28 JJ 34 (1868) 15

W R Cr 75 note

(12) *Tamur Sing v Kalidas Roy* 4 B L R O C, J 51 (1869) See now Act III of 1900 (The Prisoners Act)

of 1863 was enacted and we are not shown that there was, in the year 1820 or thereabouts, any official gazette in which the appointments of Sudder Amceens were usually notified or that this particular appointment was notified in any such gazette," and the Court accordingly refused to take judicial notice of the appointment (1)

Clauses (8—12) are in general accordance with the English law (2) Under Clause (8) the eighth section, the existence title and national flag of every State or Sovereign reign recognised by the British Crown will be recognised —(12) The status of a foreign Sovereign is a matter, of which the Courts of this country take judicial cognizance—that is to say a matter which the Court is either assumed to know or to have the means of discovering without a contentious enquiry, as to whether the person cited is or is not, in the position of an independent Sovereign Of course the Court will take the best means of informing itself on the subject if there is any kind of doubt and the matter is not as notorious as the status of some great monarch such as the Emperor of Germany (3) Under the ninth clause the Bengali Willaiti Iash Sambat or Hindi Hijri and Jalus Eras will be judicially noticed in those districts in which they are current, and reference may be made to the usual almanacs when occasion requires (4) If it be true that the Indian Courts must take judicial notice of the territories of the King in India then if there has been a cession of territory they must take notice of that and they must do so independently of the Gazette which is no part of the cession but only evidence of it (5) The Court will take judicial notice of hostilities between the British Crown and any other State (6) But the existence of war between foreign countries will not be judicially noticed (7) It was held that the Court might, for the purpose of taking judicial notice of hostilities between the British Crown and others refer to a printed official letter from the Secretary to the Government of the Punjab to the Secretary to the Government of India though it was observed that the letter was not evidence of the facts mentioned in detail by the writer (8)

The custom or rule of the road on land in England which is followed in this country, is that horses and carriages should respectively keep on the near or left side of the road except in passing from behind when they keep to the right (9) At sea the general rule is that ships and steamboats on meeting 'end on or nearly end on in such a manner as to involve risk of collision should port their helms so as to pass on the port or left side of each other next that steamboats should keep out of the way of sailing ships and next that every vessel overtaking another should keep out of its way (10) Clause (13)

The penultimate paragraph of the section is in accordance with the English law, so far as it enables the Court to refer to appropriate books or documents of reference upon matters it is directed to take judicial notice of (11) but is in advance of such law in so far as it permits the Court to refer to such books Books or documents of reference

(1) *Jahir Ali v Raj Chunder* 10 C L R 469 475 476 (1882)

(2) *Taylor Ev* §§ 4 16 17 18

(3) *Migell v Sultan of Johore* 1 Q B (1894) 149 161 *per* Kay L J In this case the person cited was the Sultan of Johore and the means which the Judge took of informing himself as to his status (and which was held to be a proper means) was by enquiry at the Colonial Office *post* *Lachmi Narain v Raja Partab* 2 A 17 (1878)

(4) *Field Fv* 6th Ed 270

(5) *Damodar Gardian v Deoram Kanj* 1 B 367 404 (1876) *per* Lord Selbourne

See s 113 *post*

(6) *S* 57 cl (11)

(7) *Dolder v Huntingfield* 11 Ves 292

(8) *R v Amiruddin* 7 B L R 63 70 (1871)

(9) *See Taylor Ev* § 5

(10) *Ib* and for the regulations for preventing collisions at sea *v ib* note (7) *See also Abbotts Merchant Shipping* 13th Ed p 832 *et seq* *ib* 14th Ed 908 *etc*

(11) *Taylor Ev* § 21 *see* as to reference upon such matters *R v Amiruddin* 7 B L R 63 70 (1871)

and documents on matters of public history, literature, science or art. For, in England, while the Courts may refer to such books and documents upon matters which are the subject of judicial notice, they may not consult them for any other purpose (1). By the introduction of the words "and also on all matters of science or art," it is not meant that the Court is to take judicial notice of all such matters. It has been said that if this be so, the provisions as to expert evidence in section 45, and as to the use of treatises in section 60, would be unmeaning and that what perhaps is meant is that though the parties must obey the law as laid down in sections 45 and 60, the Court may resort for its aid to appropriate books without any restriction (2). These words will also include reference to matters of science or art which are of such notoriety, as to be the subject of judicial notice (3). The Courts have under the present section, or the corresponding provisions of Act II of 1855 (4), referred or permitted reference to Mill's Political Economy (5), Tod's Rajpootana (6), Malcolm's Central India (7), Buchanan's Journey in Mysore (8), Elphinstone's History of India (9), Harr Sir John Shore and Lord Cornwallis's Regulations for Revenue Officers in the Glossary (14), The Institutes of the Chakraborty (17), Lord Palmerston's speech in the Protectorate of the Ionian Islands (18), the speech of Lord Thurlow in the debate in the House of Lords on the cessions made at the Peace of Versailles reported in the History of Parliament (19), British and Foreign State Papers, Hertlet's Commercial Treaties (20), Grant's Observations on the Revenue

(1) *Collier v. Simpson* 5 C & P 74

(2) *Markby Ev. Act* 49

(3) The Courts will take notice of the demonstrable conclusions of science as of the movements of the heavenly bodies the gradations of time by longitude the magnetic variations from the true meridian the general characteristics of photography etc. But conclusions dependent on inductive proof not yet accepted as necessary will not be judicially noticed. Thus the Court has refused [*Patterson v. McCausland* 3 Bland (Ind.) 69 (Amer.)] to take judicial notice of the alleged conclusion that each concentric layer of a tree notes a year's growth. *Wharton Ev.* § 335

(4) S. 11. [All Courts and persons aforesaid may on matters of public history, literature, science or art refer for the purposes of evidence to such published books, maps or charts as such Courts or persons shall consider to be of authority on the subject to which they relate] and see s. 6. *ib.* [In all cases in which the Court is directed to take judicial notice it may resort for its aid to appropriate books or documents of reference.]

(5) *Thakooranee Dossee v. Bisheshur Mookerjee* 3 W. R. Act X, 29 at p. 40 (1865), *Ischore Ghose v. Hills* W. R. Sp. No. 48 51 (1862)

(6) *Thakooranee Dossee v. Bisheshur Mookerjee* supra at p. 56. The three greatest and best authorities on the modern Native States. *Tod's Rajpootana* for the North of India. *Malcolm's Central India* for the Centre and *Buchanan's Journey*

in Mysore for the South. *per Phear J.*

(7) *ib.*

(8) *ib.*

(9) *ib.* 31 53, *Sheikh Sultan v. Sheikh Ajmodin* 17 B. 448 (1892), *Forester v. Secretary of State* 18 W. R. 354 (1872)

(10) *Thakooranee Dossee v. Bisheshur Mookerjee* supra 31 81

(11) *ib.* 33 84, *Hills v. Ischore Ghose* W. R. Sp. No. 40 *Ischore Ghose v. Hills* W. R. Sp. No. 48, s. c. 1 Hay 330

(12) *Thakooranee Dossee v. Bisheshur Mookerjee* 3 W. R. Act X, Rul. 91 72 101 *Ischore Ghose v. Hills* W. R. Sp. No. 48 52

(13) *Thakooranee Dossee v. Bisheshur Mookerjee* supra 102 114

(14) *ib.* 103 *Sheikh Sultan v. Sheikh Ajmodin* 17 B. 443 444 (1892) *Cheru kunneth v. Iengunat* 18 M. 2 (1894) *Isandas Keshavji v. Gramji Nanabhai* 7 Bom. H. C. R. 45 56 (1870) *Rangasami Reddi v. Guana Sammantha* 22 M. 267 (1898)

(15) *Thakooranee Dossee v. Bisheshur Mookerjee* supra 104. *see observations of Sir Barnes Peacock on the Civil Law* *ib.*

(16) *ib.* *Jotndromohun Tagore v. Ganendromohun Tagore* 18 W. R. 364 (1872)

(17) *Maharana Shri v. Pailal Lalathchand* 20 B. 61 72 (1894)

(18) *Damodar Gordhan v. D. Ram* Kanj. 1 B. 380 (1876)

(19) *ib.* 386

(20) *ib.* 387 374 375

of Bengal(1), Colebrooke's Remarks on the Husbandry of Bengal(2), Maine's Ancient Law(3), A Memoir on the Land Tenure and Principles of Taxation in Bengal published by a Bengal Civilian in 1832(4), Taylor's Medical Jurisprudence(5), Wigram on Malabar Law and Custom, Logan's Treatise on Malabar and Glossary(6), Chever's Medical Jurisprudence(7), Lyon's Medical Jurisprudence, Playfair's Science and Practice of Midwifery(8), Shakespeare's Dictionary(9), Morley's Glossary inserted in his Digest(10), Minutes of Sir Thomas Munro(11), Clark's Early Roman Law(12), Aitchison's Treatise(13), Grant Duff's History of the Mahrattas(14), a Portuguese work by Fra Antonio de Goneca published at Coimbra in 1606, the *India Orientalis Christiana*, by Father Paulinus, Hough's History of Christianity in India(15), Fergusson's History of Architecture(16), Hunter's Imperial Gazetteer of India(17), the Duncan Record, Wynyard's Settlement Report, Robert's Settlement Report(18), McCulloch's Commercial Dictionary(19), Smith's Wealth of Nations(20), Simcox's Primitive Civilization(21) Wilk's History of Mysore(22), Buchanan-Hamilton's Eastern India, Rajendra Lal Mitra's Budha Gva(23), Prinsep's Table(24), Koch and Schaell, *Histoire des Traites de Paix*, Dumont's *Corps Diplomatique*(25), Annual Register(26), Kattwar Local Calendar and Director(27), Borrodale's Caste Rules(28), Lord Mahon's History of England(29), Smollett's History(30), Hallam's Middle Ages(31), Maudsley's Responsibility in Mental Disease, and Bucknill and Tuke's Psychological Medicine(32), Crokes on Castes and Tribes of the N W P and Oudh(33), Srinivasa Ayyangar's Progress in the Madras Presidency and Arbuthnot's Selections from the Minutes

- (1) *Hills v. Ishore Ghose* W R, Sp No 40
 (2) *Ib*
 (3) *Ishore Ghose v. Hills* W R Sp No 48 49
 (4) *Ib*
 (5) *Hatim v. R* 12 C L R 86 (1882)
Hurry Churn v. R 10 C, 140 142 (1883)
R v. Dada Ana 15 B 452, 457 (1889)
R v. Kader Vazjer 23 C 608 (1896)
Tikam Singh v. Dhan Kunwar, 24 A 449 (1902)
 (6) *Cherukunneth Nilkandhen v. Ven gunat Padmanabha* 18 M 8, 11 (1894)
Augustine v. Medlycott, 15 M 247 (1893)
Ramasami Bhagabhathar v. Nagendrasami 19 M 33 (1895)
 (7) *R v. Dada Ana* 15 B, 457 (1889)
 (8) *Tikam Singh v. Dhan Kunwar* 24 A 448, 449 (1902)
 (9) *Gajraj Puri v. Achaibar Puri* 16 A 191, 194 (1893)
 (10) *Jivandas Keshavji v. Framji Nana bhai* 7 Bom H C R 45, 56 (1870)
 (11) *Sheikh Sultan v. Sheikh Ajmodin* 17 B 447 (1892)
 (12) *Jotendramohan Tagore v. Ganendro mohun Tagore* 18 W R, 366 (1872)
 (13) *Sheikh Sultan v. Sheikh Ajmodin* 17 B 439 *Damodar Gordhan v. Deoram Kanji* 1 B, 388, 389, 395 397 430 431 432, 433, 454 456, 458 (1876) *Lachmi Narain v. Raja Partab*, 2 A 17 (1878)
 (14) *Sheikh Sultan v. Sheikh Ajmodin* 17 B, 439.
 (15) *Augustine v. Medlycott* 15 M, 241 (1892).

- (16) *Secretary of State v. Shunmu garaya Mudaher* 20 I A 84 (1893)
 (17) *Ib* 83 arg his description of the estuary of the River Hughli was referred to by the Court in the salvage action in the matter of the German Steamship *Drachenfels* 27 C 860 (1900)
 (18) *Bejai Bahadur v. Bhupindar Bahadur*, 17 A, 460 (1895)
 (19) *Hormasji Karsetji v. Pedder* 12 Bom H C R, 206 (1875)
 (20) *Ib* 207
 (21) *Ramasami Bhagvathar v. Vagen drasiam* 19 M 33 (1895)
 (22) *Fakir Muhammad v. Tunmala Charar* 1 M, 213 (1876)
 (23) *Saipal Gir v. Dharmapala* 23 C 74 (1895)
 (24) *Forester v. The Secretary of State* 18 W R, 354
 (25) *Damodhar Gardhan v. Deoram Kanji* 1 B 393 (1876)
 (26) *Ib* 436
 (27) *Ib* 454 455
 (28) *Verabhas Aiyubhai v. Bai Huabhai* 7 C W N 716 (1903)
 (29) *Lachmi Narain v. Raja Partab* 2 A 21 (1878) in which also it was held that histories firmans treaties and replies from the Foreign Office could be referred to
 (30) *Ib*, 15
 (31) *Ib*, 23 24
 (32) *R v. Kader Vazjer* 23 C 608 (1896)
 (33) *Mariam Bibee v. Sheikh Mahomed Ibrahim* 28 C L J, 306

of Sir Thomas Munro(1), Dubois' Hindu Manners, Customs and Ceremonies(2), Atkinson's Gazetteer and Settlement Reports of Alighur(3), Balfour's Cyclopædia of India, Thomas' Report on Chank and Pearl Fisheries, Thurston's Notes on Pearl and Chank Fisheries and Marine Fauna of the Gulf of Manaar, Emerson's Tennant's "Ceylon," Cosmos Indico pleustes, Abu Zaid "Voyages Arabes," Nelson's "Manual of the Madura Country"(4), Hunter's Statistical Account of Bengal, Stirling's A of Orissa(5), the Oxford New and other similar books and do relied on Sangunni Menon's History of Travancore as an authority with regard to certain alleged local usages, the High Court did not consider it regular to have relied on this book, which had not been made an exhibit in the cause without first having called the attention of the parties to it, and heard what they had to say about the matter to which the book referred (8) In the case of *Sajid Ali v Ibad Ali*(9), the Privy Council adversely observed upon a judgment of a Lower Court which appeared to them to have had the unsafe basis of speculative theory derived from medical books, and judicial dicta in other cases, and not to have been founded upon the facts proved in this In *Dorab* "that the Province the date of the exe if not one of those

historical facts of which the Courts in India are bound, under the Indian Evidence Act 1872 to take judicial notice, at least an issue to be tried in the cause' In the undermentioned criminal trial, the Court took judicial notice of the fact that at the period when the offence of dacoity was alleged to have been committed the district of Agra was notorious as the scene of frequent and recent dacoities (11) And in *Ishri Prasad v Lalji Jas*(12), the Court said with reference to a document "It is common knowledge, of which we are entitled to take notice that the original records of the Agra Divisions were destroyed during the Mutiny of 1857, and, therefore, under s 56 cl (c) of the Indian Evidence Act the copy is admissible as secondary evidence of the original There is a real but elusive line between the Judge's personal knowledge as a private man and his knowledge as a Judge A Judge cannot use from the Bench under the guise of judicial knowledge that which he knows only as an individual observer (13) Where to draw the line between knowledge of notoriety and knowledge of personal observation may sometimes be difficult but the principle is plain (14) The Court may presume that any book to which it refers for information on matters of public or general interest, was written and published by the person, and at the time and place by whom or at which it purports to have been written or published (15) In questions of public history

(1) *Venkatanarasimha Naidu v Danda mudri Kottaya* 20 M 302 (1897)

(2) *Ramasami Aiyar v Vengudisami Aiyar* 22 M 113, 215 (1898)

(3) *Garuradhuaya Prasad v Superun dhuaya Prasad* 27 I A 248 (1900)

(4) *Anna Kurnam v Multupajal* 27 M, 557 (1903)

(5) *Shyamanand Das v Rama Kanta* 32 C 6 13 (1904)

(6) *In re Dadabhai v Jamsedji* 24 B 293 299 (1899)

(7) *Ib* 295

(8) *Vallabha v Madusudanani* 12 M 495 (1889)

(9) 21 C 1 14 (1895)

(10) 5 I A 116, 124 (1878)

(11) *R v Bholu* 23 A 124 125 (1900)
(12) 22 A 302 (1900)

(13) *Durga Prasad Singh v Ram Doyal Chaudhuri* 38 C, 153 and see *Lakshmayya v Sri Raja Viradaraya Appasa* 36 M 168 (1913) a Judge can use general knowledge as in determining the value of evidence but not his knowledge of particular facts

(14) *Wigmore Ev* § 2569 for the case of a Judge giving his own personal experience see *In re Dhunput Singh* 20 C 796 and as regards his experience in his Court see *San Hla Bor v M. Akoren* 45 I C 734

(15) S 87 *post*

the Court can only dispense with evidence of notorious and undisputed facts (1) It has been held that printed letters seventy five years old are admissible as evidence of the history of a district but not as proof that certain missionaries lived or died at certain times (2) It has been held that the question of title between the trustees of a Mosque though an old and historical institution and a private person cannot be deemed a matter of public history within the meaning of this section, and historical works cannot be used to establish title to such property (3) In the case cited (4) the accused was prosecuted and convicted under section 495A (1) of the Calcutta Municipal Act for selling adulterated ghee The Assistant Analyst to the Corporation applied certain processes of analysis to the sample of ghee in question and obtained certain results from which he made the deduction that the ghee had been adulterated

No other expert witness was examined that according to the standard works be made Some of those works were

put to the Analyst in cross examination by the defence The Magistrate allowed the defence to rely on this evidence and dealt with it as being in evidence in the judgment Held per Woodroffe J that the Magistrate was not wrong in making use of the text books but that the use of scientific treatises may lead to error if either those who use them are themselves not experts in the matter dealt with or not assisted by experts to whom passages relied on may be put Held therefore in the circumstances of the present case that it would not be safe to rely on the books alone without the aid of an expert and there should be a retrial Held per Chitty J —The procedure adopted by the Magistrate was incorrect if it were intended thereby to make these books and all their contents evidence in the case The use of such books by the Court was regulated by sections 57 and 60 of this Act Books of reference may be used by the Court on matters (*inter alia*) of science to aid it in coming to a right understanding and conclusion upon the evidence given While treatises may be referred to in order to ascertain the opinions of experts who cannot be called, and the grounds on which such opinions are held the Courts should be careful to avoid introducing into the case extraneous facts culled from text books and also to refrain from basing a decision on opinions the precise applicability of which to the subject matter of the prosecution it was impossible to gauge The books may be usefully referred to in order to comprehend and appraise correctly the evidence of the expert who has made the analysis and has given his opinion on oath as to the result of such analysis but it would be dangerous to base the decision of the Court solely on the evidence of books whether for a conviction or an acquittal Held per Smither J —the Magistrate was right under section 70 of this Act to admit the evidence of the text books

The penultimate (in so far as it deals with matters the subject of judicial notice) and the last paragraph of section 57 follow the English rule, according to which where matters ought to be judicially noticed but the memory of the Judge is at fault he may resort to such means of reference as may be at hand Thus if the point be a date he may refer to an almanac if it be the meaning of a word to a dictionary, if it be the construction of a Statute to the printed copy (5) But a Judge may refuse to take cognisance of a fact unless the party calling upon him to do so produces at the trial some document by which his memory might be refreshed (6) Thus Lord Ellenborough (7) declined to take

Refreshing
memory of
Judge

(1) *Arbabalam Pakh ya Udayan v Bartle*
36 M 418 (1913)

(2) *Id*

(3) *Farrand Ali v Zafar Ali* 46 I C
119

(4) *Granade Venkata Rulnam v Cor*

poration of Calcutta 22 C W N 745
s c 19 Cr L J 753 28 C L J 32

(5) *Taylor Ev* § 71

(6) *Id*

(7) *In Van Omeron v Downck* 2 Camp.

judicial notice of the King's Proclamation, the counsel not being prepared with a copy of the Gazette in which it was published, and in a case in which it became material to consider how far the prisoner owed obedience to his sergeant, and thus depended on the Articles of War, the Judges thought that these ought to have been produced (1) It has been said that "with regard to rules of law the Judge stands in a somewhat different position to that in which he stands in regard to what, as opposed to law, are called the 'facts' of the case The responsibility of ascertaining the law rests wholly with the Judge It is not necessary for the parties to call his attention to it, and the last paragraph of the section is not applicable to it" (2) In many cases, the Courts have themselves made the necessary enquiries, and that too without strictly confining their researches to the time of the trial Thus where the question was, whether the federal republic of Central America had been recognised by the British Government as an independent State, the Vice Chancellor sought for information from the Foreign Office (3), in another case the Court of Common Pleas directed enquiry to be made in the Court of Admiralty as to the Maritime law (4), and the same Court also once made enquiry as to the practice of the Enrolment Office in the Court of Chancery (5), while Lord Hardwicke asked an eminent conveyancer respecting the existence of a general rule of practice in the latter's profession (6) So the Lord Chancellor made enquiry at the India House, upon which it appeared from the proceedings of the Governor General of Bengal that the Vice-Chancellor had been given view to its admission in evidence (8), and in the case cited enquiry was made at the Colonial Office as to the status of the Sultan of Johore (9) So a similar practice has been followed in this country where in application under the Civil Procedure Code, section 380 (10) that the plaintiff be required to furnish security for the costs of a suit it was necessary to determine whether the cantonments of Wadhwan and Secunderabad were within the limits (11) The Court directed its Prothonotary to make enquiry in the Calcutta Court (13) directed the Registrar's Office to ascertain the circumstances under which the place came into existence as a British cantonment and the real character of its connection with the British Government (14) It being suggested in the Insolvency Court of Bombay that it was desirable to enquire what had been the practice of the High Courts at Calcutta and Madras the Bombay High Court directed letters to be written by the Prothonotary to the officers of both these Courts, requesting them to give the required information (15) In the case cited it has been held that under

(1) Cited by Buller J in *R v Holt* 5 T R 446

(2) Markby Ev Act 50

(3) *Taylor v Barclay* 2 Sim 221
See also *The Charkish*, 42 L J Adm 17
Cited in *Lachmi Narain v Raja Partab*
2 A 17 (1878)

(4) *Chandler v Greaves* 2 H Bl 606
n (a)

(5) *Doe v Lloyd* 1 M & Gr 685

(6) *Willoughby v Willoughby* 1 T R 772 see *Taylor Ev* § 21

(7) *Hutcheson v Mannington* 6 Ves 823 824

(8) *In re Dallas Trusts* L R 8 Eq 89 99

(9) *Mighell v Sultan of Johore* 1 Q B (1894), 149 161 In reply a letter was sent written by the Secretary of

State for the Colonies It was contended that the letter was not sufficient but Kay L J observed I confess I cannot conceive a more satisfactory mode of obtaining information on the subject than such a letter and the statement was held to be conclusive

(10) Now represented by O S S r 1
(11) Bayley J

(12) *Tricam Panachand v Bombay Baroda & Railway* 9 B 244 247 (1885)

(13) Sale J

(14) *Hossain Ali v Abid Ali* 21 C. 177 178 (1873) See also *Lachmi Narain v Raja Partab*, 2 A, 7 (1878)

(15) *In re Bhagwandas Hurjiwan* 8 B. 511 516 (1884)

this section the Canon Law can be invoked as a guide in deciding questions of temporal rights in the Catholic Church (1)

58. No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time, they are deemed to have admitted by their pleadings ;

Facts admitted need not be proved

Provided(2) that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions

Principle—Proof of such facts would ordinarily be futile. The Court has to try the questions on which the parties are at issue not those on which they are agreed (3) See Notes *post* and Introduction *ante*

s 3 (Fact)

s 3 (Proved)

s. 3 (Court)

Steph Dig, Art 60 Taylor Ev §§ 724A *et seq* 783 Annual Practice O 32 rr 1—; Civ Pr Code (2nd Ed) O VI, and O VII pp 777—804 O VIII r 5 p 844 Giesley Fr 47—51, (Admissions by agreement and waiver of proof) 456 *et seq* (Effect of the Admissions) 9—16 (Admissions in the Pleadings) Poscoe Cr Ev 13th Ed 110 116 Poscoe N P Fr 72—75 Powell Fr 9th Ed, 490—430 Phipson Fr 5th Ed 10

COMMENTARY

The section deals with the subject of admissions made *for the purpose of dispensing with proof at the trial* which admissions must be distinguished from evidentiary admissions or those which are receivable as evidence on the trial (4) A Court in general has to try the questions on which the parties are at issue not those on which they are agreed (5) Thus the admission of a defendant's *vakil* in Court was held to be evidence of the receipt of a certain sum of money and to do away with the necessity for other proof (6) So also the admission of a fact upon the pleadings will dispense with proof of that fact (7) Although a plaintiff when the defendant denies his claim is bound to prove his case by the document on which he relies, still if the defendant admits any sum to be due, that admission irrespective of proof offered by the plaintiff is sufficient to warrant a decree in the plaintiff's favour for the amount covered by the admission (8) So a subsequent agreement by the mortgagee to take less than his due under a registered mortgage is an agreement modifying the terms of a written contract and if it has to be proved aural evidence is inadmissible under section 92 Proviso 4 Where however such an aural agreement is admitted in the pleadings of the parties the proof of the agreement is dispensed

Admissions for purpose of trial

(1) *A balam Pakkaya Udayan v Barile* 36 M 418 (1913)

(2) See as to the proviso and application of the section *Oriental etc Assurance Co v Narasimla Chari* 25 M 205 (1901)

(3) *Burjorji Cursetji v Muncherji Kuterji* 5 B 143 152 (1880)

(4) See as to these latter ss 17 18 *et seq ante* and see *Lakhichand v Lalchand* 42 B 352 s c 45 I C 555

(5) *Burjorji Cursetji v Muncherji Kuterji* 5 B 143 152 (1880)

(6) *Kalcekanind Bhuttaclarjee v*

Gireebala Dabia 10 W R 322 (1868)

(7) *Burjorji Cursetji v Muncherji Kuterji* supra see as to this case *post* but as to admissions not made in the pleadings but in a deposition see *Sheikh Ibrahim v Partala Hari* 8 Bom H C R., A C J 163 (1871) As to estoppel by pleading see *Dinomony Dabee v Doorga Pershad* 12 B L R 274 276 (1873) *Luchman Chunder v Kali Churn* 19 W R 292 297 (1873) As to estoppel generally see s 115 *post*

(8) *Jasur Chunder v Nabodoepp Chun der* 6 W R 132 (1866)

with by this section, and the Court is bound to recognise and give effect to such agreement (1) It appears to be doubtful upon the English cases whether admissions for the purpose of trial amount to more than a mere waiver of proof and whether if a party seeks to have any inference drawn from facts so admitted, he must not prove them to the jury (2) But the terms of the present section seem to show that proof of such facts is dispensed with for all purposes and that inferences may be drawn from them in all respects as if they had been proved by the party who seeks to draw from them such inferences

Admissions for the purpose of a trial in civil cases may be divided into (a) admissions on the record which are either *actual* i.e. either on the pleadings or in answer to interrogatories or *implied* from the pleadings, and (b) admissions between the parties which may either be by agreement or notice (3) Such admissions may thus be made either (a) pursuant to notice (4), (b) by agreement at (5) or before (6) the trial, (c) by the pleadings (7) In the case of admissions made before the hearing, the section requires that the admissions be in the handwriting of the party or of his agent The admissions mentioned in this section take the place of witnesses called to prove the facts admitted but in any case the Court may in its discretion require the facts howsoever admitted to be proved otherwise than by such admission When an admission as frequently happens, is made at the hearing the Judge's note is sufficient record of the fact Generally as to what takes place before a Judge at a trial, civil or criminal, the statement of the presiding Judge or his notes are conclusive or notes or statement of case is conclusive

(1) *Malappa v Naga Chetty* 42 M 41 s c 48 I C 158

(2) See *Edmunds v Groves* 2 M & W 642 645 per Alderson B

(3) See Annual Practice

(4) As to the case of a notice to admit genuineness of documents under O XXII r 2 2nd Ed p 801 of the Civ Pro Code see O 32 r 2 and generally as to admissions pursuant to notice O 32 rr 1—5 Taylor Ev § 724A *et seq* and as to discovery generally see Appendix and Civ Pr Code O XI 2nd Ed pp 777—800 Under the existing procedure documents which are not admitted must be proved The observation in *Bibee Jolas v Begler* 6 Moo I A 521 (1856) and *Nardkishore Das v Ramkaly Roy* 6 B L R App 49 51 (1871) were made with reference to a state of procedure which no longer exists See Field Ev 379

(5) S 58 see Ch XI of the Civ Pr Code O XIV 2nd Ed pp 813—824 on the settlement of issues A party is bound by an admission of fact made by his pleader at the trial see *Kaleekannund Bhattacharjee v Gireebala Debbya* 10 W R 322 (1868) *Rajunder Nara v Bijai Govind* 2 Moo I A 253 (1839) *Akhay Abdool v Gour Monee* 9 W R 375 (1868) *Sreenmitty Dossee v Pitambur Pundah* 21 W R 332 (1974) *Kouer Nara v Sreenath Mitter* 9 W R 485 (1868) *Berkley v Mussamut Chittur* 5

N W P 2 (1873) But where a valuer upon a mistaken view of the law goes beyond and contravenes his instructions his erroneous consent cannot bind his client *Ran Kant v Brindabai Clunder* 16 W R 246 (1871) A party is not however bound by an admission of a point of law nor precluded from asserting the contrary in order to obtain the relief to which upon a true construction of the law he may be entitled *Tagore v Tagore* I A Sup Vol 71 (1872) *Srendra Keslav v Doorga Sundari* 19 I A 115 (1892) *Gopce Lall v Clundraolce* 11 B L R 395 (1872) An erroneous admission by counsel or pleader on point of law does not bind the party *Malaram Beni v Dudh Nath* 4 C W N 274 (1899) *Krishnaji Narayan v Rajmal Maick* 24 B 360

(6) S 58 and see Civ Pr Code O XII 2nd Ed pp 801—804 *supra*

(7) S 58 see post

(8) *R v Pestany Dnshe* 10 Dom H C R 57 81 (1873) where the cases are collected Norton Fv 238 In an earlier case in the Calcutta High Court it was stated that a judgment deliberately recording the admission of a pleader must be taken as correct unless it is contradicted by an affidavit or the Judge's own admission that the record he made was wrong *Hur Dyal v Heeralal* 16 W R 107 (1871)

if made for the purpose of dispensing with the proof at the trial (1) But an admission made by a party to a suit or his attorney that a certain fact exists and need not be proved does not dispense with proof of the existence of that fact subsequent to the date of the admission (2) The function of admissions made on the pleadings is to limit the issues and therewith the scope of the evidence admissible (3) Where in a suit for specific performance of an agreement the defendant admitted in his written statement the terms of the agreement and its execution the Court held that the plaintiff was not called upon to prove the execution of the agreement or to put it in evidence and citing the case of *McGowan v Smith* (4) and *Gresley on Evidence* (5) remarked as follows — "A Court, in general has to try the questions on which the parties are at issue not those on which they are agreed, and admissions which have been deliberately made for the purposes of the suit whether in the pleadings or by agreement, will act as an estoppel to the admission of any evidence contradicting them. This includes any document that is by reference incorporated in the bill or answer (6) The point is not in issue and as to the counter statements of the parties 'a plea or a special replication admits every point that it does not directly put in issue The same rule applies to an answer when it assumes the form of a demurrer or plea by submitting a point of law or by introducing new facts Thus a submission that the defendants would not be in any way affected by the notice set forth in the bill precluded them from disputing the validity of this notice' (7) Such rules are to be applied with discretion in this country where a strict system of pleading is not followed (8), but here as I suppose everywhere the language of Lord Cairns holds true,

against whom the suit
' (9) The principle is
The Court is to frame
it in the written state

ments tendered in the suit But the issues as they stand, were suggested by the defendant's counsel They waive controversy as to the actual execution of the document assume it to have been executed, and raise questions only that depend for their pertinence on that assumption Under such circumstances the plaintiff is not, I think, called on to prove the execution of the document or to put it in evidence If the document being pronounced absolutely invalid for some purpose on considerations of public policy it were sought to defeat the law through the effect usually given to an admission in pleading, such an attempt could not be allowed to succeed, but for its proposed purposes in this case it is not invalid" (10) An admission may be implied Thus where a suit is so conducted as to lead to the inference that a certain fact is admitted the Court may treat it as proved, and a party in appeal cannot afterwards question it and recede from the tacit admissions (11) And thus is so not only for the particular issue, but for all purposes and for the whole case (12) So, where counsel, in his opening states, though he does not subsequently prove, his client to be in possession of a certain document, this will after notice to produce,

(1) *Urquhart v Butterfield* 37 Ch D 357 *Hartley v Croxson Union* 26 Ch 249 *Gresley Ev* 4598 *Taylor Ev* 783

(2) *Lavison v Presumptive Ev* 189 citing *McLeod v Wakeley* 3 C. & P 311

(3) *Wills Ev* 101 2d Ed 150

(4) 26 L J Ch 8

(5) *Law of Evidence* 457 22

(6) *Id* 457

(7) *Gresley Ev* 457 22

(8) See next paragraph

(9) *Brown v McClintock* 6 E. & L. App at 453

(10) *Burjorji Cursetji v Munckerrji Aitery* 5 B 143 152 153 (1880) see *Sambasiva v Gangasiva* 13 M 312 (1880), but as to admissions with respect to unstamped or unregistered documents see s 65 cl (b) post

(11) *Mohima Chunder v Ram Kishore*, 23 W R 174 (1875) s. c. 15 B L R. 142 155 following *Stracy v Blake*, 1 M & W 168 *Doe v Roe* 1 E. & B. 279

(12) *Bolton v Sherman* 2 M. & W. 403

with by this section, and the Court is bound to recognise and give effect to such agreement (1) It appears to be doubtful upon the English cases whether admissions for the purpose of trial amount to more than a mere waiver of proof, and whether if a party seeks to have any inference drawn from facts so admitted, he must not prove them to the jury (2) But the terms of the present section seem to show that proof of such facts is dispensed with for all purposes, and that inferences may be drawn from them in all respects as if they had been proved by the party who seeks to draw from them such inferences

Admissions for the purpose of a trial in civil cases may be divided into (a) admissions on the record, which are either *actual*, i.e., either on the pleadings or in answer to interrogatories or *implied* from the pleadings; and (b) admissions between the parties, which may either be by agreement or notice (3) Such admissions may thus be made either (a) pursuant to notice (4); (b) by agreement at (5) or before (6) the trial, (c) by the pleadings (7) In the case of admissions made before the hearing, the section requires that the admissions be in the handwriting of the party or of his agent The admissions mentioned in this section take the place of witnesses called to prove the facts admitted, but in any case the Court may in its discretion require the facts howsoever admitted to be proved otherwise than by such admission When an admission, as frequently happens, is made at the hearing, the Judge's note is sufficient record of the fact Generally as to what takes place before a Judge at a trial, civil or criminal, the statement of the presiding Judge or his notes are conclusive Neither the affidavits of bystanders, nor of jurors, nor the notes of counsel or of shorthand-writers are admissible to controvert the notes or statement of the Judge (8) It has been held that an admission in a civil case is conclusive

(1) *Malappa v Naga Chetty*, 42 M. 41, s. c., 48 I C, 158

(2) See *Edmunds v Grotes*, 2 M & W, 642 645, per Alderson, B

(3) See Annual Practice

(4) As to the case of a notice to admit genuineness of documents under O XXII, r. 2 2nd Ed, p 801 of the Civ Pro Code, see O 32, r 2 and generally as to admissions pursuant to notice, O 32, rr 1—5, Taylor, Ev, § 724A, *et seq*, and as to discovery generally see *Appendix* and Civ Pr Code, O XI, 2nd Ed, pp 777—800 Under the existing procedure documents which are not admitted must be proved The observation in *Bibee Jokai v Begler* 6 Moo I A, 521 (1856), and *Nandkishore Das v Ramlaty Roy*, 6 B L R App, 49 51 (1871) were made with reference to a state of procedure which no longer exists See Field, Ev, 379

(5) S 58, see Ch XI of the Civ Pr Code O XIV, 2nd Ed, pp 813—824, on the settlement of issues A party is bound by an admission of fact made by his pleader at the trial; see *Kaleekannund Bhutacharjee v Gueebala Debya*, 10 W R, 322 (1868) *Rajunder Narain v Bijai Govind*, 2 Moo I A, 253 (1839), *Khajah Abdool v Gour Monee*, 9 W R, 375 (1868), *Sreenutty Dossee v Pilambur Pundah*, 21 W R, 332 (1874), *Kouer Narain v Sreenath Mutter*, 9 W R, 485 (1868), *Berfley v Mussamut Chittur*, 5

N-W P, 2 (1873) But where a vakil upon a mistaken view of the law goes beyond and contravenes his instructions his erroneous consent cannot bind his client, *Ram Kant v Brindaban Chunder*, 16 W R, 246 (1871) A party is not, however, bound by an admission of a point of law nor precluded from asserting the contrary in order to obtain the relief to which upon a true construction of the law he may be entitled, *Tagore v Tagore*, 1 A, Sup Vol 71 (1872), *Surendra Keshav v Doorga Sundari*, 19 I A, 115 (1892), *Gopee Lall v Chundraolee*, 11 B L R, 395 (1872) An erroneous admission by counsel or pleader on point of law does not bind the party *Maharani Beni v Dudh Nath*, 4 C W N, 274 (1899); *Krishnaji Narayan v Rajmal Manick* 24 B, 360

(6) S 58, and see Civ Pr Code, O XII, 2nd Ed, pp 801—804, *supra*

(7) S 58 see post

(8) *R v Pestany Dinsha*, 10 Bom H C R, 57, 81 (1873) where the cases are collected Norton, Ev, 238 In an earlier case in the Calcutta High Court it was stated that a judgment deliberately recording the admission of a pleader must be taken as correct, unless it is contradicted by an affidavit, or the Judge's own admission that the record he made was wrong; *Hur Djal v Heeralal*, 16 W. R, 107 (1871)

if made for the purpose of dispensing with the proof at the trial (1) But an admission made by a party to a suit or his attorney that a certain fact exists and need not be proved does not dispense with proof of the existence of that fact subsequent to the date of the admission (2). The function of admissions

and its execution the Court held that the plaintiff was not called upon to prove the execution of the agreement or to put it in evidence, and citing the case of

ment, will act as an estoppel to the admission of any evidence contradicting them. This includes any document that is by reference incorporated in the bill or answer (6). The point is not in issue, and as to the counter statements of the parties, 'a plea or a special replication admits every point that it does not directly put in issue. The same rule applies to an answer when it assumes the form of a demurrer or plea by submitting a point of law or by introducing new facts. Thus a submission 'that the defendants would not be in any way affected by the notice set forth in the bill precluded them from disputing the validity of this notice' (7). Such rules are to be applied with discretion in this country, where a strict system of pleading is not followed (8), but here, as I suppose everywhere the language of Lord Cairns holds true, 'that the first object of pleading is to inform the persons against whom the suit is directed, what the charge is that is laid against them' (9). The principle is equally valid as applied to either party in the cause. The Court is to frame the issues according to allegations made in the plaint or in the written statements tendered in the suit.

But the issues as they stand were suggested by the defendant's counsel. They waive controversy as to the actual execution of the document assume it to have been executed, and raise questions only that depend for their pertinence on that assumption. Under such circumstances the plaintiff is not, I think, called on to prove the execution of the document or to put it in evidence. If the document being pronounced absolutely invalid for some purpose on considerations of public policy it were sought to defeat the law through the effect usually given to an admission in pleading, such an attempt could not be allowed to succeed, but for its proposed purposes in this case it is not invalid' (10). An admission may be implied. Thus where a suit is so conducted as to lead to the inference that a certain fact is admitted, the Court may treat it as proved and a party in appeal cannot afterwards question it and recede from the tacit admissions (11). And this is so not only for the particular issue but for all purposes, and for the whole case (12). So, where counsel, in his opening, states, though he does not subsequently prove, his client to be in possession of a certain document, this will after notice to produce,

(1) *Urquhart v Butterfield* 37 Ch D 357; *Hartley v Croxson Union* 26 Ch 249; *Gresley v* 4598 *Taylor v* 783

(2) *Lawson's Presumptive v* 189 citing *McLeod v Wakeley* 3 C & P 311

(3) *Wills v* 101 ib 2nd Ed 150

(4) 26 L J Ch 8

(5) *Law of Evidence* 457 22

(6) *Id* 457

(7) *Gresley v* 457 22

(8) See next paragraph

(9) *Brown v McClintock* 6 E & I App at 453

(10) *Burjorys Cursetys v Muncherys Kutyry* 5 B 143 152 153 (1880) see *Sambayya v Gangayya* 13 M 312 (1880), but as to admissions with respect to unstamped or unregistered documents see s 65 cl (b) post

(11) *Mohima Chunder v Ram Kishore* 23 W R 174 (1875) s c 15 B L R., 142 155 following *Stracy v Blake*, 1 M & W 158 *Doe v Roe* 1 E & B., 279

(12) *Bolton v Sherman* 2 M & W., 403

admit secondary evidence thereof from his adversary (1) Where in an action of salvage the defendants admitted in their defence all the facts alleged in the various statements of claim but not the defence sought to be drawn from them, it was held that further admission was inadmissible, the Court being only concerned with the facts admitted. And where neither party had objected when a case was made over to a Joint Subordinate Judge, it was agreed that they had by this tacit admission agreed to dispense with proof of jurisdiction (3)

Pleadings

A vakil's general powers in the conduct of a suit include the power to abandon an issue which in his discretion he thinks it inadvisable to press (4)

The effect given in the English Courts to admissions on the pleadings was formerly greater than that given to admission in the less technical pleadings in the Courts in India (5) But now under the Code of Civil Procedure O VIII, r 5, "Every allegation of fact in the plaint, if not denied specially or by necessary implication or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability. Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission"

This rule is taken from the English O XIX, r 13, but that rule has been modified in accordance with this section (6)

The section only deals with the authority of agents to make admissions of particular facts in the suit. There is a considerable difference between the case where a pleader by way of *compromise* purports to give up a right claimed by the client, or to saddle him with a liability that is not admitted and the case where a pleader makes admissions as to relevant facts in the usual course of litigation however much those admissions affect the client's interest. The power to bind by such admissions, which, in effect, is but dispensing with proof

able results would follow from holding that in the absence of specific authority a pleader cannot bind by compromises strictly such (7)

Criminal cases

In a Civil case there is no doubt that the party or his pleader may at any time relieve his adversary from the necessity of proof, and the generality of the language used in this section might lead to the inference that this was so in a Criminal trial also. But as to admissions before the hearing it is certain that in a Criminal case they can only be used as evidence, and for this purpose it does not signify whether they are in writing or not, and it is generally supposed that in a Criminal charge admissions made after a plea of not guilty can also only be made use of as evidence (8) In England the rule has been stated to be that in a trial for felony the prisoner (and therefore also his counsel, attorney or vakil) can make no admissions so as to dispense with proof, though a confession may be proved as against him subject to the rules relating to the

(1) *Duncombe v Daniell* 8 C & P 222 approved in *Haller v Worman* 2 F & F 165 3 L T N S 741 contra *Machell v Ellis* 1 C & K 682 in which Pollock C B declined to take the facts from the opening of counsel

(2) *The Buteshire* (1909) P 170

(3) *Baretto v Rodriguez* (1910) 35 B. 24

(4) *Venkata Narasimha v Bhashyakarlusaidu*, 25 M 367 (1902)

(5) *Amritolal Bose v Rajoneekant*

Mitter 15 B L R. (P C) 10 23 (1875) 28 W R 214 L R 2 I A 113 per Sir B Peacock *Burjoris Cursetji v Muncherji Kuvverji* 5 B 143 152 (1880) per West J [Rules with regard to admission by pleading must be applied with discretion in this country] *Norton* Ev 115

(6) O VIII r 5 2nd Ed pp 733 734

(7) In the previous editions this subject which does not belong to the Law of Evidence will be found treated

(8) *Markby*, Ev Art 51

admissibility of confessions (1) In cases of felony it is the constant practice of the Judges at the Assizes to refuse to allow even counsel to make any admission (2) In a case also of indictment for a misdemeanour (perjury) where it appeared that the attorneys on both sides had agreed that the formal proof should be dispensed with and part of the prosecutors case admitted Lord Abinger, C B said 'I cannot allow any admission to be made on the part of the defendant unless it is made at the trial by the defendant or his counsel', and the defendant's counsel declining to make any admission the defendant was acquitted (3) A plea of guilty only admits the offence charged and not the truth of the depositions (4) Prior to this Act the reported decisions are not uniform (5) It has been suggested that the section applies to Civil suits only (6) Though it is not in terms so strictly limited the suggestion receives warrant from the phraseology employed which is more suitable to Civil than to Criminal proceedings Whether this section applies to Criminal cases or not the Court may by the express terms of the section in its discretion require the facts admitted to be proved otherwise than by such admissions It is not the practice of counsel or vakils to make admissions in Criminal cases, and even if they have the power they will seldom if ever assume the responsibility of making such admissions Were such an admission made, the Court would doubtless in most Criminal cases require the facts admitted to be proved otherwise than by such admissions under the provisions of the last paragraph of the section (7) In a case in the Madras High Court it was held that this section would not enable a Judge to admit the evidence of an absent witness under section 32 where the reasons specified in that section had not been proved but the accused had consented to such admission or had failed to object to it (8) As to a plea of guilty see s 43

(1) Steph Dig Art 60

(2) Phill Ev 10th Ed 391 n 6
Wills Ev 2nd Ed 171 see Roscoe Cr
Ev 13th Ed 115 116

(3) *R v Thornhill* 8 C & P 575
it will be observed that this was a case
of admission before trial the Judge
assuming that an admission could be made
at the trial by the defendant or his
counsel

(4) *R v Riley* 18 Cox 285, *Foucar*
v Sinclair 33 T L R 318

(5) *R v Kari v Mundle* 17 W R Cr
49 (1872) it was held that admissions
made by a prisoner's vakil cannot be used

against the prisoner But in *R v Gogalao*
12 W R Cr 80 (1869) proof of a fact
was dispensed with on the admission of
the prisoner's counsel in the case of *R v*
Surroop Chunder 12 H R Cr 76 (1869)
it was said with reference to a particular
arrangement so far as prisoners can
assent to anything that arrangement was
assented to by the vakils for each party

(6) Norton Ev 238

(7) v also notes to s 5 ante

(8) *Anazhi Mithirujan* (n the matter
of) 39 M 449 (1916) and see *R v Bhola*
nath Sen 2 C 23 (1877)

CHAPTER IV

OF ORAL EVIDENCE

ORAL evidence has been defined by the Act to be all statements which the Court permits or requires to be made before it by witnesses in relation to matters of fact under enquiry (1) This Chapter declares (a) that all facts except the contents of documents may be proved by oral evidence, a proposition of law which, though obvious, was lost sight of in several cases anterior to the passing of the Act So it was held that oral evidence if worthy of credit is sufficient without documentary evidence, to prove a fact or title(2), such as boundaries(3), the existence of an agreement, *e.g.*, a farming lease(4), the quantity of defendant's land and the amount of its rent(5), the fact of possession(6), a receipt for a debt(7), a bond(8), a payment of accounts(9), the date of a transaction(10), the date of a will(11), the date of a short (as the section now

It is an error to suppose that oral evidence not supported by documentary evidence is of no importance whatever for the determination of the true merits of a case (11) There is no presumption of perjury against oral testimony, but before acting upon such testimony its credibility should be tested both intrinsically and extrinsically (12) And in the contradiction of oral testimony, which occurs in almost every Indian case, the Court must look to the documentary evidence, in order to see on which side the truth lies (13) Much greater credence also is to be given to men's acts than to their alleged words, which are so easily mistaken or misrepresented (14)

The contents of documents may not (except when secondary evidence is admissible)(15) be proved by oral evidence because it is a cardinal rule not one of technicality but of substance, which it is dangerous to depart from that where written documents exist, they shall be produced as being the best evidence

(1) S 3 ante as to testimony by signs see note to s 59 post

(2) *Paik Scondir v Akima Bibee* 8 W R 366 (1867)

(3) *Rance Surut v Rajender Kishore* 9 W R 125 (1868) but see *Goluck Chunder v Rajah Sreemurd* W R (1864) 135

(4) *Goluck Kishore v Nund Mohun* 2 W R 394 (1869)

(5) *Deo Singh v Doorga Pershad* 12 W R 348 (1872)

(6) *Sheo Suhaye v Goodur Roy* 8 W R 128 (1867) *Thakoor Deen v Nowab*

Sund 8 W R 341 (1867) *Maharajah Gobind v Rajah Anund* 5 W R Cr 79 (1866)

(7) *Meherban Khan v Mukhoob Khan* 7 W R 462 (1867)

(8) *Molison Ahmed v Sayyid Muham* mad 1 Mad H C R 92 (1862)

(9) *Kanpikaribavappa v Somasu*

muddiram 1 Mad H C R 183 (1863)

Purnima Choudhram v Nittanand Shah B L R Sup Vol F B 3 (1863)

(10) *Ramarada usar Aiyar v Raja* Bhattar 2 Mad H C R 412 (1865)

Gunan Gullubhai v Sorabji Barjori 1 Bom H C R 11 (1863) *Dalip Singh v*

Durga Prasad 1 A 442 (1877) [even though there be a written receipt not produced] see s 91 ill (c) post

(11) *Girdharee Lall v Modho Roy* 18 W R 323 (1872)

(12) In the matter of *Goomance* 17 W R Cr 59 60 (1872)

(13) *Mussumat Imam v Hurgood* Ghose 4 Moo I A 403 407 (1848)

s c 7 W R P C 67 *Ekhauri Singi v* Hiralal Seal 2 B L R P C 4 (1868),

s c 11 W R P C 24

(14) *Meer Usdoolah v Beeby Inaman* 1 Moo I A 19 42 43 (1836)

(15) See s 65 post

of their own contents (1) But the rule is confined to documents Though the non production of an article may afford ground for observations, more or less weighty according to the circumstances, it only goes to the weight, not to the admissibility of the evidence When the question is as to the effect of a written instrument, the instrument itself is primary evidence of its contents, and until it is produced, or the non production is excused no secondary evidence can be received. But there is no case whatever deciding that when the soundness of a horse, or the quality of production of the chattel is primary given till the chattel is produced in

Court for its inspection (2)

(b) Secondly, this Chapter declares that oral evidence must in all cases be direct That is, it must consist of a declaration by the witness that he perceived by his own senses the fact to which he testifies Thus if *A* is charged with the murder of *B* and nine witnesses in support of the charge are as follows (a) *A* came running (b) Some one screamed out at *A* saying "Run" (c) *A* left his house at 11½, vowing that he would be revenged on *B* for pressing so hard for his debt (d) There was blood at the scene of the murder and on *A*'s hands and clothes (e) There were tracks of footsteps from the scene of the murder to *A*'s house, which correspond with *A*'s shoes (f) The wound which *B* received was, in my opinion, of a character to cause death and could not have been inflicted by himself (g) The deceased said "The sword blow inflicted by *A* has killed me" (h) The prisoner said to me, "I killed *B* because I was desperate" (i) The prisoner told me that he was deeply indebted to *B* The prisoner was a man of excellent character

All these various circumstances, statements and opinions could be relevant facts under Part I and the rule now under consideration provides that, in each instance, they must be proved by direct evidence, that is, the fact that *A* came running from the scene of the murder, as alleged, must be proved by a witness, who tells the Court that he himself saw *A* so running, the fact of the screams heard by the second witness must be proved by the second witness telling the Court that he did hear such screams, the fact of *A*, having vowed, shortly before the murder, to be revenged on *B* must be proved by the third witness, who heard the vow, so the blood by the person who saw it, the footsteps by the person who tracked and compared them, the doctor's opinion as to the wound, by the doctor testifying that that is his opinion, the dying man's statements and the prisoner's confession by a person who heard them They must not be proved by the evidence of persons to whom any of the witnesses abovementioned may have told what they heard or saw, or thought

On the other hand, the evidence of the following seven witnesses would be indirect (l) My child came in and said "I have seen *A* running in such a direction" (m) Father said, "I heard *A* at such a time" (n) Father said, "I saw *A* has just left the house, and I saw that they had compared the footsteps and found that they exactly fitted" (o) The doctor said that the man could never cut himself like that (p) Everybody said that there was no more doubt, for the deceased man had identified the prisoner (q) *B*'s wife told me the day before that *A* was heavily indebted to him

(1) *Dismocks, Debi v Roy Luchmisput*, 7 I A 8 (1879)

(2) *R v Francis* 12 Cox C C. 612, 616 per Lord Coleridge C J and as to notice to produce things other than docu

ments see Editor's Note to *Line v Taylor*, 3 F & F 731 at p 733 as to parol evidence of inscriptions on banners etc. see *The King v Hunt* 3 B & Ald. 566 574

must be discarded; and it is most manifest that, however fallible such evidence may be, however carefully to be watched, justice never can be administered in the most important causes without recourse to it"(1) "The ordinary legal and reasonable presumptions of fact must not be lost sight of in the trial of Indian cases, however untrustworthy much of the evidence submitted to these Courts may commonly be, that is, due weight must be given to evidence there as elsewhere, and that evidence in a particular case must not be rejected from a general distrust of Native testimony, nor perjury widely imputed without some grave grounds to support the imputation. Such a rejection, if sanctioned, would virtually submit the decision of the rights of others to the suspicion(2), and not to the deliberate judgment of their appointed Judges, nor must an entire history be thrown aside, because the evidence of some of the witnesses is incredible or untrustworthy"(3) Evidence of witnesses though not independent, but not shaken in cross examination and accepted by the Judge who heard them and saw their demeanour should not be rejected on mere suspicion where the story itself as told by them is not improbable(4) The whole evidence is not to be rejected because part is false. The maxim "*Falsus in uno falsus in omnibus*" must be applied in this country with great discretion(5), for it not uncommonly happens in this country that falsehood and fabrication are employed to support a just cause(6) In the words of the Calcutta High Court "The Court will bear in mind that the use of fabricated written evidence by a party, however clearly established, does not re-

under the name of a presumption. Forgery or fraud in some material part of the evidence if it is shown to be the contrivance of a party to the proceedings, may afford a fair presumption against the whole of the evidence adduced by that party, or at least against such portion of that evidence as tends to the

(1) *Bunwarce Lal v Maharajah Het narin* 7 Moo I A 167 (1858) 4 W R P C 128

(2) Suspicion is not to be substituted for evidence see *Sreeman Chunder v Gopal Chunder* 11 Moo I A 28 (1866) *Fac-Bux v Fakiruddin Mahomed* 9 B L R 458 (1871) *Kali Chandra v Shib chandra Bhaduri* 6 B L R 501 (1870) *Olpherts v Mahabir Pershad* 10 I A 30 (1887) *R v Ram Saran* 8 A 315 (1885) and cases cited next note

(3) *Ramamani Ammal v Kalanthalai Natheer* 14 Moo I A 354 355 (1871) cited in *Hanmantrao v Secretary of State* 25 B 298 (1900) and see *Nikristo Deb v Bir Clandra* 3 B L R P C 13 (1869) s c 12 W R P C 21

(4) *Vagbhan v Ahmaf Husan* 8 C W N 241 (1903) s c 26 A 108 116 In this case it was also held that the description of a witness in the heading of a deposition taken down in Court is no part of the evidence given by the witness on solemn affirmation s c 6 Bora L R 233

(5) See observations in *Norton Ex* cited in *State* 25 B 297 (1900)

(6) *Rance Surnomoyee v Maharajah Sultteschunder* 10 Moo I A 149 150

(1864) *Hise v Sunduloonissa Choud rance* 11 Moo I A 183 (1867) 7 W R P C 13 ["In a native case it is not uncommon to find a true case placed on a false foundation and supported in part by false evidence and it is not always a safe conclusion that a case is false and dishonest in which such falsities are found"] *Sevaji Vijaya v Chinna Nayana* 10 Moo I A 161-163 (1864) [If a party put in evidence in support of his title documents prove to be forged but the other evidence adduced by him is not impeached the Court in rejecting the forged documents will take the unimpeached evidence into consideration and if satisfied adjudicate thereon] *Pattabhiram v Venkatarao Naichen* 7 B L R 147 143 (1871) *Goribolla Kacee v Gooroodas Poo* 2 W R Act N 99 (1865) *Bengal Indigo Co v Tarince pershad Ghose* 3 W R Act N 149 (1865) *Kulsoo Mahomed v Hurdeb Dass*, 19 W R 107 (1873) See also *Koonjo Beharce v Poy Mothooranath* 1 W R, 155 (1864) in which case it was held that the Judges should not have dismissed the whole claim on the ground that great part of plaintiff's claim being shown to be untrue none of it could be reliable

same conclusion with the fabricated evidence. It may, perhaps, also have the further effect of gaining a more ready admission for the evidence of his opponent. But the presumption should not be pressed too far, especially in this country, where it happens, not uncommonly that, falsehood and fabrication are employed to support a just cause"(1) If a part of the evidence of a witness is disbelieved, other evidence coming from the same quarter must be viewed warily, but that does not exonerate the Court from weighing whatever evidence has actually been tendered and the mode in which it has been met (2) In *Meer Usdoolah v Beeby Imamam*(3) Baron Parke said —“There are some other facts which are established beyond all possibility of doubt, and there is no better criterion of the truth, no safer rule for investigating cases of conflicting evidence, where perjury and fraud must exist on the one side or the other, than to consider what facts are beyond dispute, and to examine which of the two cases best accords with these facts, according to the ordinary course of human affairs and the usual habits of life” And in another case the Privy Council said “In examining evidence, with a view to test whether several witnesses who bear testimony to the same facts are worthy of credit, it is important to see whether they give their evidence in the same words or whether they substantially agree, not indeed concurring in all the minute particulars of what passed but with that agreement in substance and that variation in unimportant details which are usually found in witnesses intending to speak the truth and not tutored to tell a particular story”(4) In the undermentioned case(5) the Court observed with regard to discrepancies in evidence as follows —“No doubt it may be contended that if these witnesses were tutored ones, care would have been taken to see that they should tell the same story. But care is not always taken or effectually taken, in such cases and discrepancies are not less infirmative of testimony because a greater sagacity on the part of the witnesses would have avoided them”

In short, oral evidence must be considered in conjunction with the documentary proofs on the record, and the probabilities arising from all the surrounding circumstances of the case, and the only satisfactory mode of dealing with a disputed point of fact is to consider the evidence, direct or presumptive, be which is nowhere more necessary than in *se* is looked upon with so much distrust (6)

“The consideration of a case,” observed their Lordships in the Privy Council in the case of *Maharajah Rajendro v Sheopursun Misser*(7), no evidence can seldom be satisfactory, unless all the presumptions for and against

on the course
in or defence,
per se might
more neces

sary than in the Courts of Justice in this country. We cannot shut our eyes to the melancholy fact that the average value of oral evidence in this country

(1) *Goriboolia Kasee v Gooroodass Roy* 2 W R Act X 99 (1865)

(2) *Rameswar Koer v Bharat Pershad* 4 C W N 18 (1899) P C. as to disbelieve of one statement and setting up alternative case see *Caspersz v Kedernath Sarbadhikari* 5 C W N 858 (1901)

(3) 1 Moo I A 19 44 (1836), s c 5 W R P C, 26

(4) *Nana Naran v Hurce Puntu* Marshall's Rep 436 (1862) [analysis of conflicting evidence in a suit setting up a will] In *Haranund Roy v Ram Gopal*

4 C W N 430 (1899) the Privy Council speak of small differences quite consistent with the truthfulness of the witnesses who it will be remembered were speaking of conversations some 12 or 14 years after they took place and see remarks at p 431 ib

(5) *R v Kalu Patil* 11 Bom H C R 146 (1874)

(6) *Rajah Leelanund v Mussanunt Basieeroomissa* 16 W R 102 (1871) per Dwarkanath Mitter J

(7) 10 Moo I A 453

is exceedingly low, and although in dealing with such evidence we are not to start with any presumption of perjury, we cannot possibly take too much care to guard against undue credulity. There is hardly a case involving a disputed question of fact, in which there is not a conflict of testimony, one set of witnesses swearing point blank to a particular state of facts, the other swearing with equal distinctness to a state of facts diametrically opposed to it (1). If therefore we were to form our conclusions upon the bare depositions of the witnesses, without reference to the conduct of the parties and the presumptions and probabilities legitimately arising from the record, all hope of success in discovering the truth must be at an end" (2).

In the case last mentioned the same learned Judge observed as follows (3) —

"It is a truth confirmed by all experience, that in the great majority of cases fraud is not capable of being established by positive and express proofs. It is by its very nature secret in its movements and if those whose duty it is to investigate questions of fraud were to insist upon direct proof in every case, the ends of justice would be constantly, if not invariably, defeated. We do not mean to say that fraud can be established by any less proof or by any different kind of proof from that which is required to establish any other disputed question of fact, or that circumstances of mere suspicion which lead to no certain result should be taken as sufficient proof of fraud, or that fraud should be presumed but what we mean to say is that in the evidence is our only resource in dealing with evidence is sufficient to overcome the natural presumption of honesty and fair dealing and to satisfy a reasonable mind of the existence of fraud by raising a counter-presumption, there is no reason whatever why we should not act upon it.

If a Judge in dealing with a question of fact forms his conclusion upon a portion of the evidence before him, excluding the other portion under an erroneous impression that it is not legal evidence but conjecture, there can be no doubt that the investigation is erroneous in law, and that the error thus com-

law in the investigation of the case which goes to vitiate his whole decision on the merits."

59. All facts, except the contents of documents, may be proved by oral evidence

Principle.—See Introduction, *ante*

s. 3 ("Fact")

s. 3 (Oral evidence)

s. 3 ("Document")

ss. 61—66 (Proof of content of documents)

Proof of facts by oral evidence

COMMENTARY

The distinction between primary and secondary evidence in the Act applies to documents only. All other facts may be proved by oral evidence

Proof of facts by oral evidence

(1) In some cases effect can be given to testimony without discrediting witnesses who have given opposing testimony. See *Mothoor Mohun v. Bank of Bengal* 1 C. L. R. 514 [in which case it was argued that it was impossible to find in favour of plaintiff without impeaching the honesty

and veracity of two European gentlemen of position the secretary and manager of the Bengal Bank respectively]

(2) *Mallura Pandey v. Ram Rucha* 3 B. L. R. A. C. J. 112 (1869) per Mitter J.

(3) *Ib* p. 110

See Introduction, *ante* where this section is discussed. It is not very happily worded. Contents of documents may be proved by oral evidence under certain circumstances, that is to say when such evidence of their contents is admissible as secondary evidence (1). Where a fact may be proved by oral evidence it is not necessary that the statement of the witness should be oral. Any method of communicating thought which the circumstances of the case or the physical condition of the witness demand may, in the discretion of the Court, be employed. Thus a deaf mute may testify by signs, by writing or through an interpreter. So where a dying woman, conscious, but without power of articulation, was asked whether the defendant was her assailant and if so to squeeze the hand of the questioner, the question and the fact of her affirmative pressure were held admissible in evidence (2).

Oral evidence must be direct

60. Oral evidence must, in all cases whatever, be direct that is to say:

if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it,

if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it,

if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner, (3)

if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds (4)

Provided that the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held may be proved by the production of such treatises if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable.

Provided also that, if oral evidence refers to the existence or conditions of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection.

Principle—This is the best evidence. Derivative or second hand evidence is excluded owing to its infirmity as compared with its original source (5). See Introduction *ante* and Notes *post*.

s 3 (*Oral evidence*) . ss 45 51 (*Opinion when relevant*)
s 3 (*Fact*) s 51 (*Grounds of opinion*)

(1) Norton Ev 239 see s 63 cl (5) *post*

(2) Best Ev p 109 see *R v Abdullah* 7 A 385 (F B) (1885) cited at p 318 note 1 *ante*

(3) See *Ash Tosh Das v R* 23 Cr L J 289

(4) *Oriental Government & Co v Narasimha Chari* 25 M 208 209 (1901)

(5) Best Ev § 402 *et seq* Taylor Ev § 567 *et seq* Powell Ev 9th Ed 305 and see Notes *post*

s. 3 ("Evidence")

s. 45 (*Opinions of experts*)

s. 3 ("Court")

s. 165 (*Judge's power to put question or order production*)

s. 3 ("Document")

Steph Introd, 161—163, 170, and *passim* Steph Dig, Art 14, pp 173—176, Taylor, Ev, §§ 367—606, Field, Fr, 6th Ed, 224, 225, 123, 124, Best, Ev, § 492 *et seq* and pp 444—453, Powell, Ev, 9th Ed, 305, Wills, Ev, Index, *sub voc* 'Hearsay', Norton, Ev, 23, 174, 237, 238, Markby, Ev, 52, 53, 19, Wigmore, Ev, §§ 1361—1363, Index *sub voc* 'Hearsay'

COMMENTARY

This section enacts the general rule against the admission of hearsay. Rule against hearsay. "Hearsay evidence has been defined to be, and in its legal sense denotes, 'all the evidence which does not derive its value solely from the credit given to the witness himself, but which rests also in part on the veracity and competence of some other person' (1) Another definition is 'the evidence not of what the witness knows himself but of what he has heard from others' It has also been defined as 'A statement made by a witness of what has been said and declared out of Court by a person not a party to the suit' Bentham's definition is 'The supposed oral testimony transmitted through oral supposed orally delivered evidence of a supposed extrajudicially narrating witness judicially delivered *in id voce* by the judicially deposing witness' It must be borne in mind that the term 'hearsay' is not only used with reference to what is done or written, but also to what is spoken The general rule, with regard to hearsay evidence is, that it is not admissible, and within the scope of this rule are included all statements, oral or written the probative force of which depends either wholly or in part on the credit of an unexamined person, notwithstanding that such statements may possess an independent evidentiary value derived from the circumstances under which they were made and also where no better evidence of the facts stated is to be obtained The fact, therefore that a statement was made by a person not called as a witness, and the fact that a statement is contained in any book, document, or record whatever, proof of which is not admissible on other grounds, are respectively deemed to be irrelevant to the truth of the matter stated" (2) This is the general rule, but there are several exceptions to it as will be seen from a consideration of sections 32, 33, *ante* The late Mr Justice Stephen asserted that the phrase 'hearsay is no evidence' had many meanings its common and most important meaning, he said, might be expressed by saying that the connection between events and reports that they have happened is generally so remote that it is expedient to regard the existence of the reports as irrelevant to the concurrence of the events except in certain cases Another meaning is that it expresses the same thing from a different point of view, and is subject to no exceptions whatever It asserts that, whatever may be the relation of a fact to be proved to the fact in issue it must, if proved by oral evidence, be proved by direct evidence, *e.g.*, if it were to be proved that *A*, who died 50 years ago, said that he had heard from his father, *B*, who died 100 years ago that *A*'s grandfather *C*, had told *B* that *D*, *C*'s elder brother, died without issue, *A*'s statement must be proved by some one who, with his own ears heard him make it If (as in the case of slander) the speaking of the words was the very point in issue, they must be proved in exactly the same way, *i.e.* the fact of their utterance by the defendant must be proved to be some person hearing them used. Evidence given as to character or general opinion is not an exception to this rule, for, when a man swears that another has a good character, he means that

(1) Taylor Ev § 570 As to the history of the Rule see Wigmore Ev, § 1364 Down to the middle of the 17th

century hearsay statements were constantly received

(2) Law Times p 4 May 2nd, 1896

See Introduction *ante* where this section is discussed. It is not very happy worded. Contents of documents may be proved by oral evidence under certain circumstances that is to say when such evidence of their contents is admissible as secondary evidence (1). Where a fact may be proved by oral evidence it is not necessary that the statement of the witness should be oral. A method of communicating thought which the circumstances of the case or the physical condition of the witness demand may in the discretion of the Court be employed. Thus a deaf mute may testify by signs by writing or through an interpreter. So where a dying woman conscious but without power of articulation was asked whether the defendant was her assailant and if so squeeze the hand of the questioner the question and the fact of her affirmative pressure were held admissible in evidence (2).

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if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it,

if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it,

if it refers to a fact which could be perceived by any other sense or in any other manner it must be the evidence of a witness who says he perceived it by that sense or in that manner, (3)

if it refers to an opinion or to the grounds on which the opinion is held, it must be the evidence of the person who holds that opinion on those grounds (4)

Provided that the opinions of experts expressed in any treatise commonly offered for sale and the grounds on which such opinions are held may be proved by the production of such treatises if the author is dead or cannot be found, or has become incapable of giving evidence or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable

Provided also that, if oral evidence refers to the existence or conditions of any material thing other than a document the Court may, if it thinks fit require the production of such material thing for its inspection

Principle—This is the best evidence. Derivative or second hand evidence is excluded owing to its infirmity as compared with its original source (a) See Introduction *ante* and Notes *post*

3 (Oral evidence) ss 45—51 (Op on when relevant)
3 (Fact) s 51 (Grounds of opinion)

(1) Norton Ev 239 see s 63 cl (5)
post

(2) Best Ev p 109 see *R v Abdullah*
7 A 385 (F B) (1885) cited at p 318
note 1 *ante*

(3) See *Ash Tosh Das v R* 23 Cr L
J 299

(4) *Oriental Government & Company*
v Narasimha Chari 25 M 208 209
(1901)

(5) Best Ev § 402 *et seq* Taylor
Ev § 567 *et seq* Powell Ev 9th Ed
305 and see Notes *post*

- s. 3 ("Evidence")
 s. 3 ("Court")
 s. 3 ("Document")

- s. 45 (*Opinions of experts*)
 s. 165 (*Judge's power to put question or order production*)

Steph Introd, 161—163, 170, and *passim* Steph Dig, Art 14, pp 173—176, Taylor Ev, §§ 567—606, Field Ev, 6th Ed, 224, 225, 123 124, Best, Ev, § 492 *et seq* and pp 444—453, Powell Ev, 9th Ed, 305, Wills, Ev, Index, *sub voc* 'Hearsay', Norton, Ev, 23, 174, 237, 238, Markby, Ev, 52, 53 19, Wigmore, Ev, §§ 1361—1363, Index *sub voc* 'Hearsay'

COMMENTARY

This section enacts the general rule against the admission of hearsay. Rule against hearsay.
 "Hearsay evidence has been defined to be, and in its legal sense denotes, 'all the evidence which does not derive its value solely from the credit given to the witness himself, but which rests also in part on the veracity and competence of some other person' (1) Another definition is 'the evidence not of what the witness knows himself but of what he has heard from others' It has also been defined as 'A statement made by a witness of what has been said and declared out of Court by a person not a party to the suit' Bentham's definition is 'The supposed oral testimony transmitted through oral supposed orally delivered evidence of a supposed extrajudicially narrating witness judicially delivered *in* *to*ce by the judicially deposing witness' It must be borne in mind that the term 'hearsay' is not only used with reference to what is done or written, but also to what is spoken The general rule, with regard to hearsay evidence is, that it is not admissible, and within the scope of this rule are included all statements, oral or written the probative force of which depends either wholly or in part on the credit of an unexamined person notwithstanding that such statements may possess an independent evidentiary value derived from the circumstances under which they were made and also where no better evidence of the facts stated is to be obtained The fact therefore that a statement was made by a person not called as a witness, and the fact that a statement is contained in any book, document or record whatever, proof of which is not admissible on other grounds are respectively deemed to be irrelevant to the truth of the matter stated' (2) This is the general rule, but there are several exceptions to it as will be seen from a consideration of sections 32 33, *ante* The late Mr Justice Stephen asserted that the phrase 'hearsay is no evidence' had many meanings its common and most important meaning he said might be expressed by saying that the connection between events and reports that they have happened is generally so remote that it is expedient to regard the existence of the reports as irrelevant to the concurrence of the events except in certain cases Another meaning is that it expresses the same thing from a different point of view and is subject to no exceptions whatever It asserts that whatever may be the relation of a fact to be proved to the fact in issue, it must, if proved by oral evidence be proved by direct evidence, *e g*, if it were to be proved that A who died 50 years ago said that he had heard from his father, B, who died 100 years ago that A's grandfather C, had told B that D, C's elder brother, died without issue A's statement must be proved by some one who with his own ears heard him make it If (as in the case of slander) the speaking of the words was the very point in issue, they must be proved in exactly the same way *i e* the fact of their utterance by the defendant must be proved to by some person hearing them used Evidence given as to character or general opinion is not in exception to this rule for, when a man swears that another has a good character he means that

(1) Taylor Ev § 570 As to the history of the Rule see Wigmore Ev § 1364 Down to the middle of the 17th

century hearsay statements were constantly received

(2) Law Times p 4 May 2nd 1896

he has heard many people speak well of him, though he does not particularly recollect what people, or recollect all that they said

The grounds for the exclusion of hearsay evidence are these "(a) the irresponsibility of the original declarants, for the evidence is not given on oath or under personal responsibility, (b) it cannot be tested by cross examination, (c) it supposes some better testimony and its reception encourages the substitution of weaker for stronger proofs; (d) its tendency to protract legal investigations to an embarrassing and dangerous length, (e) its intrinsic weakness, (f) its incompetency to satisfy the mind as to the existence of the fact, for truth depreciates in the process of repetition 'It is matter of common experience that statements in common conversation are made so lightly and are so liable to be misunderstood or misrepresented that they cannot be depended upon for any important purpose unless they are made under special circumstances' (1), and (g) the opportunities for fraud its admission would open' (2) A statement which "if made by a witness" would be perfectly relevant is, when so made, excluded because it is wanting in the sanction and the tests which apply to sworn testimony and admitted only when in respect of the persons making it or of the circumstances under which it was made, there is some security for its accuracy, which countervails the absence of those safe guards (3) The exceptional cases in which such statements are admitted are dealt with in ss 17-39, ante (4) Oral or written statements made by persons not called as witnesses, are generally speaking, and subject to the exceptions mentioned, not receivable to prove the truth of the matters stated that is such a statement is inadmissible as hearsay when it is offered as proof of its own truth But statements by non witnesses may be original evidence, and as such admissible, that is, where the making of the statement and not its accuracy is the material point (5) The test whether a statement belongs to one class or the other is the purpose for which it is tendered

(1) Steph Intro 161

(2) Law Times p 4 May 2nd 1896
See Steph Dig pp 173-176 Powell Ev
9th Ed 305 Phipson Ev 5th Ed 206-
212 Best Ev § 494 p 444 *et seq*
where the principle of the hearsay rule is
discussed Gresley Ev 304 Phillips
Ev 142

(3) Phipson Ev 5th Ed 208 Whar-
ton Ev 170-176 Best Ev §§ 492-
495 Steph Dig Art 14 & Note viii
Taylor Ev §§ 567-606 Powell Ev
9th Ed 305 Phillips Ev, 143, *Doe d*
Wright v Tatham 7 A & E 313 408

(4) See notes to these sections ss 17-
31 (admissions and confessions) 32-33
(statements by persons who cannot be
called as witnesses) 34-38 (statements
made under special circumstances) To
these may be added statements made in
the presence of a party See s 8

(5) *Eg* statements which are part of
the *res gestæ* whether as actually con-
stituting a fact in issue (*eg* a libel) or
accompanying one (ss 5 8) statements
amounting to acts of ownership as leases
licenses and grants (s 13) statements
which corroborate or contradict the testi-
mony of witnesses (ss 155 157 158)
Enquiries made of and answers received
from parties (themselves not called)
tendered to the jury to show reasonable
search for a lost document or an absent

person are admissible (*R v Brantree*
1 E & E 51 *Watt v Bateman* 7 C &
P 586 see notes to s 33 In some
cases what is called a verbal fact (There
is a category of cases in which a man's
words are his acts sometimes indeed the
most important acts of his life *per Erle*
J Shilling v Accidental Death Co post)
may be admissible as original evidence
although the particulars of it may be ex-
cluded as hearsay *eg* the fact that a
person made a communication to another
in consequence of which an act was done
(*R v Wilkins* 4 Cox 92 *R v Ham-*
right 13 Cox 171) or consulted him on
a given subject (*Shilling v Accidental*
Death Co 4 Jur N S 244) see s 8
and *Cunningham Ev* 94 or complained
of an injury (see s 8 *illustr*) (j) (k) in
this case however according to Ind an
law the particulars are receivable or had
a dispute prior to the publication of a
libel (s 9 *illustr*) (b) see Phipson Ev
5th Ed 207 Hearsay in its legal sense
is confined to that kind of evidence
(whether spoken or written) which does
not derive its credibility solely from the
credit due to the witness himself but rests
also in part on the veracity and competency
of some other person from whom the
witness may have received his information
Phillips Ev 143

The intention of this section is to take care that whatever is offered as evidence shall itself sustain the character of evidence. It must be immediate. It may not be mediate or delivered through a medium, second hand, or to use the technical expression *hearsay* (1). *A* who saw, heard, &c., must be produced. The fact cannot be proved through the medium of *B* who did not himself see, hear, &c., but is prepared to swear that *A* told him he had seen, heard, &c. So with respect to the fourth case, opinion evidence, when such is admissible. This section necessitates the production of the witness who holds the opinion, it excludes the evidence of any witness who can merely say that he has heard another express such an opinion. It is admissible evidence for a living witness to state his opinion on the existence of a family custom and to

But it must be the expression of independent opinion based on hearsay and not mere repetition of hearsay (2). The same rule of excluding hearsay—second hand, or mediate—evidence prevails with regard to circumstantial evidence as to direct evidence. Circumstantial evidence must be established by direct evidence within the meaning of this section, namely by witnesses who themselves saw, &c., the facts to which they depose and which are the material for inference respecting the existence of the fact in issue (3). This section provides that when it (i.e., the oral evidence) refers to a fact which could be seen, it (i.e., the oral evidence) must be the evidence of a witness who says he saw it. This last 'it' is somewhat indefinite but I think that this 'it' has reference to the fact previously spoken of, and I think the fact previously spoken of is the fact deposed to, and therefore not always the fact which it is ultimately intended to prove. In other words, I do not think it was intended by this section to exclude circumstantial evidence of things which could be seen, heard, and felt, though the wording of the section is undoubtedly ambiguous, and at first sight might appear to have that meaning' (4). In the undermentioned case (5) the Privy Council held that the evidence of certain witnesses was hearsay and, to use the language of the Evidence Act, not relevant, and should be disregarded. Where evidence such as hearsay is improperly admitted, the question for the Judicial Committee is whether, rejecting that evidence, enough remains to support the finding (6).

The admissions of a person whose position in relation to property in suit it is necessary for one party to prove against another are in the nature of

(1) In his notes on this Act Markby J. says that the first four paragraphs of this section have been supposed to have been intended to exclude that kind of evidence which is called hearsay but that for the reason he states it is difficult to believe this and moreover hearsay would not be excluded by the language here used. For statements are facts and are so treated in ss 17, 29 *passim*. If therefore *A* a witness had been told something by *B* and *A* were asked what *B* had told him the evidence of *A* would refer to a fact which would be heard and *A* is a witness who says he heard it this section would therefore not exclude it. He states that the following universally recognised rule has been in fact omitted from the Act, *viz*—No statement as to the existence or non-existence of a fact which is being enquired into made otherwise than by a witness whilst under examination in Court can be

used as evidence. Markby Ev 52, 53, 19.

(2) *Ganuradhwaja Prosad v Supern dhwaja Prosad* 23 A 37, 51, 52 (1900).

(3) Norton Ev 240. The proof of the circumstances themselves must be direct. That is the circumstances cannot be proved by hearsay. Thus if the circumstance offered in evidence is the correspondence of the prisoner's shoes with certain marks in mud or snow the party who has made comparison and measurement must himself be called, not a third party who heard from the measurer of the correspondence. Ib 82.

(4) *Neel Kanto v Juggobondho Ghose*, 12 B L R App 18, 19 (1874) per Markby J.

(5) *Lala Naran v Lala Ramanuj* 2 C W N 193 (1897).

(6) *Mohur Singh v Ghuriba* 6 B L R 495 (1870).

original evidence and not hearsay cited as a witness (1) For the not apply to those declarations t which he himself has made Hearsay evidence amounting to evidence of general repute is admissible for the purpose of proceedings under Chapter VIII of the Criminal Procedure Code (2) Under the provisions of section 165, *post*, the Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time of any witness, or of parties about anv facts relevant or irrelevant

Hearsay in
cross-exa-
mination

The evidence offered in a Court of Justice is of two kinds (a) substantive evidence or evidence of facts necessary and relevant to the determination of the issue, and (b) evidence of facts affecting the trustworthiness of the *media* by which the former evidence is presented to the Court, namely, evidence touching the credibility of the witnesses examined This credibility is the subject of cross examination Hearsay is always inadmissible as substantive evidence whether that evidence be elicited in examination or cross examination But hearsay may be admissible in cross examination in so far as it touches the question of the credibility of the witness examined (3) The rule against hearsay applies in strictness to the proof of the relevant facts in the course of cross examination just as much as to their proof by examination in chief, that is to say a party is not entitled to prove his case merely by eliciting from his opponent's witness in cross examination not his own knowledge on the subject, but what he has heard others say about it, but not verified for himself The application of the rule is however, obscured by the fact that the opponent is entitled to test the witness's own conduct and consistency and for that purpose to interrogate him as to statements made to him by other persons so that the party by whom the witness was called is not entitled to exclude the question but only to comment to the jury on the effect and value of the witness's answer Similar considerations apply with even greater force to the witness's admissions in cross examination of his own previous statements about the relevant facts (4)

Provisos

The first proviso which makes an exception to the general rule analogous to the exceptions made in section 32 should be read with section 45, *ante*, and is an alteration of the rule of English law, which does not admit this evidence (5) The treatise in order to be admissible, must be one commonly offered for sale, and the author of it must be not producible within the meaning of the section Strictly the burden of proving these facts will be upon the person who desires to give such treatise in evidence (6) Section 45, *ante*, refers to the evidence of living witnesses given in Court This section makes scientific treatises and the like commonly offered for sale, evidence, if the author be dead, or under any of the circumstances specified in section 32, which render his production impossible or impracticable The Court has thus referred to Taylor's Medical Jurisprudence (7) In a case in the Madras High Court it was held that under this section the Court could consider and act upon the opinions of experts (as contained in treatises), when dealing with the question whether a child could have been begotten at a certain date (8)

(1) *Ali Moidin v Elayachanidathil* 5 M 239 (1882)

(2) *R v Raaja Foolchand* 6 Bom. L R 34 (1903)

(3) See *Ganouri Lal v R* 16 C 210 211 215 (1889) This case is however no authority for the contention that such evidence (hearsay) is admissible in cross examination except under the provisions of s 146 *post* Field Ev 381, *ib*, 6th Ed 224

(4) *Wills*, Ev 2nd Ed, 146, 147, *see*

Notes to s 137 *post*

(5) Field Ev 6th Ed 224 225 Norton Ev 200 according to English Law scientific treatises are no evidence whether the author be producible or not *Coller v Simpson* 5 C & P 74

(6) S 104 *post*

(7) *Hatim v R* 12 C L R 86 87, 88 (1882) followed in *Hurry Churn v R* 10 C 140 142 (1883)

(8) *John Howe v Charlotte Howe* 38 M 466 (1915)

In regard to foreign law, section 38, *ante*, makes certain books admissible which would not be probably regarded as treatises under this section. And it would be difficult to say that under the words of section 57 any books on science or art could not be consulted by the Judge without any restriction as to whether any person could be called or not (1). In respect of the second proviso it has already been observed (2) that the production of a chattel is not primary evidence of it. A witness may, therefore, without infringing the rule relating to direct evidence, give evidence with reference to the existence or condition of any material thing other than a document, without that material thing being produced in Court. This proviso however, permits the Court, if it thinks fit, to require the production of such material thing for its inspection. Under section 165 also the Judge may, in order to discover or to obtain proper proof of relevant facts direct the production of any document or thing.

(1) Markby *Ev*, 53(2) *v ante* p 485

-continued by

reference to the handwriting to the seal to the stamp⁽⁹⁾ the description of

- (1) S 3 *ante* Best Ev § 123
 (2) *v* *b* and Best Ev p 13 where it is suggested that the definition of document might with advantage be narrowed in certain instances to the single case of writing as a means of conveying thought. See also *ib* § 215 *et seq* as to the difference between actual and symbolical representations *eg* between writings and models or drawings
 (3) *v* *ante* pp 104—110
 (4) *v* *ante* s 57 and pp 113—114
 (5) Best Ev p 109
 (6) *ib* § 216
 (7) Best Ev § 60. The force of written proofs consists in this that men have agreed together to preserve by writing the recollection of things past and of which they were desirous to establish the remembrance either as rules for their

guidance or to have therein a lasting proof of the truth of what they wrote. Denat cited *ib* § 21 and see observations of Best, C J in *Stratker v Barr* 5 Begg. 151

(8) *Per* Best, C J in *Stratker v Barr* *supra*, especially may this be said to be the case in this country see as to this the remarks of the Judicial Committee in the cases cited in introduction to Chapter IV

(9) *Bunwarree Lal v Mahara J Hel naran* 7 Moo I A 156 (1858). In Field Ev p 65 note the author says "Some years ago the author discovered a forgery in a case which came before him in appeal, by examining the stamp. A conveyance purporting to have been executed in 1855 was engrossed on a stamp-paper bearing the Royal Arms of England with V R.

the paper, the alleged habits of him who is said to have written it(1), and by a comparison of the circumstance indicated by the document with those which are proved to have actually existed at the date of its execution. Documentary evidence is especially valuable where there is a conflict of oral testimony, as a guide to show on which side the truth lies (2). Obviously the value of such evidence might be destroyed if the rule which required that the best evidence shall be given did not necessitate the production of the document itself or an accounting for its absence to the satisfaction of the Judge (3). "One single principle runs through all the propositions relating to documentary evidence. It is that the very object for which writing is used is to perpetuate the memory of what is written down and so to furnish permanent proof of it. In order that full effect may be given to this, two things are necessary, namely, that the document itself should, whenever it is possible be put before the Judge for his inspection(4) and that if it purports to be a final settlement of a previous negotiation as in the case of a written contract, it shall be treated as final and shall not be varied by word of mouth (5). If the first of these rules were not observed the benefit of writing would be lost. There is no use in writing a thing down unless the writing is read. If the second rule were not observed people would never know when a question was settled as they would be able to play fast and loose with their writings' (6). The Act therefore requires that documents must be proved by primary evidence (that is the document itself produced for the inspection of the Court)(7) except in certain cases specifically mentioned by the Act (8). It is primarily for the trial Court to decide whether

The appellate
of a lost deed
her the general

and a crown above. This paper was not manufactured till 1859 when Her Majesty assumed the Government of India. The paper in use previously bore the arms of the East India Company with the letters

—The forger had partly erased the let
EC

ters V R and the Crown but the minute device on the arms and the difference of the motto wholly escaped him. The author has also more than once detected forgeries by the presence or absence of the distinguishing mark impressed on stamps issued before the mutiny see Act XIX of 1838. It would be very easy to mark all stamp paper with the date of issue by means of an instrument such as is used to mark railway tickets and the author is convinced that this simple contrivance would do much to stop forgery by facilitating detection. In a large number of forgeries it is necessary to antedate and the difficulty of procuring a stamp with a suitable date could be increased if stamp vendors were made to account more strictly for their sales than is at present the practice. The check of having the purchaser's name endorsed on the stamp is useless as fictitious names are used. The author has detected more than one stamp vendor having stamp paper ready endorsed with such fictitious names. Too great reliance should not be placed upon an apparently ancient document by reason

of the genuineness of the stamp for as above stated it is well known that blank stamped papers may be obtained which extend for very many years past

(1) *Bunwaree Lal v Maharajah Het narin* supra 156 157

(2) *v ante* Introduct to ch iv

(3) See s 64 post. This rule as applied to documents is as old as any part of the Common Law of England. Taylor Ev § 396 and cases there cited. Best Ev p 15. The best evidence of which the subject is capable ought to be produced or its absence reasonably accounted for or explained before secondary or inferior evidence is received. *Ramakshini Ammal v Sivanatha Perumal* 14 Moo I A 388 (1872) if the best evidence be kept back it raises a suspicion that if produced it would falsify the secondary evidence on which the party has rested his case. *Strother v Barr* 5 Bing 151

(4) See s 64 post

(5) See ss 91 92 post

(6) Steph Introduct 171 1 2

(7) S 62 post

(8) Ss 64—66 post

(9) *Rameswar Lal Bhagat v Raj Kumar Gurusar* 5 Pat L W 316 45 I C 888 as where all reasonable steps have been taken to produce the document. *Atal Behary Keora v Lal Mohan Singha Roy* 49 I C 507 and search is fruitless, *Jiban Lal Mukherji v Manimala Dassi*, 49 I C 1006

rule is that even oral admissions as to the contents of a document are not relevant unless secondary evidence is admissible (1). In dealing, therefore, with documentary evidence, the substantial principles, on which the authenticity and value of evidence rest should be observed (2), thus secondary evidence should not be accepted without a sufficient reason being given for the non production of the original (3), nor should documents be considered as proved because they have not been denied by the opposite side (4), and the use to which it can legitimately be put should be kept in view,—thus a document may be relevant to affect a person with knowledge of its contents, whether true or false without being relevant to prove the truth of its contents (5). And notwithstanding the general value of documentary evidence regard must be had to the habits and customs of the people of this country, and their well known propensity to forge any instrument which they might deem necessary for their interest and the extreme facility with which false evidence can be procured from witnesses. Under such circumstances the probability or improbability (6) of the transaction forms a most important consideration in ascertaining the truth of any transaction relied upon (7). The use of fabricated written evidence by a party, however clearly established, does not relieve the Court from the duty of examining the whole of the evidence adduced on both sides and of deciding according to the truth of the matters in issue (8). The presumption against the party using such evidence must not be pressed too far especially in this country, where it happens not uncommonly, that falsehood and fabrication are employed to support a just cause (9). In addition to guarding against fraud care must be taken that the documentary evidence is in itself admissible, lest documents which are not strictly evidence at all should be used to prop up oral evidence too weak to be relied on (10).

Documents are of two kinds public and private. Under the former come Acts of the Legislature judgments and acts of Courts. Proclamations public books, and the like. They are also divided into 'judicial', and 'not judicial', and also into "writings of record" and "writings not of record" (11).

(1) See notes to s 63 but this rule will not apply to admissions made under s 58 ante see *Sheikh Ibrahim v Parvata* 8 Bom H C R 163 [A party's admission as to the contents of a document not made in the pleadings but in a deposition is secondary evidence and cannot supply the place of the document itself].

(2) *Ramalakshmi Ammal v Sivanatha Perumal* 14 Moo I A 588 (1872) see the judicial criticisms on the laxity of documentary evidence prior to the passing of this Act in *Bunaree Lal v Maharajah Heinnara* 7 Moo I A 148 168 (1858) s c 4 W R P C 128 *Unide Rajah v Pemmasamy Venkatadry* 7 Moo I A 137 (1858) see p 128 ante. The provisions of the Act must now however be strictly observed *Ram Prasad v Raghunandan Prasad* 7 A 743 (1885).

(3) *Ramalakshmi Ammal v Sivanatha* 14 Moo I A 588 (1872) *Ram Gopal v Gordon Stuart* 14 Moo I A 461 (1872) s 64 post *Syed Abbas v Yadeem Ramy* 3 Moo I A 156 (1843).

(4) *Kirttebash Maytee v Ramdhan Khora* B L R F B 658 (1867) *Reasonssa v Bookoo Choudhri* 12 W R 267 268 (1869) [Every document must first be started by some proof or

other before the person who disputes that document can be considered in any way bound by it].

(5) *Barindra Kumar Ghose v R* (1909) 37 C 91.

(6) *v ante* p 113 note (7) *R v Hedger* 134 Field Ev 6th Ed 42 *Sri Raghunadha v Sri Broso* 3 I A 175 176 (1875) *Bunaree Lal v Maharajah Heinnara* 7 Moo I A 155 156 167 168 (1858) *Mudho Soodun v Surcoop Chunder* 4 Moo I A 441 (1849) *Chotey Narain v Mussamut Ratan* 22 I A 23 24 (1894) *Hurichurn Bose v Monandra Nath* 19 I A 4 (1893) *Wise v Sundloomissa Choudhranee* 11 Moo I A 187 188 (1867) *Mussamut Edun v Mussamut Bechun* 11 W R 345 (1869).

(7) *Bunaree Lal v Maharajah Heinnara* 7 Moo I A 155 (1858).

(8) *Goriboola Kaee v Gooroodas Roy* 2 W R Act X 99 (1865) *Sevija Jayaya v Chinna Nayana* 10 Moo I A 151 (1864) *v ante* p 487.

(9) See cases cited at p 487.

(10) *Eckourie Singh v Heeralal Seal* 11 W R P C 2 (1868) ante p 128 note (2).

(11) *Best Ev* § 218 see s 74 post.

Public documents other than those mentioned in the section are private (1) The Civil and Criminal Procedure Codes regulate the production of documents (2) and the former, the discovery, admission and inspection of documents in civil cases (3) In criminal cases it is the duty of the Judge to decide upon the meaning and construction of all documents given in evidence at the trial (4)

There are three distinct questions which are dealt with in the Act in regard to documentary evidence—(a) *firstly*, there is the question how the contents of a document are to be proved, (b) *secondly*, there is the question how the document is to be proved to be genuine, (c) *thirdly*, there is the question how far and in what cases oral evidence is excluded by documentary evidence

(a) The first question is dealt with in ss 61—66 and is also affected by ss 59 and 22 Taking s 59 with ss 61 and 64 the result may be stated as follows—The contents of a document must in general be proved by a special kind of evidence called primary evidence, but there are exceptional cases in which such contents may be proved otherwise Evidence used to prove the contents of a document which is not primary is called secondary Primary evidence is said (s 62) to be the document itself produced for the inspection of the Court Later on in the section this is called the original document The contents of public documents being provable in a particular manner this matter is dealt with separately in ss 74—78 The question how far witnesses may be cross examined as to written statements made by them without producing the writings is dealt with by s 145, *post* (b) Besides the question which arises as to the contents of a document, there is always the question when it is used as evidence—is it what it purports to be? In other words is it genuine? The signature or writing, sealing or mark and attestation where the latter is a necessary formality of execution, must be proved This matter is dealt with in ss 67—73 Lastly the Chapter deals ss 79—90,—with the presumptions which the Courts are enabled or directed to make in respect of certain documents or specified classes of documents tendered in evidence before them (c) The exclusion of oral by documentary evidence is the subject-matter of the next Chapter to the Introduction, to which the reader is referred (5)

As to the stamping and registration of documents, see Appendix

61 The contents of documents may be proved either by primary or by secondary evidence Proof of contents of documents

62 Primary evidence means the document itself produced for the inspection of the Court Primary evidence

Explanation 1—Where a document is executed in several parts, each part is primary evidence of the document

Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each

(1) S 75 *post*

(2) Woodroffe & Ali's Civ Pr Code 2nd Ed O VIII rr 14—18 pp 723—726 O XI rr 14—23 pp 793—800 O XIII pp 805—812 The Court may send for papers from its own records or from other Courts ib O XIII r 10 p 810 the provisions as to documents are applicable to all other material objects ib O XIII r 11 p 812 See Field Fv 6th Ed 288 As to the production of

document and other movable property in criminal cases see Cr Pr Code Chap VII As to applications in respect of endorsements made on exhibits see *Ratan Koer v Chotoy Narain* 21 C 476 (1894)

(3) Woodroffe & Amir Ali's Civ Pr Code Orders XI XII XIII 2nd Ed, pp 777—812

(4) Cr Pr Code s 298

(5) Markby Ev 56 57 60

rule is that even oral *admissions* as to the contents of a document are not relevant unless secondary evidence is admissible (1). In dealing therefore, with documentary evidence, the substantial principles, on which the authenticity and value of evidence rest, should be observed (2), thus secondary evidence should not be accepted without a sufficient reason being given for the non production of the original (3), nor should documents be considered as proved because they have not been denied by the opposite side (4), and the use to which it can legitimately be put should be kept in view,—thus a document may be relevant to affect a person with knowledge of its contents, whether true or false without being relevant to prove the truth of its contents (5). And notwithstanding the general value of documentary evidence regard must be had to the habits and customs of the people of this country, and their well known propensity to forge any instrument which they might deem necessary for their interest and the extreme facility with which false evidence can be procured from witnesses. Under such circumstances the probability or improbability (6) of the transaction forms a most important consideration in ascertaining the truth of any transaction relied upon (7). The use of fabricated written evidence by a party, however clearly established, does not relieve the Court from the duty of examining the whole of the evidence adduced on both sides, and of deciding according to the truth of the matters in issue (8). The presumption against the party using such evidence must not be pressed too far especially in this country, where it happens, not uncommonly, that falsehood and fabrication are employed to support a just cause (9). In addition to guarding against fraud care must be taken that the documentary evidence is in itself admissible, lest documents which are not strictly evidence at all should be used to prop up oral evidence too weak to be relied on (10).

Documents are of two kinds public and private. Under the former come Acts of the Legislature judgments and acts of Courts Proclamations public books, and the like. They are also divided into 'judicial', and 'not judicial', and also into "writings of record" and "writings not of record" (11).

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(2) *Ramalakshmi Amal v Sivanatha Perumal* 14 Moo I A 588 (1872) see the judicial criticisms on the laxty of documentary evidence prior to the passing of this Act in *Bunwaree Lall v Maharajah Hetnara n* 7 Moo I A 148 168 (1858) s c 4 W R P C 128 *Unde Rajah v Pemmasamy Venkatsastry* 7 Moo I A 137 (1858) see p 128 ante. The provisions of the Act must now however be strictly observed *Ram Prasad v Raghunandan Prasad* 7 A 743 (1885).

(3) *Ramalakshmi Ammal v Sivanatha* 14 Moo I A 588 (1872) *Ram Gopal v Gordon Stuart* 14 Moo I A 461 (1872) s 64 post *Syed Abbas v Yadeem Rams* 3 Moo I A 156 (1843).

(4) *Kirtsebah Maylee v Ramdian Khaira* B L R F B 658 (1867) *Rearoomissa v Bookoo Choudhrai* 12 W R 267 268 (1869) [Every document must first be started by some proof or

other before the person who disputes that document can be considered in any way bound by it].

(5) *Barindra Kumar Ghose v R* (1909) 37 C 91.

(6) v ante p 113 note (7) *R v Hedger* 134 Field Ev 6th Ed 42 *Sri Raghunadha v Sri Broo* 3 I A 175 176.

(1875) *Binaaree Lai v Maharajah Hetnara n* 7 Moo I A 155 156 167 168.

(1858) *Mudho Soodun v Suroop Chunder* 4 Moo I A 441 (1849) *Chotey Narain v Mussamut Ratan* 22 I A 23.

24 (1894) *Hurichurn Bose v Monindra Nath* 19 I A 4 (1893) *Wise v Swinduloonissa Choudhranee* 11 Moo I A

187 188 (1867) *Mussamut Edun v Mussamut Bechun* 11 W R 345 (1869).

(7) *Binaaree Lal v Maharajah Hetnara n* 7 Moo I A 155 (1858).

(8) *Goriboola Kasee v Gooroodas Roy* 2 W R Act X 99 (1865) *Seeraj Vijaya v Chinna Nayana* 10 Moo I A 151.

(1864) v ante p 487.

(9) See cases cited at p 487.

(10) *Eckourie Singh v Heeralal Seal* 11 W R P C 2 (1868), ante p 123 note (2).

(11) Best Ev § 218 see s 74 post.

Public documents other than those mentioned in the section are private (1) The Civil and Criminal Procedure Codes regulate the production of documents (2) and the former the discovery admission and inspection of documents in civil cases (3) In criminal cases it is the duty of the Judge to decide upon the meaning and construction of all documents given in evidence at the trial (4)

There are three distinct questions which are dealt with in the Act in regard to documentary evidence—(a) *firstly* there is the question how the contents of a document are to be proved (b) *secondly* there is the question how the document is to be proved to be genuine (c) *thirdly* there is the question how far and in what cases oral evidence is excluded by documentary evidence

(a) The first question is dealt with in ss 61—66 and is also affected by ss 59 and 2^o Taking s 59 with ss 61 and 64 the result may be stated as follows—The contents of a document must in general be proved by a special kind of evidence called primary evidence but there are exceptional cases in which such contents may be proved otherwise Evidence used to prove the contents of a document which is not primary is called secondary Primary evidence is said (s 6^o) to be the document itself produced for the inspection of the Court Later on in the section this is called the original document The contents of public documents being provable in a particular manner this matter is dealt with separately in ss 74—78 The question how far witnesses may be cross-examined as to written statements made by them without producing the writings is dealt with by s 145 *post* (b) Besides the question which arises as to the contents of a document there is always the question when it is used as evidence—is it what it purports to be? In other words is it genuine? The signature or writing sealing or mark and attestation where the latter is a necessary formality of execution must be proved This matter is dealt with in ss 67—73 Lastly the Chapter deals ss 79—90—with the presumptions which the Courts are enabled or directed to make in respect of certain documents or specified classes of documents tendered in evidence before them (c) The exclusion of oral by documentary evidence is the subject matter of the next Chapter to the Introduction to which the reader is referred (5)

As to the stamping and registration of documents see Appendix

61 The contents of documents may be proved either by primary or by secondary evidence

Proof of contents of documents

62 Primary evidence means the document itself produced for the inspection of the Court

Primary evidence

Explanation 1—Where a document is executed in several parts each part is primary evidence of the document

Where a document is executed in counterpart each counterpart being executed by one or some of the parties only, each

(1) S 75 *post*

(2) Woodroffe & Als C v Pr Code 2nd Ed O VIII rr 14—18 pp 723—726 O XI rr 14—23 pp 793—800 O XIII pp 805—812 The Court may send for papers from its own records or from other Courts b O XIII r 10 p 810 the provisions as to documents are applicable to all other material objects b O XIII r 11 p 812 See Feld Ev 6th Ed 288 As to the production of

document and other movable property in criminal cases see Cr Pr Code Chap VII As to applications in respect of endorsements made on exhibits see *Ratan Koer v Clotey Nara n* 21 C 476 (1894)

(3) Woodroffe & Am r Als C v Pr Code Orders XI XII XIII 2nd Ed pp 777—812

(4) Cr Pr Code s 298

(5) Markby Ev 56 57 60

counterpart is primary evidence as against the parties executing it

Explanation 2—Where a number of documents are made by one uniform process, as in the case of printing lithography or photography, each is primary evidence of the contents of the rest, but where they are all copies of a common original, they are not primary evidence of the contents of the original

Illustrations.

A person is shown to have been in possession of a number of placards all printed one time from one original. Any one of the placards is primary evidence of the contents of any other but no one of them is primary evidence of the contents of the original

Secondary evidence

63 Secondary evidence means and includes—

- (1) Certified copies given under the provisions hereinafter contained,
- (2) Copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies,
- (3) Copies made from or compared with the original,
- (4) Counterparts of documents as against the parties who did not execute them,
- (5) Oral accounts of the contents of a document given by some person who has himself seen it

Illustrations

(a) A photograph of an original is secondary evidence of its contents though the two have not been compared if it is proved that the thing photographed was the original

(b) A copy compared with a copy of a letter made by a copying machine is secondary evidence of the contents of the letter if it is shown that the copy made by the copying machine was made from the original

(c) A copy transcribed from a copy but afterwards compared with the original is secondary evidence but the copy not so compared is not secondary evidence of the original although the copy from which it was transcribed was compared with the original

(d) Neither an oral account of a copy compared with the original nor an oral account of a photograph or machine copy of the original is secondary evidence of the original

a. 3 (Document)

a. 3 (Proof.)

a. 3 (Evidence)

a. 3 (Court)

a. 76 78 (Certified copies)

Steph Dig Arts 63 64 70 Taylor Ev §§15 45 394 496 550 553 cited and ab Index sub voc (Primary Evidence and Secondary Evidence) Norton Ev 941

COMMENTARY

Document

Reference should be made to the definition given in the third section. Exchequer tallies and wooden scores used by milkmen and bakers have been included in the term (1). So also an inscription on a ring (2) or coffin plate (3)

(1) Pest Ev § 215

(2) R v Farr 4 F & F 366

(3) R v Edge Walls Circ. Ev 6th

Ed 309 340 per Maule J (the plate being removable)

and perhaps a direction on a parcel (1) On the other hand it has been held in England that inscriptions on flags and placards exhibited to public view and of which the effect depends upon such exhibition, bear the character rather of speeches than of writings and are not subject to the rules relating to documents (2)

But in the undermentioned case it has been held there that a sealed packet is a document and therefore liable to production upon a *subpoena duces tecum*, even when it had been confided to a banker upon the terms that he should not part with it without the depositor's consent (3)

The contents of documents may be proved either by primary or secondary evidence "Primary" and "secondary" evidence means this primary evidence is evidence which the law requires to be given first secondary evidence is evidence which may be given in the absence of the better evidence which the law requires to be given first when a proper explanation is given of the absence of that better evidence (4) Primary evidence of a document is defined by the Act to mean the document itself produced for the inspection of the Court (5) Secondary evidence is defined by section 63 Section 61 lays down that "the contents of documents may be proved either by primary or secondary evidence" within the meaning given to those terms in the Act and this rule means that there is no other method allowed by law for Whatever the law may have been upon the Act, the rules contained in this enactment r

Meaning of "primary" and "secondary" evidence (s 61).

Primary evidence means the document itself produced for the inspection of the Court As the law requires that the particulars of a claim should be embodied in the decree, recitals of the contents of the plaint made in a decree are not secondary evidence of the contents of the plaint but are admissible as primary evidence of the statement of facts made to the Judge as the basis of the plaintiff's claim (7) Written receipts for payments are important but by no means necessary as proof nor are they of the nature of primary evidence the loss of which must be shown in order to let in secondary (8)

Primary evidence (s 62).

If accounts be merely memoranda and rough books from which regular accounts are prepared the former it has been said can hardly be treated as the original account (9) Though different classes of books of account may, and in fact in the larger number of instances must deal with the same matter, it does not follow that one only of such classes constitutes the original document So where entries in a ledger were tendered and it was objected that the ledger was secondary evidence, being merely a copy of the cash book, the Court admitted the ledger entries (10)

The first portion of the *first Explanation* of section 62 refers to what are known as duplicate triplicate or the like originals The expressions 'executed in parts' and 'in counter part' refer to the mode in which documents

(1) *R v Fenton* cited 3 B & C 760 per Parke B *R R Co v Maples* 63 Ala 601 (Amer) contra *Burrell v North* 2 C & K 680 Com v *Morrel* 99 Mass 542 (Amer)

(2) *R v Hunt* 3 B & Ald 566 Phipson Ev 3rd Ed 458 5th Ed 507

(3) *R v Daje* (Div Court) 1908 2 K B 333

(4) *Per Lord Esher M R in Lucas v Williams & Sons* L R 2 Q B (1892) 113 116 and see *Taylor Ev* § 394

(5) S 62

(6) *Ram Prasad v Ragunandan Prasad* 7 A 738 743 (1885)

(7) *Mahommed Ismail v Bilgobutti Barnanja* Appeal from original decree Cal H C No 303 of 1897 (25th June 1900) as to the statement of a witness deposing that another person gave evidence being primary evidence see *Hararund Roy v Ran Gopal* cited in notes to s 65 post

(8) *Raniessar v Koer v Bharat Pershad* 4 C W N 18 (1899)

(9) *Raja Pearu v Narendra Nath* 9 C W N 421 431 (1905) see s 34 ante

(10) *Megraj v Senarain* 5 C W N, 222 (1901)

are sometimes executed. It is convenient sometimes that each party to a transaction should have a complete document in his own possession. To effect this the document is written out as many times over as there are parties and each document is executed—that is, signed or sealed as the case may be—by all the parties. No one of these is more the original than the other, and any one of them may be produced as primary evidence of the contents of the document. When an instrument is executed by all the parties in duplicate or triplicate, and each party keeps one, each instrument is treated as an original, and each is primary evidence of all the other. When each of the instruments is signed by one party only, and each delivers to the other, the documents are termed 'counterparts,' and each is primary evidence against the party executing it, and those in privity with the executing party, and secondary evidence⁽¹⁾ as against the other parties ⁽²⁾. Execution in counterpart is a method of execution adopted when there are two parties to the transaction. Thus if the transaction is a contract between *A* and *B* the document is copied out twice, and *A* alone signs one document, whilst *B* alone signs the other. *A* then hands to *B* the document signed by himself and *B* hands to *A* the document signed by himself. Then as against *A* the document signed by *A* is primary evidence whilst as against *B* the document signed by *B* is primary evidence ⁽³⁾.

This section is exhaustive of the kinds of secondary evidence admissible under the Act. Where therefore, the terms of a document were sought to be proved by a judgment containing a translation thereof in a suit which was not between the same parties or their representatives in interest held that neither the translation of the document nor the statement in the judgment was secondary evidence of the contents of the document ⁽⁴⁾.

Secondary
evidence

Second Explanation—"A printed paper does not differ from a written one in respect of both being copies, they can alike therefore only be received as secondary evidence of the original under such circumstances as render secondary evidence admissible, for instance if the original is shown to be lost or destroyed, or to be in the possession of the opposite party, notice having been given to produce it. There is no more guarantee for a printed copy being a true copy than a written one, indeed being a copy at all. But there is a far better guarantee for a number of printed papers struck off from the same machine at the same time being correct facsimiles of each other than of a number of written papers, for here the draftsman or draftsmen may introduce differences impossible with the machine. In this case, each machine made copy is accepted as primary evidence of all the others *inter se*, and not of the original from which they were copied, for instance if it is desired to prove the publication of a libel in a newspaper any copy of the issue in which the libel appeared would be primary evidence of publication in all the other copies of that issue. But if it were necessary to prove the original libel from which the article was set up, the printed paper would not be primary, but only secondary, evidence of the manuscript and admissible only under the conditions which render the reception of secondary evidence admissible' ⁽⁵⁾.

First Clause—Section 76 enables certified copies of public documents to be given, and such documents may be proved by the production of a certified copy ⁽⁶⁾. Certain other official documents especially designated may be also proved by certified copies ⁽⁷⁾. Section 79 deals with the presumption as to the

(1) S 63 cl (4)

(2) Taylor Ev § 426 Norton Ev 241 242 s 62

(3) Markby Ev 57 Phipson Lv 5th Ed 509

(4) Jagannatha Naidu v Secretary of State 43 M L J 37 (1922)

(5) Norton Ev 242 and see R v

Hatton 32 How St. Tr 82

(6) S 77 post

(7) S 78 post as to certified copies of decrees or orders made by the Queen in Council see Woodroffe & Am r Al s Civ Pr Code O XXXVI r 15 2nd Ed p 1343

genuineness of certain certified copies, and section 86 as to certified copies of foreign judicial records. And the Civil Procedure Code(1) now gives the Court power to order production of verified copies of entries in business books instead of the originals when inspection of the latter has been demanded.

Second Clause—The copies must be made from the *original* by such mechanical processes as in themselves insure the accuracy of the copy; such for example as the processes mentioned in the *second Explanation* section 62 (2) *Illustration (a)* must be read with the first portion of this clause, and means that provided it can be shown that the original which is sought to be proved was really photographed, such photograph will be receivable as secondary evidence. *Illustration (b)* must be read with the second portion of this clause and means that a copy of such copy (compared) is receivable as secondary evidence of the original and cannot be rejected as being a copy of a copy (3). The reason of this rule is that the actual mechanical process it is not necessary it will be taken to correctly reproduce, or at least not an effective one, in the case of copies taken from such first copy and they must therefore be proved to have been compared with it before they will be receivable as secondary evidence of the original. An oral account of a photograph or a machine copy of the original is not secondary evidence of the original [*Illustration (d)*].

Third Clause, see *Illustration (c)*. In the first case here put, the party who made the copy can swear to its being a true copy. If he is not produced, then a witness must be called who can swear to his own comparison, or, as sometimes two witnesses, one of whom read the original, while the other read the copy or the reverse. But it will save time and trouble to have the comparison made by one and the same person (4). Reading together second and third Clauses and *Illustrations (b)* and *(c)* it will appear that a copy of a copy i.e., a copy transcribed and compared with a copy is inadmissible (5), unless the copy with which it was compared was a copy made by some mechanical process which in itself insures the accuracy of such copy (6). But copies of copies kept in a registration office when signed and sealed by the registering officer are admissible for the purpose of proving the contents of the originals (7). The correctness of certified copies will be presumed (8), but that of other copies will have to be

nately both ways. If the documents be in an ancient or foreign character the witness who has compared the copy with it must have been able to read and

(1) O. XI r. 19 2nd Ed. p. 797.

(2) Field Ev. 382 1b 6th Ed. 227 cf. s. 35 Act II of 1855. "An impression on of a document made by a copying machine shall be taken without further proof to be a correct copy."

(3) Norton Ev. 243.

(4) *Ib.* See *Ralli v. Gau Kim* 9 C. 943 944 (1883).

(5) *Ra. v. Prasad v. Raghunandan Prasad* 7 A. 738 743 (1885). *Secretary of State v. Manjeshwar Krishnaswar* 28 M. 257 see Taylor Ev. § 553 the following cases are no longer law so far as they relate to copies. *Unde Rajah v. Pemiasamy Venkatadry* 7 Moo. I. A. 128 (1858) [dictum followed in *Ajoodhya*

Prasad v. Umrao Singh 6 B. L. R. 509 (1870). *Jaybhunnissa Bibi v. Kutar Sham* 7 B. L. R. 627 (1871). *Mahbul Ali v. Srimati Masnad* 3 B. L. R. 54 (1869). *Ram Gopal v. Gordon Stuart* 14 Moo. I. A. 453 (1872). *Norton Ev.* 243. Field Ev. 383 1b 6th Ed. 227. Even before the Act a copy of a copy was rejected. *Raja Neelanund v. Nusseeb Singh* 6 W. R. 80 (1866).

(6) S. 63 cl. (2) v. ante but a copy transcribed from a copy and afterwards compared with the original is secondary evidence. *Illust. (c)*.

(7) Act XVI of 1908 s. 57.

(8) S. 79 post.

on dispenses with proof and omission of a true copy. Where a document has been produced without objection its admissibility is not open to the Appellate Court to consider whether the copy was properly compared with the original or not (2). In the undermentioned case (3) a copy of a deed which was filed in another suit and was still on the records of the Court was let in as secondary evidence. That deed was endorsed "copy in accordance with the original," and was signed by the Judge presiding in the Court. The Privy Council accepted and concurred in the opinion of the Judicial Commissioner upon the value of that copy. His words were—"There can be no doubt that the Judge, in the course of the suit, in 1864, did accept and file, with the proceedings, a copy of a deed of gift by K B, and the only question is whether that copy had been compared with the original, when the copy is enforced, in accordance with practice, 'copy according to the original,' and the Judge's order to file is also found on it. I cannot doubt that the copy was duly compared. Except the Judge, there was no person who was authorised to compare and accept a copy, and his signature to the order must, it seems to me guarantee the genuineness of the copy" (4).

It is scarcely necessary to observe that proof of a copy being a *correct copy* is no proof of the execution and genuineness, etc., of the original (5). And secondary evidence cannot be given by means of a copy until it be shown that such copy is *accurate* (6). The correctness of certified copies is directed to be presumed by this Act (7). And other Acts, such as the Registration Act (8) declare that copies given thereunder shall be admissible for the purpose of proving the contents of the original documents, that they shall be taken to be true copies without other proof than the Registrar's certificate of their correctness (9).

Fourth Clause—A counterpart is primary evidence only as against the parties executing it (10). The most usual case of counterparts is that of *patta* and *kabuliat* (11).

Fifth Clause—The person must have *seen* the original. It will not be sufficient that he heard it being read. Moreover, it must have been the *original*. It will not be sufficient for the person to have seen a copy. Thus, a written statement of the contents of a copy of a document, the original of which the person making the statement has not seen, cannot be accepted as an equivalent of that which this clause renders admissible, namely, an oral account of the contents of a document given by some person who has himself seen it (12). It is, moreover, plain that even if parol evidence be admissible as secondary

(1) Taylor Ev § 15—45 Field Ev 383 ib 6th Ed, 227

(2) Ram Lochan Misra v Pandit Harinath Misra 1 Pat, 606 (1922) approving Chinnaji Govind Godbole v Dhinkar Dhandar Godbole 11 B 320 Lakshman Govind v Amrit Gopal 24 B 591, Kishori Lal Goswami v Rakhal Das Bannerjee 31 C 155

(3) Luckman Singh v Puna 16 C, 753 (1889) 16 I A 125

(4) *Ib* at p 756

(5) See Field Ev 6th Ed 227, Ramjadoo Gangooly v Luckhee Narain 5 R C and Cr Reporter Act X Rule 23 (1867) Shookram Sookul v Ram Lal 9 W R 248 250 (1868) Mussumat

Amecroonissa v Mussumat Abedoonissa 23 W R 208 (1875) Appathura Pattar v Gopala Panikkar, 25 M 674 676 (1901)

(6) Taylor Ev § 553 Shookram Sookul v Ram Lal 9 W R 248 250 (1868) Krishna Kishori v Kishori Lal 14 C 487 488 (1887)

(7) S 79 post

(8) Act XVI of 1908 s 57

(9) Hurish Chunder v Frosunno Coomar 22 W R 303 (1874)

(10) S 67 Explanation (1) ante

(11) *ante*

(12) Kanayalal v Pyarabai 7 B 139 (1882) see Illust (d)

evidence of a document, it may, owing to its character or the circumstances of the case, be such that the Court cannot rely upon it for the purpose of proving those contents (1) Secondary evidence in actions for libel should give the actual words used and complained of (2)

The general rule is that there are no degrees in secondary evidence and that a party is at liberty to adduce any description of secondary evidence he may choose (3) So a party may give oral evidence of the contents of a document, even though it be in his power to produce a written copy For, if one species of secondary evidence were to exclude another, a party tendering oral evidence of a document would have to account for all the secondary evidence that has existed He may know of nothing but the original, and the other side at the trial might defeat him by showing a copy the existence of which he had no means of ascertaining Fifty copies might be in existence unknown to him and he would be bound to account for them all Further there is the inconvenience of requiring evidence to be strictly marshalled according to its weight But if more satisfactory proof is withheld that will go to the weight of the evidence If, for instance the party giving such oral evidence appears to have better secondary evidence in his power which he does not produce, that is a fact from which the Court may presume that the evidence kept back would be adverse to the party withholding it (4) There are however exceptions to the general rule For the Act declares that when the existence condition or contents of the original have been admitted in writing the written admission public document (6) or a document in Act or by any other law in force a copy of the document but not the original (8)

No degrees in secondary evidence

64 Documents must be proved by primary evidence except in the cases hereinafter mentioned

Proof of documents by primary evidence

Principle—This rule is one of the most forcible illustrations of the maxim that the best evidence that the case admits of must always be produced (9) It is said to be based on the 'best evidence principle' but the rule is however probably older than its reasons being a survival of the doctrine of 'proferret' which required the actual production of the document pleaded (10)

* 3 (Document)

* 62 (Meaning of primary evidence)

* 3 (Proved)

* 65 (Excepted cases)

Steph Dig Art 60 Taylor Ev §§ 396 409 Phipson Ev 5th Ed 38 507 Thavers Cases on Evidence 726

COMMENTARY

Lord Tenterden said I have always acted most strictly on the rule that what is in writing shall only be proved by the writing itself My experience has taught me the extreme danger of relying on the recollection of

What is in writing shall only be proved by the writing itself

(1) *Krishna Kishori v Kishori Lal* 14 C 487 488 (1887)

(2) *Raja v Brato* L R 4 P C 287

(3) *See Patpal Singh v Uday Bhai* 53 I C 607 in which a statement in a previous suit was held to be secondary Evidence

(4) *Doc v Ross* 7 M & W 402 *Brown v Woodman* 6 C & P 206 *Hall v Hall* 3 M & G 242 Taylor Ev §§ 550—553 Best Ev § 483 Wills Ev 2nd Ed 396 The rule applies whether the original evidence be itself oral or

documentary Taylor Ev § 550 see eg Notes to s 47 ante

(5) S 65 post see cl (b)

(6) Within the meaning of s 74 post

see s 65 cl (e)

(7) S 65 cl (f)

(8) S 65 post see Notes to that section

(9) Taylor Ev § 396 and v post and Introduction ante

(10) Thavers cases on Evidence 76 See also 6 Law Quart Re 75 The superiority of written evidence Phipson Ev 5th Ed 38 507

Principle.—The general rule having been stated in the preceding section the present one states the exceptional cases in which secondary evidence is admissible. Some of these exceptions rest upon considerations which are obvious. This is the case with exceptions (c) and (d). The exceptions (e) and (f) are not, for the case of exception (g) it is admitted in substitution for the person who has examined them (1). The written admission in cl (b) affords a reliable guarantee of truth. With regard to cl (a), as in the case of (c) and (d), the production of primary evidence is out of the party's power; see *Commentary, post*

s 63 ('Meaning of "secondary evidence"')

s 3 ('Document')

s 3 ('Court')

s 66 ('Rules as to notice to produce')

s 22 ('Oral admissions as to contents of documents')

s 74 ('Public documents')

ss 76, 79, 80 ('Certified copies')

s 89 ('Presumption as to documents called for and not produced after notice to produce.')

Fryer, Ev, §§ 429, 437, 439—460, 918, 919, Roscoe, N P Ev, 7—14, 157—160, Phipson, Ev, 5th Ed, 516—521, Powell, 9th Ed, 367—377, Steph Dig, Arts 72, 118, 119, Wharton, Ev, Ch III Greenleaf, Ev, §§ 91—97, Burr Jones, Ev, 197—232.

COMMENTARY.

When secondary evidence may be given

The last section having declared the general rule as to the proof of documents the present deals with the exceptions to that rule, namely, the cases in which secondary evidence may be given. Secondary evidence of the contents of a document cannot be admitted without the non production of the original

of the contents of a document not produced in Court is the accounting for the non production of the original (3). It must in the first place, be shown that there is or was, a document in existence capable of being proved by secondary evidence and, *secondly*, that the circumstances are such that secondary evidence may be given, or, to use the technical expression, a proper foundation must be laid for the reception of such evidence (4). There are cases in which secondary evidence is admissible even though the original is in existence and producible, as in the case of clauses (e) and (f) (5), and (b) and (g) of section 65, but ordinarily it must be shown that the document is not producible in the natural sense of the word for this is the general ground upon which secondary evidence is admitted. When one of the questions on appeal to the Privy Council

(1) Markby Ev 97 Phipson Ev 5th Ed 488

(2) Krishna Kishori v Kishori Lal 14 C 486 (1887) 14 I A, 71

(3) Bhubaneswari Devi v Harisaran Surma 6 C 720 (1880), see also Mussamut Ameeroonissa v Mussamut Abedoonissa 23 W R, 208 209 P C (1875) 2 I A 37, Sreenutty Gour v Huree Kishore 10 W R 338 (1868) Roop Joorie Chodhurance v Ram Lal 1 W R 145 (1864), Shookram Sookul v Ram Lal 1 W R 248 (1868) Muscezoodeen Kasee v Meher Ali 1 W R 213 (1864) Islen Chunder v Bhzyrub Chunder 5 W R 21 (1866), Mussamut Ustoorn v

Baboo Mohun 21 W R 333 (1874) Muhammad Abdul v Ibrahim 3 Bom. H C R A C J, 160 (1866), Wuseer Ali v Kallee Koomar, 11 W R 228 (1869), Krishna Kishori v Kishori Lal 14 C 486 (1887) Rahhal Das v Indra Monte 1 C L R 155 (1877)

(4) This is a matter to be judicially determined by the Court which tries the case its conclusions on this head will not generally be disturbed in Special Appeal, Shookram Sookul v Ram Lal 9 W R, 249 (1868), see also Harrisria Devi v Rukhmuni Devi 19 C 438 (1892)

(5) Krishna Kishori v Kishori Lal 14 C, 491 (1887)

was whether secondary evidence had been properly admitted on a case that had arisen for its admission, such question was decided in the affirmative on the ground that whether the evidence offered would itself prove the making of the document or not, it formed good ground for holding that there was a document capable of being proved by secondary evidence admissible with reference to sections 65 and 66 of this Act (1). This section is applicable to both civil and criminal cases (2).

The last four paragraphs provide what kind of secondary evidence is to be given in the particular cases mentioned in the section, and in cases (b), (e), (f), (g) establish exceptions to the general rule that there are no degrees of secondary evidence (3). With reference to these paragraphs, it will be observed that there is no provision for cases in which two causes for non production of the original are combined as for instance, when the original is a record of a Court of Justice, which has also been lost or destroyed, a case which has occurred more than once in India (4). But it has been held that the rule laid down in this section that a certified copy is the only secondary evidence admissible when the original is a document of which a certified copy is permitted by law to be given in evidence does not apply where the original has been lost or destroyed. In such a case any secondary evidence is admissible (5). So where one *B B*, an official in the Sikhur Court in the Native State of Jey pore, gave evidence of litigation there between *R B* and one *C*, and said that in his presence evidence of *C* was taken by the Judge, Moonshi *M M*, and that in his presence the suit was adjudicated and the order passed, and he put in a document which he swore was a copy of *C*'s deposition, in the handwriting of one of the Court Amlas, endorsed "copy corresponding with the original" in the handwriting and bearing the signature of the Sheristadar of the Court, the High Court excluded these proceedings in the Sikhur Court on the ground that they were not proved according to the mode mentioned in section 86 of this Act. The Privy Council however, held that that section does not exclude other proof and observed as follows — "The assertion of *B B* that *R B* sued *C* and that she gave evidence before Moonshi *M M* in his presence is primary evidence of these matters. His proof of the Sikhur records is secondary evidence, and by sections 65 and 66 of the Evidence Act, secondary evidence may be given of public documents, (which these are under section 74) without notice to the adverse party, when the person in possession of the document is out of the reach of or not subject to, the process of the Court, which is the case here." If the Privy Council held that the effect of *B B*'s evidence was to supply proof that the copy produced was a certified copy (there being no presumption under either section 79 or 86) and the document was admitted as a certified copy, then it was so admitted in accordance with the last paragraph but one of the section. This however, appears for several reasons not to be the case for amongst others the Privy Council say that no notice was necessary as the person in possession of the document was not subject to process. But the provisions as to notice apply to cl (a) only and not to cl (e). It would appear therefore that it was held that the case fell under both clauses, and that as it also fell under cl (a) any secondary evidence was admissible (6). In a suit for a declaration that certain survey numbers were kept joint at a partition between the parties' ancestors in 1809, the plaintiff relied upon a certified copy of a partition deed passed

(1) *Luchman Singh v Puna* 16 C 753 (1889) s c L R 16 I A 125

(2) 1 Field Ev 6th Ed 231

(3) ante

(4) Field Ev 6th Ed 230 see Baboo Garoo v Durbaree Lal 7 W R 18 (1867) [record lost in transit] secondary evidence ordered to be given *Bun carry Lal v James Furlong* 8 W R 38 (1867)

record lost direction to take further evidence *Ranje Emaun v Hurdial Singh*, W R 1864 301 [lost decree]

(5) *Kunn th Odangal v Jayoth Palliyal*, 6 M 80 (1882) in the matter of a collision between the *Ara* and the *Brenhilda* 35 C 568 (1879)

(6) *Harranund Roy v Ram Gopal* 4 C W N 429 (1899)

between the parties in that year. The copy which was produced showed that the original document was produced in Court in a suit of 1823 held that the Court could rely upon the certified copy as showing the terms of the partition as there was no reason to doubt, owing to the lapse of time, that the certified copy retained on the file of the suit of 1823 was a correct copy of the original (1)

The question whether secondary evidence was in any given case rightly admitted is one which is proper to be decided by the Judge of first instance and is treated as depending very much on his discretion. This conclusion should not be overruled except in a very clear case of miscarriage (2). With regard to objections on appeal to the admission of secondary evidence *see note below* (3).

be received still this was not meant to exclude secondary evidence of the contents of the acknowledgment, under section 65 of the Evidence Act when a proper case for the reception of such evidence is made out (4)

CLAUSE (A)

The first case in which secondary evidence of a written document is admissible is when a document is in the possession or power of the adversary or a third party who withhold it at the trial and a notice duly served, where such notice is required in civil and criminal cases. In either mode of proceeding in order to render the notice available, it must be first shown that the document is in the hands or power of the party required to produce it (7). The reason of this rule is self-evident, for otherwise the party calling for the document might foist upon the Court an alleged copy of an original which never had any existence (8). Slight evidence however, will suffice to raise a presumption of this where the document exclusively belongs to or in the regular course of business ought to be, in the custody of a party served. (9) What is sufficient evidence is in the discretion of the Court. If papers were last seen in the hands of a defendant it lies upon him to trace them out of his possession (10). When a party has notice to produce a particular document which has been traced to his possession, he cannot it seems object to parol evidence of its contents being given on the ground that, *previously* to the notice he had ceased to have any control over it, unless he has stated this fact to the

(1) Chudasama Khodaba Sartansang v Chudasama Taklatsang Narsingji 46 B 32 (1922)

(2) *Vingara* & *Ramapfa* 5 Bom L R
708 (1903)

(3) "notes
2 W

Mohes
James Fegredo v Mahomed Moddessur
10 W R 267 (1868)

10 (4) *Shambu Nath v Ram Chandra* 12 C. 267 (1885) *Wajun v Kadr Buksh* 13 C. 792 (1886) *Chaitu v Irayan* 15 M. 491 (1892) The contrary appears to have been held in *Zulmaisa Ladis v Moti dev Ratandev* 12 B., 268 (1887) but the report does not show that the earlier decisions were cited. When the date has been altered see *Savak Gulamali v Mirabha*

26 B 128 (1901) and s 106 *post*:

(5) See s. 66.

(3) See *Taylor v. Puna* 16 C 753 (1899). In *Dwarka Singh v. Ramanand Upadhyay*, 41 A 592 s.c. 17 All L.J. 711, notice was held unnecessary as the defendants must have known that they were required to produce the document.

(7) *Sharpe v. Lamb* 11 A & E, §05

(8) Norton Ev 246

(9) *Henry v Leigh* 3 Camp 502 see also *Robb v Starkey* 2 C. & K. 143 see *Bhudanewari Deb v Harisaran Surma* 6 C 724 (1881) Presumptively the document is in the possession of the one to whom it belongs *Burr Jones* § 218

(10) R \ Th silewood 33 How St. Tr.
757 758 R \ Ings id. 989

opposite party, and has pointed out to him the person to whom he delivered it (1) Neither can he escape the effect of the notice, by *afterwards* voluntarily parting with the instrument, which it directs him to produce (2) The documents must be traced to the possession of the party on whom notice is served or some one in privity with him, such as his banker, agent, servant, deputy, or the like. Such persons need not be served with a *subpœna duces tecum*, or even be called as a witness, but a notice given to the party himself will suffice (3) Possession may be proved by showing that the document was last seen in the adversary's possession or power, or by calling his solicitor, who may be compelled to testify to its possession (4), or by the admission of his counsel (5), or presumptively, by showing that it belongs exclusively to him, or would, in the ordinary course of business, be in his custody (6) The adversary may, on the other hand, interpose evidence to disprove the possession (7) Secondary evidence tendered to prove the contents of an instrument which is retained by the opposite party after notice to produce it, can only be admitted in the absence of evidence to show that it was unstamped when last seen (8) A copy of a document should not be received in evidence until all legal means have been exhausted for procuring the original. . . . the possession or power of a certain part . . . that he has ever had the document is not . . . the processes the law provides for his testimony, and his being called on to produce the original. If a Judge is satisfied of a plaintiff's inability to produce an original *pottah* on which he relies, he ought to allow secondary evidence to be given of the contents of the document, but he should be satisfied on reasonable grounds that the evidence gives a true version of its contents, and he should require sufficient evidence of the execution of the *pottah* (9)

Any secondary evidence is admissible in a case falling within clause (a) (10)

Secondary evidence may also be given when the original is in the possession or power of any person who is *out of reach of, or not subject to the process of the Court* (11) No notice is required when the person in possession of the document is out of reach of or not subject to, the process of the Court (12) If a document be deposited in a foreign country, and the laws or established usage of that country will not permit its removal, secondary evidence of the contents will be admitted because in that case it is not in the power of the party to produce the original (13) But ordinarily, being filed in another Court, is not sufficient reason for non production (14) Any secondary evidence will be admissible (15)

(1) *Sinclair v Stevenson* 1 C & P 582 *Knight v Martin* Gow R 103

(2) *Knight v Martin* Gow R 104

(3) *Taylor* Ev § 441 *Partridge v Coales* Ry & M 156 *Burton v Payne* 2 C & P 520 *Sinclair v Stevenson* 1 C & P 582 *Blubaneswari Debi v Har sara* Surma 6 C 724 (1881)

(4) *Bevan v Waters* M & M 235 *Dwyer v Collins* 7 Exch 639 see *Notes to ss 126—129 post*

(5) *Duncombe v Danell* 8 C & P 222 see s 58 ante

(6) v ante *Burr Jones* Ev § 218

(7) *Phipson* Ev 5th Ed 516 517 *Taylor* Ev §§ 440 441

(8) *Sennadram v Kollakiran* 2 M 208 (1880)

(9) *Shookram Sookul v Ram Lal* 9 W R 248 (1868)

(10) S 65

(11) See *Ralli v Gau Kari* 9 C 939 (1883) *Bishop Melius v Isaac Apostolic* 2 M 295 (1879) In s 36 of Act II of 1855 it was the document that must be out of the process of the Court here it is the person in whose possession it is

(12) S 66 cl 6 From s 65 (which is not happily worded in this respect) it might be gathered that notice was necessary see last para. of cl (a) and *Ralli v Gau Kari* 9 C 939 (1883)

(13) *Burnaby v Rallie* 42 Ch D 782 291 *Crispin v Doghion* 32 L J P & M 109 *Alton v Furnival* 1 C M & R 277 291 292 *Boyle v Wiseman* 10 Ex R 647 *Quilter v Jorss* 14 C B N S, 747 See 14 & 15 Vic c 99

(14) *Sreenitty Gour v Hutree Kishore*, 10 W R 338 (1868)

(15) S 65

difficulty (1) In the first place it must be noted that every person summoned to produce a document must, if it is in his possession or power, *bring it to Court* notwithstanding any objection which there may be to its production or to its admissibility. The validity of such objection is a matter to be decided on by the Court. (2) Assuming the present clause to have reference to that class of documents only which a person is not justified in refusing on the ground of privilege, to produce, in other words, documents which a person is legally

such nor production under the terms of this clause. It will appear, therefore, that the English rule abovementioned, according to which secondary evidence is not admissible of a document which is, without justification withheld is not law under this section. (3) Much, however, may be said in favour of a departure from the English rule upon this point. It may be argued that it is not

(1 In *Norton v 244 246 248* it appears to be considered that the clause ought and was meant to run 'if any person not legally bound to produce it the word not having been omitted by accident'. Mr Markby also thinks probable that the word not has been omitted by mistake though he concedes that no question of there being any misprint in the Act seems to have been raised in this country. *Ev Act p 58 v post*. If this be correct the clause would then be in agreement with the rule of English law as above stated and there would be no difficulties of construction on the points hereafter dealt with. One point of variance from English law is however suggested by Mr Norton as arising out of a later portion of the section viz. that whereas under that law where a person refuses to produce a document which he is legally compellable to produce the party calling for the document cannot give secondary evidence and has no remedy except as against him on the other hand under the Act such a case may have been provided for in the second portion of cl (c) dealing with inability to produce in reasonable time. The learned author says 'Perhaps under this too [cl (c) portion referred to *supra*] a party might give secondary evidence of a document which person having no legal right to refuse the production of nevertheless refuses on notice to produce. *Id 248*'

(2) *S 162 post R v Daye (1908) 2 K. B. 333 R v Lord John Russell (1839) 7 Dow 693*

(3) Mr Markby says (*Ev Act p 58*) 'We have now to consider s 65 (a) and to understand this we must refer to the Code of Civil Procedure. That Code only speaks of a notice to produce documents in connection with their production before the trial so that they may be inspected and preparation made to meet them' (O XI

r 13 2nd Ed p 794.) Still it can hardly be doubted that if A and B were in litigation and A were to give B notice to produce a document in the possession of B at the trial and B did not do so the Court would consider this to be reasonable notice within the meaning of s 66 and would admit secondary evidence under the first clause s 65 (a). So again if the document were not in the possession of A or B but of C a third person and C were out of reach secondary evidence could be produced without any notice of any kind [s 65 (a) cl 6 s 66]. But suppose C is within reach and subject to the process of the Court. By the Code of Civil Procedure O XVI r 1 Woodroffe & Ameer Ali's 2nd Ed p 825 a summons to produce the document must be issued and if it is not obeyed then proceedings may be taken to compel C to produce the document and special powers are granted for that purpose. If however we are to take the words of any person legally bound to produce it as they stand there is no necessity to take any steps to procure the production of the document as secondary evidence of it at once becomes admissible. I can hardly believe that this is what was intended. I think it probable that the word not has been omitted here by mistake and that the case intended to be dealt with here is the case of a person who though within reach of the Court, is not legally bound to produce the document. Several such cases are mentioned in ss 122-131. This would be quite intelligible and in accordance with English law. It must however be admitted that no question of there being any misprint in the Act seems to have been raised in India if there is no misprint then if in the case above put C having been summoned to produce the document, omits to obey it secondary evidence is once admissible.

reasonable that a party's right to give evidence should be taken away by the wilful, negligent, and possibly fraudulent refusal of another to produce a document which the law requires him to produce. It may be that the person refusing to produce the original does so at his own peril and is liable to an action for damages in which he may be required to make good to the party calling for a document the loss which he has sustained by its non-production. A remedy of this kind would, however, in many cases be illusory. Thus a sum for several lakhs of rupees might be dismissed or decreed owing to the inability of the parties to give secondary evidence of a document, while the person in possession of the original against whom an action would lie might be a man of straw. On the other hand the danger of collusion must not be overlooked.

The question, however, next arises whether the act has made any, and if so what, provision for the giving of secondary evidence of documents which the person in possession is justified in refusing to produce. If, for example, a person summoned to produce a document brings it to Court, as he must (1) but

being valid calling for the original, as he would be undoubtedly entitled to do according to the English rule abovementioned? According to the wording of the section as it now stands the person so summoned would not be a 'person legally bound to produce'. It has been suggested that in such case he is not *qua* such production subject to the process of the Court (4), for he cannot be compelled by the Judge to produce the document (5). But this is open to the objection that by section 66, clause (6), no notice to produce is necessary where a person is 'not subject to the process of the Court'. And not only is it difficult to suppose that notice would be excused in such a case, but such notice would clearly be necessary in order that the document be produced for adjudication by the Court on the question of privilege, and moreover the last paragraph to this clause expressly and plainly requires such notice to be given. Another construction is that which reads the words 'legally bound' as meaning legally bound by virtue of the subpoena to produce in Court. The clause would in such case include all persons in possession of documents which they are summoned to produce, whether those documents be privileged or not (section 162). But this construction is meant to produce in going to Court' and virtue of a process from a party, such as:

notice by a party or the attorney of such party' to the other party or to his attorney, strictly speaking creates no legal obligation. The only penalty, if it be one, attached to refusal to produce on such a notice, is that secondary evidence may be given. If then 'legally bound' means legally bound by virtue of the subpoena, it is plainly unnecessary to give a person already affected with notice to produce by virtue of the subpoena any further notice to produce. But the section would then read "or of any person subpoenaed to produce it and when after the notice mentioned, etc." On the other hand, this argument is weakened by the fact that there has, in respect of another matter, been a clear error of draughtsmanship in the last paragraph of this clause.

Mr Markby says that if the word "not" has been omitted in the fourth paragraph of cl (a) then by the express provisions of that section secondary evidence is admissible, and this is also the English law (6). By implication,

(1) S 162 post

(2) See ss 130 131 post

(3) S 162

(4) Whitley Stokes Anglo Indian Codes

" 892

(5) S 165 post

(6) Markby Ev Act 94

therefore, he would consider secondary evidence inadmissible under the clause as it now stands. And this also appears to be the view taken by Mr. Field, who says that "as section 65, clause (a), para 4, admits secondary evidence of the existence, condition or contents of a document only when a person legally bound to produce it refuses after notice to do so, it may appear that neither the owner nor any one else can be called to give secondary evidence of a document bound to produce. If this be admitted, it admits secondary evidence of its contents, and is therefore admissible by law to produce."

If the case is not covered by the words of the section, according to those constructions already given favouring the admissibility of secondary evidence, there has been either an intentional or accidental omission to provide for the admission of secondary evidence under the circumstances mentioned. It is difficult to assign any reason for its intentional omission. For the effect of such omission should be to establish a rule contrary to English law, and to the general principles controlling the reception of secondary evidence, which might in many cases cause serious and unreasonable injury to a litigant. If, therefore, it be held that this section does not make provision for the case mentioned, it may perhaps nevertheless be held upon the English cases and the general principles and considerations adverted to, that where a person is justified in refusing to produce a document on the ground of privilege, secondary evidence may be given by the party calling for the document, for he has, in the words of Parke, B(2), done everything in his power to obtain it (3). It is also apprehended that the rule with regard to documents, the subject of lien, is the same under this Act as it is in England (4).

Where oral evidence was given to prove the contents of a letter, which was neither produced nor called for, but no objection was raised to the giving of the evidence, held that this was secondary evidence of the contents of a document and could not be given without satisfying the conditions of this section. Section 66 rendered it legally inadmissible, although no objection was raised to the giving of it (5). This decision is unsustainable, and has been dissented from (6). It fails to draw the distinction between evidence which is irrelevant and relevant evidence proved in a particular manner without objection. An objection to the irregularity of proof should not be entertained in the Appellate Court where no objection on this head has been taken in the Court of first instance (7).

CLAUSE (B)

Oral admissions of the contents of documents are ordinarily inadmissible, unless and until the party proposing to prove them shows that he is entitled to give secondary evidence (8). The present clause, however, provides that a written admission is receivable as proof of the existence, condition, or contents of a document, even though the original is in existence and might be, but is

(1) Field *Ev* 6th Ed 423

(2) See *Hibberd v Knight* 2 Ex 12 ante

(3) But see also Field *Ev* 6th Ed 423
Cunningham Ev 213

(4) *v ante* p 512

(5) *Kameshwar Pershad v Amanutulla* 26 C 53 (1898) s e 2 C W N 649
Rampini J observing that there is no law in this country that the absence of objection to evidence which is legally inadmissible makes it admissible

(6) *Kishori Lal v Rakhal Das* 31 C 155 (1903) Approved in *Ram Lochan Misra v Paridit Har Nath Misra* 1 Pat 606 approving *Chinnaya Govind Godbole v Dhinkar Dhandej Godbole* 11 B 320, *Lakshman Govind v Anrit Gopal* 24 B, 591

(7) See Notes to s 5 ante Objections by parties and *Shahzadi Begam v Secretary of State for India* P C 1907, 34 C 1059 L R 34 I A 194

(8) S 22 ante

not produced (1) The written admission is the secondary evidence admissible in the case mentioned in this clause (2) This clause will not apply or avail a party where the original document is inadmissible for want of a stamp (3) or of registration (4) In the undermentioned criminal case (5) it was held that inasmuch as the record of the statement of the accused was not admissible secondary evidence thereof could not be given the Court observing as follows — Reference is made by the Sessions Judge to section 65 of the Evidence Act the words appearing in clause (b) of that section being quoted but for the reasons above stated I am of opinion that it was not open to the Magistrate to procure an admission in writing—if the affixing of his mark to the whole statement by the accused can be held to constitute an admission in writing for this purpose—in respect of the contents of the previous statements

This clause must be read with section 22 The result seems to be this — The written admission may always be proved The oral admission can only be proved in the cases stated in section 65 (a) (c) and (d) Of course admissions as to the contents of documents are frequently made by the parties or their pleaders at the hearing The reference now under consideration has no application to such admissions (6) which are governed by section 58 The admissions spoken of in sections 22 and 65 are evidentiary admissions Admissions under section 58 dispense with proof

CLAUSE (C)

When the original has been destroyed (7) or lost (8) or when the party offering evidence of its contents for any other reason not arising from his own default or neglect produces it in reasonable time (9) any (10) secondary evidence of the contents of the document is admissible If the instrument be destroyed or lost the party seeking to give secondary evidence of its contents must give some evidence that the original once existed (11) and must then either prove its destruction positively that it has been thrown aside by proof that a search has been where it was most likely to be the search cannot be peculiar circumstances has in good faith ation and means o

(1) *Canningham* E 214 *Phillips and Arn* E 320 320 *Goss v. Quanten* 3 M & G 285

(2) See last para but two of s 65

(3) *Damodar Jagannath v. Atmaram Babai* 12 B 443 446 (1888)

(4) *Duvell v. Varada v. Krishnaswami Ayya* 6 M 117 (1882) *Sambayya v. Gangayya* 3 M 308 (1890)

(5) *R v. Ian* 9 M 234 240 (1886)

(6) *Markby* Ev Act 59

(7) See *Syed Abbas v. Yadeem Ramy* 3 Moo I A 156 (1843) *Luchmeedhur Pattuck v. Raghoobir Singh* 24 W R 284 285 (1874) [destruction of record during the mutiny] *Aunneti Odanga v. Iroth Pally* 6 M 80 (1882) *Muhammad Abdul v. Ibrahim* 3 Bom H C R 160 167 163 (1866) *Krishna Kishore v. Kishore Lal* 14 C 487 490 (1887)

(8) See *Hurriah Chander v. Prosunna Cooar* 27 W R 303 (1874) in the matter of a *Colliso* between the *Asa* and the *Brenhida* 5 C 568 (18 9) *Kleitur Chunder v. Kleitur Paul* 5 C 886 *Roopmonjoorie Clouthranee v. Ram Lal* 1 W R 145 (1864) *Luchman Singh v. Pina* 16 C 755 756 (1897)

(9) See *Womesh Chunder v. Shama Sndar* 7 C 98 100 (1881) and *post*

(10) *vide pp* 517-518 *post*

(11) *Doe v. Whitcomb* 6 Ex. R. 601 605 606

(12) See *Museeooddeen Kasee v. Meher Ali* 1 W R 212 213 (1864)

(13) *R v. Johnson* 7 East 66 29 How St Tr 437-440 S C.

(14) *Breuster v. Sexell* 3 B & A 303 *Gully v. Bp of Exeter* 4 Bing 298. See *Pardoe v. Price* 13 M & W 267 R v. Gordon 25 L. J. M. C. 19

suggest and which were accessible to him (1). As the object of the proof is merely to establish a reasonable presumption of the loss of the instrument and as this is a preliminary inquiry addressed to the discretion of the Judge (2), the party offering secondary evidence need not on ordinary occasions have made a search for the original document, as for stolen goods, nor be in a position to negative every possibility of its having been kept back (3). If the document be important and such as the owner may have an interest in keeping or if any reason exist for suspecting that it has been fraudulently withheld, a very strict examination will properly be required to be of little or no value, a very slight doubt as it will be aided by the presumption of circumstance affords (4). It is not necessary that the search should be recent or made for the purpose of the trial (5), though it will be more satisfactory if the search be made shortly before the trial. Hearsay evidence of the answers given by persons likely to have had the document in their custody is admissible (6). Where there is one person chiefly interested in a document, enquiry should be made of him where two persons have an equal title to its custody, as a lessor and lessee enquiry should be made of both though perhaps such strictness is not legally necessary (7). If the party entitled to the custody of the document be dead enquiries should generally be made of his heirs and representatives, though such steps will not be necessary should it appear that another party is in possession of the papers of the deceased (8). It has been already observed that before copies of other secondary evidence will be admissible there must be evidence of a search for the originals (9). Whether or not sufficient proof of search for or loss of, an original document to lay ground for the admission of secondary evidence has been given is a point proper to be decided by the Judge of first instance and is treated as depending very much on his discretion. His conclusion should not be overruled except in a clear case of miscarriage (10).

Where the plaintiff stated the accidental destruction of a document and prayed leave to put in evidence a registered copy, which the Court allowed and at the same time ordered the fragments of the original bond to be produced which was done and the Court admitted the registered copy as evidence, the Judicial Committee reversed this finding on the ground that the registered copy in the absence of satisfactory evidence of the destruction of the original bond was improperly admitted as secondary evidence. There was nothing to show that the fragments produced were fragments of the original (11). In a suit by the purchaser of a debt the plaintiff stated that in 1873 *A* executed a bond in favour of *B* to secure the repayment of Rs 1000 and that he had purchased the interest of *B* at a sale in execution of a decree against him. The plaintiff now sued *A* upon the bond making *B* a party. At the trial *A* denied the execution of the bond and it was not produced by the plaintiff who having

(1) *R v Safron Hill* 22 L. J. M. C. 22 and E. & B. 93 (S. C.) See *Moriarty v Gray* 12 Ir. Law R. N. S. 129

(2) *Taylor* Ev. § 23 (a)

(3) *McGaley v Alisto* 2 M. & W. 214 *Hart v Hart* 1 Hare 9

(4) *Taylor* Ev. § 429 *Gatlercole v Mital* 15 M. & W. 319 320 329 330 335 336 *Breuster v Stoll* 3 B. & A. 299 300 303 *Kensington v Inglis* 8 East 278 *R v East Farley* 6 D. & R. 153 *Freeman v Arkell* 2 B. & C. 494

(5) *Fitz v Rabbits* 2 M. & Rob. 60 *Taylor* Ev. § 435

(6) *R v Branree* 28 L. J. M. C.

1 *R v Kenilworth* 7 Q. B. 642 *Taylor* Ev. § 430

(7) *Taylor* Ev. § 432

(8) *Taylor* E. § 434

(9) *Meer Usdoolah v Mussumat Beeby* 1 Moo. I. A. 41 (1836) *Blubaneshtari Debts v Harisaran Surna* 6 C. 723 724 (1881) *Krishna Kislori v Kishori Lal* 14 C. 490 (1887) *Haripriya Debts v Rukmini Debts* 19 C. 438 (1892)

(10) *Haripriya Debts v Rukmini Debts* 19 C. 843 (1892) see also *Shookram Sookul v Ran Lal* 9 W. R. 749 (1868)

(11) *Syud Abbas v Yadeem Ramy* 3 Moo. I. A. 156 (1843)

served *B* with notice to produce, tendered secondary evidence of its contents *B* was not examined as a witness, and no evidence was given of the loss or destruction of the bond. It was held by Pontifex and Morris, JJ. (Prinsep, J., dissenting), that secondary evidence was not admissible (1). Secondary evidence of the contents of a document requiring execution, which can be shown to have been lost in proper custody, and to have been lost, and which is more than 30 years old may be admitted under this clause and section 90, *post*, without proof of the execution of the original (2). In the Court of Probate where a will itself has, after the death of the testator, been irretrievably lost or destroyed if its substance can be distinctly ascertained (either by the original instructions by copy of the will, or even by the recollection of witnesses who have heard it read), probate may be granted of a copy embodying such substance (3).

It was held prior to the Act that when a party himself fraudulently destroys a document he is not entitled to give secondary evidence of it (4). But a party in possession of a document cannot refuse to produce it and give secondary evidence because the document has been in the possession of the opposite party who might have, or had, tampered with it (5).

The second portion of this clause deals with the case of a person who by no fault of his own, is unable to procure the production of the original. It has been said that perhaps under this portion of the clause [if the word 'not' has been omitted from the penultimate paragraph of clause (a)] (6), a party might give secondary evidence of a document which a person having no legal right to refuse the production of, nevertheless refuses on notice to produce (7). If the party interested in the document had difficulty in procuring the production of the original, it is not enough for

of a document to produce it, he must show that its non registration was not due to his own default or neglect, or he must shew that the party objecting to its production was not a party to or he must shew that the

production of the secondary evidence (9). In the undermentioned case (10) it became necessary to prove that in July 1877 certain immovable property vested in one *K S* as a purchaser at an auction sale. A certified copy under section 57 of the Registration Act was tendered and objected to. The case was remanded by the Appellate Court in order that a *subpoena duces tecum* might be served on *K S*, the Court observing that if the party seeking the production of the document could not compel *K S* to produce it and could show that the non production was not due to his own default or neglect, then secondary evidence could be given under this clause, and in such a case by section 57 of the Registration Act a copy of the entry made in the registration record was admissible.

Any secondary evidence may be given in this case (11). So where a registered deed of sale had been lost, it was held that oral evidence of the transaction

(1) *Homesh Chunder v Slama Sundari* 7 C. 98 (1881)

(2) *Khettur Chunder v Khettur Paul* 5 C. 886 (1880) 6 C. L. R. 199

(3) *Taylor Ex* § 436 and cases there cited and see *Harris v Knight* L. R. 15 P. D. 170 *Woodward v Goulstone* L. R., 11 App. Cas. 469 *Sugden v St Leonards* 1 P. D. 154, see Act X of 1865 (Ind. An. Succession) ss 208, 209 *Phipson Fv* 5th Ed. 306. See notes on ss 101—104 *post sub toc* Wills.

(4) *Sheikh Abdulla v Sheikh Muham*

mud 1 Bom. H. C. R. A. C. J. 177 (1864)

(5) *Hira Lall v Ganesh Prasad* 4 A. 406 411 (1882)

(6) *ante* p. 513 note (1)

(7) *Norton Fv* 247 248

(8) *Harcree Ali v Kalsoo Coonar* 11 W. R. 228 (1869)

(9) *Kumeezooddeen Holdar v Rajjub Ali* 9 W. R. 528 (1868)

(10) *Pasani v Haribhai* 2 Bom. L. R. 533 (1900)

(11) S. 65

might be received, and that it was not necessary to insist upon the production of a certified copy (1). And in the undermentioned case it was held that oral evidence was admissible to prove the contents of a written acknowledgment which had been lost. In this case it was said by Channell, J., that a Judge should carefully scrutinize such evidence, following the analogy of claims against the estate of a deceased person which are often disallowed unless corroborated (2). Where a deed has been executed and lost or destroyed, it is not necessary that the witnesses called to give oral testimony of its contents should be attesting witnesses, if they have seen and know the contents of the deed it will be sufficient, provided the Court gives credit to them and is satisfied of the due execution (3).

CLAUSE (D)

Secondary evidence may be given when the production of the original is either physically impossible or highly inconvenient. Thus inscriptions on wall-(4) and fixed tables, mural monuments, gravestones(5), surveyor's marks on boundary trees, notices fixed on boards to warn trespassers, and the like, may be proved by secondary evidence since they cannot conveniently, if at all, be produced in Court. For instance, on one occasion, a man was convicted of writing a libel on the wall of the Liverpool gaol, on mere proof, of his handwriting. In order, however, to let in this description of secondary evidence, it must clearly appear that the document or writing is affixed to the freehold and cannot be easily removed, and, therefore, where a notice was merely

of mural inscriptions it is not in the power of the party to produce the original (6). Any secondary evidence of the contents of the original is here admissible (7).

CLAUSE (E).

Secondary evidence may be given when the original is a public document within the meaning of section 74 (8). This provision is intended to protect the originals of public records from the danger to which they would be exposed by constant production in evidence (9). In this case a certified copy (10) of the document is admissible, but other secondary evidence of the contents has been admitted under cl (g) (11). But this provision applies only when the public

(1) *Hurish Chunder v Prosunno Coe* 22 W R 303 (1874)

(2) *Read v Price* (1909) 1 K B 577

(3) *Sud Lootfoollah v Mussamat Anseebun* 10 W R 24 (1868)

(4) See s 3 (definition of document)

(5) See s 32 cl (6) *ante*

(6) Taylor Ex § 438 and authorities there cited. The case last cited in the text would not strictly come within the wording of s 65 clause (d) which refers to originals not easily movable in the instance given the originals are not movable at all. In *Whitley Stokes Anglo Indian Codes* n 89² it is suggested that such a case is not provided for unless perhaps by the latter part of cl (c). But it can hardly be said that the original cannot be produced in reasonable time when it cannot be produced at any time. It is

apprehended that the case would come within the purview of the third paragraph of cl (a) because the document would under the circumstances given be in the possession or power of a person or persons out of reach or not subject to the process of the Court.

(7) S 65

(8) See Notes to s 74 *post* so an examined copy of a quinquennial register was held to be evidence without the production of the original. *Sreenivasy Oodoy v Bishonath Dutt* 7 W R 14 (1867). See also to this clause *Krishna Kishori v Kishori Lal* 14 C 491 (1877).

(9) *Kunnath Olanqal v Vajoth Palliyil*, 6 M 80 81 (1882). *Doc v Ross* 7 M & W 106

(10) See ss 76 77 *post*

(11) *Sandar Kuar v Chandreshwar Prasad Narain Singh* (1907) 34 C 293

document is still in existence on the public records, and does not interfere with the general rule in clause (e) that any secondary evidence may be given when the original has been destroyed or lost (1) A certificate of sale granted under the Civil Procedure Code, Act VIII of 1859, and before section 107 of Act XII of 1879 was enacted, is a document of title, but is not a public document so as to allow secondary evidence of it to be given under this clause (2) A certified copy of a *rubakar* is admissible (3) See further p 509, *ante*, as to cases in which two causes for non production of the original are combined, and notes to s 86, *post*

CLAUSE (F)

When the original is a document of which a certified copy is permitted by this Act (4), or by any other law in force in India (5) to be given in evidence a certified copy is the only evidence admissible (but *cf post*) The words "to be given in evidence" mean to be given in evidence in the first instance without having been introduced by other evidence (6) A registered deed of sale is not a document of which a certified copy is permitted by law to be given in evidence in the first instance without having been introduced by other evidence Section 57 of the Registration Act only shows that when secondary evidence has in any way been introduced, as by proof of the loss of the original document a copy certified by the registrar shall be admissible for the purpose of proving the contents of the original, that is it shall be admitted without other proof than the Registrar's certificate of the correctness of the copy, and shall be taken as a true copy, but that does not make such a copy a document which may be given in evidence without other evidence to introduce it (7) Section 86 of this Act contains an instance of documents to which this clause seems to refer (8) The Bankers' Books Evidence Act (XVIII of 1891) is an instance of an Act, other than the present one which permits certified copies of original documents to be given in evidence (9) So also under the Powers of Attorney Act a certified copy of an instrument deposited shall without further proof be sufficient evidence of the contents of the instrument and of the deposit thereof in the High Court (10) And as to production of verified copies of entries in business books see Civil Procedure Code O XI, r 19 (11) Although the section provides that in clause (f) a certified copy of the document, but no other kind of secondary evidence is admissible yet in a case falling under clause (f) and also under clause (a) or (c) of the same section any secondary evidence is admissible (12)

(1) *Kunneth v Paoth* note (9) *supra* see also In the matter of a collision between the "Ata" and the "Brenhilda" 5 C 568 (1879) *Bishendyal Singh v Must Akhderma* Marshall's Rep 213 (1862)

(2) *Lasanj v Haribhai* 2 Bom L R 533 (1900) *per Candy J*

(3) *Radhanath Kabaria v Emperor* 22 C. W. N 742 s. c. 19 Cr L J 769

(4) See s 8 and as to this clause *Krishna Aishori v Aishori Lal* 14 C. 491 (1887)

(5) E.g. Act XVIII of 1891 (The Bankers' Books Evidence Act) *v post* see also Woodroffe and Ali's Civ. Pr. Code O LV, r 15 2nd Ed p 1343

(6) *Hurrish Chunder v Prosunno Coomar* 22 W. R. 303 (1874)

(7) *Hurrish Chunder v Prosunno Coomar* 22 W. R. 303 (1874) and although such a copy may be taken as a

correct copy of some document registered in the office this circumstance does not make that registered document evidence or render it operative against the persons who appear to be affected by its terms A document registered in and brought from a public registry office requires to be proved when it is desired that it should be used as evidence against any party who does not admit it quite as much as if it came out of private custody *Sakh Fau v Omedee Singh* 21 W. R. 265 (1879)

(8) *Hurrish Chunder v Prosunno Coomar* *supra*

(9) Act XVIII of 1891 s 4 see *Appendix* to last Edition

(10) Act VII of 1887 s 4 cl (d)

(11) P 797 (2nd Ed.)

(12) In the matter of a collision between the "Ata" and the "Brenhilda" 5 C 568 (1879)

CLAUSE (G)

This provision is for the saving of public time. If the point to be ascertained were, for instance, the balance in a long series of accounts in a merchant's books, evidently great inconvenience would arise, and much public time be wasted if a witness were compellable to go through the whole of the books and to make his examination and calculations before the Court. He is allowed, therefore, to do this before he comes to be sworn, and then to give the general result of his scrutiny. He can, of course, be tested by cross examination and the books should always, where it is practicable, be in Court and open to the opposite side's inspection and to that of the Court (1). So a witness who has inspected the accounts of the parties, though he may not give evidence of their particular contents, will be allowed to speak to the general balance without producing the accounts, and where the question is as to the solvency of a party at a particular time, the general result of an examination of his books and securities may be stated in like manner (2). But the word "result" must be construed strictly to mean the actual figures or facts arrived at. The "exception under consideration will not enable a witness to state the general contents of a number of letters received by him from one of the parties in the cause, though such letters have been since destroyed, if the object of the examination be to elicit from the witness not a fact but merely an opinion or impression, for instance, the impression which the destroyed letters produced on his mind with reference to the degree of friendship subsisting between the writer and a third party. In the other cases mentioned the fact in question is one which simply depends on the honesty of the witness, whereas he might from the perusal of the documents conscientiously draw a very different opinion or inference from that which would be drawn by a jury" (3). In case (g) secondary evidence may be given as to the general result of the documents by any person who has examined them and who is skilled in the examination of such documents. The competence of the witness must, therefore, be proved to the satisfaction of the Court before such evidence is tendered. In the under-mentioned case it was held that the general result of the examination of many documents may be given under this clause, even though they may be 'public documents' within the meaning of clause (e) and section 74, since the evidence was admitted not because the documents were public but because they were such as could not be conveniently examined in Court and because the fact to be proved was the general result of the examination (4).

Upon the analogy of the rule contained in this clause, if bills of exchange or the like have been drawn between particular parties in one invariable mode, this may be proved by the testimony of a witness conversant with their habits of business, who speaks generally of the fact without production of all the bills (5). But if the mode of dealing has not been uniform the case does not fall within this exception, but is governed by the rule requiring the production of the writings (6).

66 Secondary evidence of the contents of the documents referred to in section 65, clause (a) shall not be given (7), unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the

Rules as to
notice to
produce

(1) Norton *Ex* 248 see also Civ Pr Code O XXVI r 11 2nd Ed p 1097 (Commissions to investigate and adjust accounts)

(2) Taylor *Ev* § 462

(3) *Id*

(4) *Sandar Kuar v Chandreshwar*

Prasad Varain Singh (1907) 34 C 293

(5) *Spencer v Billing* 3 Camp (310)

(6) Taylor *Ev* § 46²

(7) See *Kameshwar Pershad v Amanutulla* 26 C 53 (1898) s c 2 C W N, 649 cited *ante* p 515 and the observations on the case

document is(1), or to his attorney or pleader, such notice produce it as is prescribed by law, and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it —

- (1) when the document to be proved is itself a notice,
- (2) when, from the nature of the case, the adverse party must know that he will be required to produce it, (3)
- (3) when it appears or is proved that the adverse party has obtained possession of the original by fraud or force,
- (4) when the adverse party or his agent has the original in Court,
- (5) when the adverse party or his agent has admitted the loss of the document,
- (6) when the person in possession of the document is out of reach of, or not subject to, the process of the Court

Principle—Notice is required in order to give the opposite party a sufficient opportunity to produce the document and thereby to secure if he pleases the best evidence of its contents. Notice to produce also excludes the argument that the opponent has not taken all reasonable means to secure the original (3). See further Notes *post* as to the ground of the rule and of the provisions.

s 63 (Meaning of secondary evidence)

s 3 (Document)

s 65 Cl (a) (Proof of secondary evidence)

s 3 (Court)

Steph Dig Art 72 Taylor Ex §§ 449—456 Mandrylle and Amir Als (17 1r Code 2nd Ed. O V r 7 p 641 O VIII pp 800—812 O VI rr 15—18 pp 794—796 Cr Pr Code ss. 94—98 480 Ch VI 16 Penal Code s 175

COMMENTARY

Notice to produce

A proper notice to produce is in the cases mentioned in section 63 clause (a) necessary before secondary evidence (4) becomes admissible. The true principle on which a notice to produce a document on the trial of a cause is required is not to give the opposite party notice that such a document will be used by a party to the cause in order to enable him to prepare evidence to explain or confirm the document but is merely to give him a sufficient opportunity to produce it and thereby secure if he pleases the best evidence of the

(1) These words in s 66 were inserted by Act XVIII of 1872 s 6

(2) See *Duarka Singh v Ramanund Upadhye* 41 A 592 s c. 17 A L J 711

(3) *Dyer v Collins* 7 Ex 639—647

(4) In s 65 existence condition or

contents are spoken of. In s 66 secondary evidence of the contents is alone mentioned. *Quare* whether secondary evidence of existence or condition can be given in any case without notice. Field Ev 6th Ed 23. Apparently yes.

contents, and therefore, when a document is shown to be in Court, a request to produce it immediately is sufficient (1)

Section 65, 'n of both parties and strangers ce is used for an adversary in the produce a document is served with a summons to produce a *subpoena duces tecum*. A notice to produce is a notice by party or his solicitor to another party or his solicitor, calling upon the latter to produce at the trial a particular document or particular documents specified in the notice. A *subpoena duces tecum* is a process used not by the party but by the Court. It would appear from clause (a) of section 65 that the notice to produce referred to in sections 65 and 66 is a notice served either on an adversary or on a stranger(2) and is a notice issued by process of Court under the Civil(3) or Criminal(4) Procedure Code. In the Mofussil all notices are served through the Court, but on the Original Side of the High Court, the party himself or his solicitor serves a notice to produce on the opposing party or his solicitor. Where however the person in possession of the document is a stranger to the suit, a *subpoena duces tecum* will be necessary in the High Court as in the English Courts whose practice in this respect is followed.

The notice to produce must be such as is prescribed by law, and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case. It must be shown that the party to whom the notice has been given has the document in his possession or power. Possession is the very foundation of notice, reasonable evidence of possession must be given, and then on proof of service of notice and non production, secondary evidence may be offered (5). If the document is in the possession or power of the person who desires to use it as evidence, he must produce it (6). 'It is difficult to lay down any general rule as to what a notice to produce ought to contain, since much must depend on the particular circumstances of each case. No mis statement or inaccuracy in the notice will however, be deemed material if not really calculated to mislead the opponent. Neither is it necessary by condescending minutely to dates contents, parties, etc., to specify the precise

will be called for this will be sufficient' (7). The form of notice may be general e.g., to produce 'all accounts relating to the matter in question in this cause' (8), or "all letters written by the plaintiff to the defendant relating to the matters in dispute in the action" (9). But a notice to produce 'letters and copies of letters and all books relating to the cause' has been held to be too vague to admit secondary evidence of a letter (10). Inaccuracies will not

(1) *Dager v Collins* 7 Ex. 639 further notice to produce excludes the argument that the opponent has not taken all reasonable means to procure the original. *ib* 647 v post. Proviso (4) p. (497). But see also *Bate v Kinsey* 1 C M & R 38.

(2) *Field v* 6th Ed. 233. *Whitley Stokes* ii 893.

(3) See *Woodroffe & Ails* Civ. Pr. Code (2nd Ed.) O V r 7 p. 641. O XI rr 15-18 pp. 794-796.

(4) See *Woodroffe & Ails* Cr. Pr. Code ss. 94-98. Ch. VI. *ib* s. 480. *ib* and ss. 167-165 post. persons omitting to produce documents after service of notice may be proceeded against under s. 175 of

the Penal Code.

(5) See *Sinclair v Stevenson* 1 C & P 585 as to the order in which the evidence may be given see s. 136 post.

(6) *Hira Lal v Ganesh Prasad* 4 A 406 410 (1882).

(7) *Taylor Ex* § 443.

(8) *Rogers v Custance* 2 M & Rob 181.

(9) *Jacob v Lee* 2 M & Rob 33. *Morris v Hauser* ex 392.

(10) *Jo es v Edwards* M C I & Y 139. Recent decisions justify a greater laxity of practice than prevailed formerly but it is believed that many English Judges still act upon the old principles. *Taylor Ex* 443.

vitate a notice unless the recipient has been misled thereby (1) As to the time and place of the service, when not fixed by law, no more precise rule can be laid down than that it must be such as to enable the party, under the known circumstances of the case to comply with the call (2) The sufficiency of the service is a question for the Judge, who must be satisfied that it was such that the recipient might, by using reasonable diligence, have complied with the notice (3) If the notice has not been properly served, or if served in insufficient time (4) or if the party calling for a document does not take all the means in his power to compel its production (5) secondary evidence will not be permitted to be given

When a party calls for a document which he has given the other party notice to produce and such document is produced and inspected by the party calling for its production, he is bound to give it as evidence, if the party producing it required him to do so (6) And when a party refuses to produce a document which he has had notice to produce he cannot afterwards use the document as evidence without the consent of the other party or the order of the Court (7) The rules with regard to the admission of secondary evidence are the same in criminal as in civil trials, and the necessity for notice the same, though it will comparatively seldom happen that documents are required to be produced at a criminal trial and notice will consequently have but seldom to be issued (8) The Court shall presume that every document called for and not produced after notice to produce was attested, stamped and executed in the manner required by law (9)

Provisos

Notice is not required in order to render secondary evidence admissible in any of the following cases —

(a) *When the document to be proved is itself a notice* This exception appears to have been originally adopted in regard to notices to produce for the obvious reason that if a notice to produce such a document were necessary, the series of notices would become infinite. The exception has subsequently been extended to other notices and now lets in proof by copies of a notice to quit of a notice of dishonour provided the action be brought upon the bill but not otherwise, and of all such notices of action or written demands as are necessary to entitle the plaintiff to recover (10)

(b) *When from the nature of the case the adverse party must know that he will be required to produce it* The second of the cases is where from the nature of the action or indictment or from the form of the pleadings the defendant must know that he will be called upon to produce it a bill of exchange or other the counsel for the plain evidence of its contents even though the defendant should offer to produce

(1) *Lawrence v Clarke* 14 M & W 251

(2) *Taylor Ev* § 445 see *ib* § 446 when the papers are in a foreign country

(3) *Lloyd v Mostyn* 10 M & W 483 484

(4) *Sugg v Bray* 54 L J Ch 132 *Taylor Ev* § 445 but if a party on being served with a notice to produce a document states that it is not in existence parol proof of the contents will be received and no objection can be taken to the lateness of the service *Foster v Poinier* 9 C & P 720

(5) *Shambals Koers v Jago B'bee* 29

C 749 (1902)

(6) S 163 *post* see *Notes* to that section

(7) S 164 *post* see *Notes* to that section and see *Civil Procedure Code* (2nd Ed) O XI r 15 p 794 O XII r 12 p 725

(8) *Norton Ev* 251

(9) S 89 *post*

(10) *Taylor Ev* §§ 450 451 and cases there cited *Quarre* whether the notices referred to in cl. (1) is a notice to produce only or includes also the other notices to which the doctrine has been extended by the English cases

the document itself (1) In a suit for redemption the plaintiffs were allowed to give secondary evidence without notice to produce the original mortgage bond as the defendants must have known that they would be required to produce it in a suit for redemption (2) A like rule prevails in an action on contract against a carrier for the non delivery of written instruments as also in indictments for conducting a traitorous correspondence It has however been held inapplicable in a charge of forging a deed and no doubt can be entertained that an indictment for arson with intent to defraud an insurance office does not convey such a notice that the policy will be required as to dispense with a formal notice to produce Similarly it is the necessary (though reverse) consequence of this rule that if the maker of a note or cheque or the acceptor of a bill does not as defendant in an action deny by the plea his making or acceptance the plaintiff who is not bound to produce the instrument as part of his case since it is admitted on the record may object to the defendant's giving secondary evidence of its contents for the purpose even of identification unless a notice to produce has been duly served or unless the instrument is shown to be in Court (3)

It has obtained possession brought he has received

In such cases in odium

spoliatoris a notice to produce is not required to be given to him before admitting secondary evidence of the contents of the document of which he has improperly obtained possession (5)

(d) *When the adverse party or his agent has the original in Court* For the object of the notice is not as was formerly thought to give the opposite party an opportunity of providing the proper testimony to support or impeach the document but merely to enable him to produce it if he likes at the trial and thus to secure the best evidence of its contents (6)

(e) *When the document has been destroyed* For in such a case Under this clause the destruction of the document and then show its contents by secondary proof unless he has first served a notice to produce since (notwithstanding the evidence to the contrary) the document may still be in existence or at any rate the opponent may dispute the facts of its having been destroyed (8)

(f) *When the person in possession of the document is out of reach of or not subject to the process of the Court* (9) On this point sections 65 and 66 are not happily drafted Section 65 appears to require a notice to be given in this case for the last paragraph of Clause (a) applies to everything that has gone before while the present Clause expressly enacts that notice is not necessary (10) Where a commission to take evidence is issued to any place beyond the jurisdiction of the Court issuing the commission it is not necessary in order to a limit secondary evidence of the contents of a document that the party tendering it should have given notice to produce the original nor is it necessary for him to prove a refusal to produce the original (11)

(1) See *Whitelhead v Scott* 1 M & R 523

see Taylor E § 456

(2) *Duarka Singh v Ranganad*

(7) Taylor E § 455

(8) *Doe v Morris* 3 A & E 46

(9) See *Bishop Mellis v Harcourt* 4 Ex 429 (1899) s c 27 C 639 cited ante

(10) See the argument in *Ralli v Gau* Km 9 C 939 (1893)

(11) *Ralli v Gau* Km supra

(3) *Leeds v Cooks* 4 Esp 256

(4) *Taylor F* § 453

(5) *Dwyer v Collins* 7 Ex 639 ante

The Court may dispense with notice

It will be observed that under this section, besides the specified cases in which notice is not required, the Court has the power of dispensing with notice "in any case in which it thinks fit" This is a relaxation of the procedure in force in the English Courts (1)

Proof of signature and handwriting of person alleged to have signed or written document produced

67. If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be that person's handwriting must be proved to be in his handwriting

Principle.—The person who makes an allegation must prove it Not post

s 3 (Document)

s 3 (Proved)

s 45 (Expert evidence & Attestation)

s 47 (Non expert evidence as to handwriting)

s 73 (Comparison of handwriting)

writing)

COMMENTARY

Proof of signature and handwriting

In addition to the question which arises as to the contents of a document dealt with in sections 61—66 the further question arises when a document is used as evidence namely whether it is that which it purports to be, whether in other words it is a genuine document. The latter question is dealt with in sections 67—73. The nature of the evidence will greatly depend upon the nature of the document. Proof of handwriting, signature and execution must be given. Formalities attend or form part of such execution of either a universal or special nature. Signature is almost universal for which sometimes but more rarely sealing is substituted. Sometimes both are used. If a person cannot write and has no seal he generally makes a mark, and some other person writes his name. Attestation as to which see sections 68—72, is sometimes an imperative formality. Whatever the document may be it cannot be used in evidence until its genuineness has been either admitted or established by proof which should be given before the document is accepted by the Court (2). Although under this section no particular kind of proof is required for the purpose of establishing the fact of execution, it must nevertheless be shown to the satisfaction of the Court that the mark or signature denoting execution was actually fixed to the document by the person who professed to execute it. A Court is not bound to treat the registration endorsement as conclusive proof of the fact of execution. If there are suspicious circumstances attending the execution of the document such endorsement cannot be resorted to for the purpose of holding that the execution has been proved (3). The word 'signing' means the writing of the name of a person so that it may convey a distinct idea to somebody else that what the writing indicates is a particular individual whose signature or sign it purports to be. A mark is a mere symbol, and does not convey any idea to the person who notices it—very often probably even to the person who made it (4). This section has not provided for the case of marks and seals, as to the proof of which, however see *ante* notes to section 47, and section 73, which assumes that seals are capable of proof. This section merely states with reference to documents what is the universal rule in all cases that the person who makes an allegation must prove it. It is in no way restrictive as to the kind of proof

(1) *Cunningham v* 218

(2) *Markby v* Act 60

(3) *Jagannath v Di raju* 5 O L J 46 I C. 277

(4) *Nri al Chunder v Sr mats Sarat mani* 2 C W N 642 648 (1898) as to signature including a mark see *ante* notes to s 47 437—438

which may be given. the proof may be by any of the recognized modes, as for instance, by statements admissible under section 32, and thus handwriting may be proved by circumstantial evidence (1) In that respect the rule is precisely the same as it stood before. It leaves it, as before, entirely to the discretion of the presiding Judge of fact to determine what satisfies him that the document is a genuine that the evidence which defendant's case depends and admitted the deed to be his, and caused it to be registered, bringing witnesses to his execution thereof. Upon that evidence the lower Court came to the conclusion that the deed was proved, but it was contended in appeal that the present section rendered it necessary that direct evidence of the hand writing of the person who was alleged to have executed the deed should have been given by some person who saw the signature affixed. But the Court, making the observations cited above, *held*, that it was not so expressly stated in this section, and that that was not the intention of the Legislature (4). So also this Act does not require the writer of a document to be examined as a witness, nor does the present section require the subscribing witnesses to a document to be produced (5).

It has been stated (6) to be commonly the practice with Subordinate Judicial Officers, when taking the evidence required by this section, to record merely that the witness verified ('*tasdiq*' *liya* or some similar expression) the document without stating the exact nature of the evidence offered or the statement made by the witness. In *Ganga Persad v Inderjit Singh* (7) the Judicial Committee said—"The Documentary evidence on which the defendant's case principally rested consisted of two documents and the endorsements of payment thereon, which purported to have been signed by the plaintiffs, because these, if really signed by them, were proof of settled accounts comprehending most of the disputed payments. In this country, or in any country where the administration of justice is conducted with any degree of formality and regularity, one would have expected to find that these documents had been put into the hands of the plaintiffs, and that they had been called upon to admit or deny their alleged signatures, and that the proof of these documents to be given by the defendants would have been far more specific than a mere statement that they were *identified and verified*, as the Judge says, by the witnesses, the witnesses would have been called upon to state whether they saw *BS* sign the first, or *BS* and *J* sign the second, or, if not, whether they could speak to the handwriting, and generally, what took place on the two occasions on which the accounts are vaguely said by one of the witnesses to have been adjusted" (8). As to the presumptions which exist in the case of documents thirty years old, see section 90, *post*.

"Executed" means completed. "Execution" is when applied to a document, the last act or series of acts which completes it. It might be defined as formal completion. Thus execution of deeds is the signing, sealing and delivering of them in the presence of witnesses. Execution of a will includes attestation. In each class of instruments we have to consider when the instrument is formally complete" (9). Thus the contract on a negotiable instrument

Proof of execution

(1) *Abdulla Paru v Gannibai* (1887) 11 B 690 *Barindra Kumar Ghose v R* (1909) 37 C 91 and as to the methods of proof see section 47 *ante*

(2) *Neei Kanto v Jugobundho Ghose* 12 B L R App 18 (1874) *per* Markby J

(3) *Ib*

(4) *Ib*

(5) *Abdool Ali v Abdool Rahman* 21 W R 429 (1874) as to attesting witnesses see s 68

(6) Field F 6th Ed 233

(7) 23 W R 390 (1875)

(8) 23 W R 390 (1875)

(9) *Bhajan v Harbhun v Devji Punja*, 19 B 635 638 (1894) *per* Farran J

is, until delivery, incomplete and revocable (1) The execution of documents to the validity of which attestation is not necessary may be proved by the admissions of the party against whom the document is tendered, whether such admissions are of an evidentiary nature, or made for the purposes of the trial only

document

him (sectic

trial for the purpose of dispensing with proof When there had been no admission as to the execution of a document which has been produced, it becomes necessary to prove the handwriting signature, or execution thereof (2) As to the various methods of proving handwriting see section 17, ante and the Notes to that section The English cases with regard to deeds and their sealing are not of much importance in this country where writings under seal or as they are technically called, "deeds" are not generally required and contracts under seal have no special privilege attached to them being treated on the same footing as simple contracts According to English law, where the signature of a deed has been proved and the attestation clause is in the usual form sealing (3) and delivery may be presumed, so if signature and sealing are proved delivery will be presumed (4) Where the seal of a corporation is not judicially noticed (5) it may be proved by anyone who knows it, no witnesses are required to the affixing of such seal, and attestation is not necessary unless the Article of Association otherwise provide The presumption is that the seal has been properly affixed (6)

If the writing which is tendered in evidence is one which receives its character from being passed from one hand to another, the delivery, if necessary must be proved So until delivery a *hundi* is not clothed with the essential characteristics of a negotiable instrument (7) No particular form of delivery is necessary (8) Lastly, certain special rules exist as to the proof of execution of documents which are required by law to be attested (9) An attested document not required by law to be attested may be proved as if it was unattested (10) In respect of the proof of plans, it is not a sufficient reason for admitting a plan in evidence, that a witness says it was prepared in his presence unless the witness also says that to his own knowledge the plan is correct (11)

Proof of

is to be
attested

68. If a document is required by law to be attested, it is evidence until one attesting witness at least for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence

Proof where
no attesting
witness
found

69. If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting

(1) See foot note (9) page 527
(2) See Phipson Ev 5th Ed 483 489
Taylor Ev § 972 et seq § 149
(3) See last Note
(4) Taylor Ev § 149 Roscoe N P
Ev 18th Ed 137
(5) s 57 ante
(6) *Moses v Thornton* 8 T P 307
see as to this case Taylor Ev § 185
as to the presumption of genuineness of
certain seals see s 87 post and as to com-
parison of seals s 73 post

(7) *Bharwanji Harbhun v Desai Pooja*
19 B 638 (1894)
(8) Phipson Ev (5th Ed 497) and
cases there cited see as to the presump-
tion in favour of the due execution of
instruments Taylor Ev §§ 148 149
and as to Presumption of delivery v
ant
(9) s 69—1 post
(10) s 72 post
(11) *R v Jora Haje* 11 Bom R C R.
247 246 (1874)

witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person

70 The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested

71. If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence	Proof wh attesting witness denies th
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72. An attested document not required by law to be attested may be proved as if it was unattested	Proof of document not required
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Principle—Attestation of documents is a common formality and in some cases imperative. The object with which it is made or required is to afford proof of the genuineness of the document. It is clear that the provi

by law as barriers against perjury and fraud must be strictly observed (1) On the other hand the fate of a document is not necessarily at the mercy of the attesting witnesses. The mere fact that they repudiate their signatures or the like does not invalidate the document if it can be proved by evidence of a reliable character that they have given false testimony (2) Where however attestation is optional a party is free to give such evidence as he pleases the case not being one in which the law has required a particular form of proof
See Notes post

8 3 (*Document*) 9 45 47 67 73 (*Proof of handwriting*)
 8 3 (*Evidence*) 8 17 (*Idem*)
 8 3 (*Court*) 88 89 90 (*Presumption of a statement*)
 8 8 (*Proof*)

Steph. Dg Arts 66-69 TAYLOR FR §§ 1939-1961 Act X of 1865 ss 50 331
Act XXI of 1870 s 9 Act IV of 1889 ss 50 193 PHIPPS EV 5th Ed 490-496
HARRIS LAW of Identification in §§ 37-381

COMMENTARY

Section 68 is imperative (3). There are but few documents which are required by law to be attested in India. Wills made after the first day of January 1866 by persons other than Hindus Muhammadans or Buddhists (4), and Wills made by Hindus, Jainas, Sikhs and Buddhists on or after the first day of September 1870, are required by law to be attested by the Lieutenant Governor of Bengal relating to immovable property. In the case of wills attestation

(1) *Arj* : *Cla dra Bladra* \ *Kalas*
Clandra Das 36 C L J 373 (1972)

() *Malraj Lal Behar Anjun an un*
n ssa 5 O L J 667 a c 48 I C
538

(3) *Siddhanta Kumar Singha v Gour
Chandra Pal* 35 C L J 473

(4) Act \ of 1865 (Ind an Success on)

55 50 331

(5 Act XXI of 1870 (Hindu Wills)
s 2 As to whether strict affirmat
proof of due attestation is absolutely nec
sary see *S do Sundar Debi v Hemangsu
Debi* 4 C W N 204 (1899) Cf Hindu
Transfers and Bequests Acts (Madras Act
I of 1914)

is, until delivery, incomplete and revocable (1) The execution of documents to the validity of which attestation is not necessary may be proved by the admissions of the party against whom the document is tendered whether such admissions are of an evidentiary nature, or made for the purposes of the trial only In the case of attested documents the admission of a party to such document of its execution by himself is sufficient proof of its execution *as against him* (section 70, *post*) whether such admission be evidentiary or made at the trial for the purpose of dispensing with proof When there had been no admission as to the execution of a document which has been produced it becomes necessary to prove the handwriting signature, or execution thereof (2) As to the various methods of proving handwriting *see* section 47, *ante* and the *Notes* to that section The English cases with regard to deeds and their sealing are not of much importance in this country where writings under seal or as they are technically called, 'deeds' are not generally required and contracts under seal have no special privilege attached to them, being treated on the same footing as simple contracts According to English law, where the signature of a deed has been proved and the attestation clause is in the usual form sealing (3) and delivery may be presumed, so if signature and sealing are proved delivery will be presumed (4) Where the seal of a corporation is not judicially noticed (5) it may be proved by anyone who knows it no witnesses are required to the affixing of such seal, and attestation is not necessary unless the Article of Association otherwise provide The presumption is that the seal has been properly affixed (6)

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Proof of execution of document required by law to be attested

68. If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence

Proof where no attesting witness found

69. If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting

(1) See foot note (9) page 527
(2) See Phipson *Fv* 5th Ed 488 489
Taylor *Ev* § 972 *et seq* § 149

(3) See last Note
(4) Taylor *Fv* § 149 Roscoe N P
Fv 18th Ed 137

(5) *et seq* 57 *ante*
(6) *Moses v Thornton* 8 T R 307
see as to this case Taylor *Fv* § 1852
as to the presumption of genuineness of certain seals *see* § 82 *post* and as to comparison of seals § 73 *post*

(7) *Bhawani Harbun v Devis Punjani*
19 B 638 (1894)

(8) Phipson *Ev* (5th Ed 497) and cases there cited *see* as to the presumption in favour of the due execution of instruments Taylor *Ev* §§ 148 149 and as to Presumption of delivery *ante*

(9) *See* 69—71 *post*

(10) *S* 72 *post*

(11) *R v Jora Haste* 11 Rom II C.R. 242 246 (1874)

witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person

70 The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested

Admission of execution by party to attested document

71. If the attesting witness denies or does not recollect the execution of the document its execution may be proved by other evidence

Proof when attesting witness denies the execution

72 An attested document not required by law to be attested may be proved as if it was unattested

Proof of document not required by law to be attested

Principle—Attestation of documents is a common formality and in some cases is imperative. The object with which it is made or required is to afford proof of the genuineness of the document. It is clear that the provi-

by law as barriers against perjury and fraud must be strictly observed (1) On the other hand the fate of a document is not necessarily at the mercy of the attesting witnesses. The mere fact that they repudiate their signatures or the like does not invalidate the document if it can be proved by evidence of a reliable character that they have given false testimony (2) Where however attestation is optional a party is free to give such evidence as he pleases the one not being one in which the law has required a particular form of proof

See Notes post

- s 3 (Document) s 45 47 67 73 (Proof of handwriting)
 s 3 (Evidence) s 17 (Idem ss on)
 s 3 (Court) ss 89 90 (Presumption of attestation)
 s 8 (Proof)

Steph. Dig. Art. 66 69 Tal. Ev. §§ 1839—1861 Act V of 186 ss 50 331
 Act XXI of 1870 s 2 Act IV of 188 ss 59 193 Pl. in Ev. with El. 439—496
 Harris Law of Evidence in §§ 397—398

COMMENTARY

Section 68 is imperative (3) There are but few documents which are required by law to be attested in India. Wills made after the first day of January 1866 by persons other than Hindus Muhammadans or Buddhists (4) and Wills made by Hindus Jains Sikhs and Buddhists on or after the first day of January 1866 are required by law to be attested. The documents required by law to be attested are:—

Documents required by law to be attested

Lieutenant Governor of Bengal relating to immovable property In the case of wills attestation

(1) *Arjun Chandra Bhadra Kalas Chandra Das* 36 C. L. J. 373 (1911)
 (2) *Maharaj Lal Behar v. Anjmanin* 5 O. L. J. 667 s. c. 48 I. C. 538
 (3) *S. d. a. K. mar Sngla Gour* 35 C. L. J. 473
 (4) Act V of 1865 (Indian Succession)

ss 50 331
 (5) Act XXI of 1870 (Hindu Wills)
 s 2 As to whether strict affirmative proof of due attestation is absolutely necessary see *S. b. Sundar Deb v. Hemangini Deb* 4 C. W. N. 204 (1899) Cf. Hindu Transfers and Bequests Acts (Madras Act I of 1914)

either of the execution or of the admission of execution by the testator is expressly made sufficient for the purpose (1) So the signature of the Registrar at the foot of the registration endorsement embodying the admission of the executant has been held to be sufficient attestation within the meaning of section 50 of the Indian Succession Act (2) But this does not, however, hold good in the case of mortgages (3) A mortgage, the principal money secured by which is 100 rupees or upwards, can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses Where the principal money is less than 100 rupees, a mortgage may be effected either by an instrument signed and attested as aforesaid, or (except in the case of a simple mortgage) by delivery of the property (4) The attestation here contemplated, is attestation of the act of signing by the executant and cannot, in the absence of any express provision to that effect, be taken to include the attestation of the executant's admission of having signed the document (5) Therefore, the requirements of section 59 of the Transfer of Property Act are not satisfied when a mortgage-bond is signed by the mortgagor attested by one witness and contains the Sub Registrar's signature to the endorsement, recording the admission of the execution by the executant (6) The Madras High Court held in one case that a mortgage for more than 100 rupees which has been prepared and accepted, but which is not attested, is invalid, and that it cannot be used in proof of a personal covenant to pay (7) But this view has not been accepted by the Calcutta High Court, which has held that an unattested mortgage, so far

attested,

held that

it was not

such as it

the Madras High

Court held that a document which purports to be a mortgage but is not one owing to the lack of the attestation required by section 59 of the Transfer of Property Act, is not a document which requires attestation within the meaning of the present section; and so (whether it is registered or unregistered) is admissible to prove the personal covenant (8) But in a more recent case (9) by the Privy Council (10) and in a later case (11) it has been held that a doc

(1) Act X of 1865 s 50 *Girindra Nath v Bejoy Gopal* 26 C 246 248 249 (1898)

(2) *Nitya Gopal v Jagendra Nath* 11 C 429 (1885), *Horendra Narain v Chandra Kanta* 16 C 19 (1888), *Girindra Nath v Bejoy Gopal* supra *Tofaluddi Peada v Mahar Ali* 26 C, 78 80 (1898)

(3) See last two cases cited and post

(4) Act IV of 1882 (Transfer of Property) s 59

(5) *Tofaluddi Peada v Mahar Ali* 26 C, 78 (1898), *Girindra Nath v Bejoy Gopal*, 26 C 246 (1898), *Abdul Karim v Salimun*, 27 C, 190 (1899), *Sasi Bhusan Pal v Chandra Peshkar*, 33 C, 1864, and *Dinaboyce Debi v Bon Behari Kapur*, 7 C W N, 160, *Ranu v Laxmanrao* 33 B, 44 (1908), *Badr Prasad v Abdul Karim* 35 A 254 (1913) *Shamu Patter v Abdul Kadir Razathan P C*, 35 M, 607 (1912), 39 I A 218, *Collector of Mirzapur v Bhagwan Prasad F B*, 35 A, 164 (1913)

(6) *Tofaluddi Peada v Mahar Ali*

(supra)

(7) *Madras Deposit Society v Oonnamalai Ammal*, 18 M, 29 (1894), overruled by post s 9

(8) *Sonatan Shaha v Dino Nath* 26 C, 222 (1898), s c. 2 C W N, cccxxv 3 C W N 228 *Tofaluddi Peada v Mahar Ali* 26 C 78 (1898)

(9) *Pulaha Peetl Muthalakulanga Kunhu Moidu v Thiruthipalli Madhava Menon (F B)*, A C (1908), 32 M, 410, over ruling *Madras Deposit Society v Oonnamalai Ammal* (1894), 18 M 29, and following *Sadakaraur v Tadepally Basaviah* (1907) 30 M, 284

(10) *Sham Patter v Abdul Kadir Razathan P C* 35 M 607 (1912) *Samoo Patter v Abdul Sammad Sahib* (1908), 31 M 337, following *Raj-uddi Sheikh v Lal Nath Mookenjee* 33 C, 945 and *Narayan v Lakshmandas* 7 B 934

(11) *Collector of Mirzapur v Bhagwan Prasad F B*, 35 A, 164 (1913)

but is invalid as one for want of due attestation under section 59 of the Transfer of Property 'property in property of the donor

“ ‘To attest’ is to bear witness to a fact. Take a common example, a notary public attests a protest, he bears witness, not to the statements in that protest, but to the fact of the making of those statements, so I conceive, the witnesses in a will bear witness to all that the Statute requires attesting witnesses to attest namely, that the signature was made or acknowledged in their presence (2) To ‘attest’ an instrument is not merely to subscribe one’s name to it as having been present at its execution, but includes also, essentially, the being in fact present at its execution (3) In the case of a *purda nashin* witnesses who are separated from her by a *chick* and recognize her by her voice without seeing her face are present at her execution of a document (4) The ordinary sense of the expression ‘attestation by witnesses’ is attestation by witnesses of the execution of the document not of the admission of execution (5) The term ‘attesting witness’ in this section has the same meaning as attesting witness under section 59 of the Transfer of Property Act (IV of 1882) (6) ‘Attesting witness’ means a witness who has seen the deed executed and who signs it as a witness (7), but in another view the term includes a scribe who has in fact witnessed the execution (8) When a document is produced and tendered as evidence, the first point for consideration is whether it is one which the law requires to be attested. There are many such documents in England. In India they are comparatively few. The above sections contain the rules relative to the admission in evidence of attested documents. Sections 68—71 apply only to documents required by law to be attested. Their general object is to give effect to the law relating to the attestation of documents which is itself enacted for the purpose of ensuring the genuineness of certain documents in respect of which claims are made. An attested document not required by law to be attested may be proved as if it was unattested (9) For a long time it was held that when a document was attested even though the law did not require attestation, one at least of the attesting witnesses should be produced. But as this worked great hardship on suitors the Common Law Procedure Act of 1854 (10) in England, and the Indian Evidence Act of 1855 (11) whose provisions on this point are produced in section 72 (*ante*) introduced the present more reasonable practice. In respect of the persons who may be attesting witnesses, it has been held that a

(1) Act IV of 1882 (Transfer of Property) s 123 *Bajjath Singh v Mt Biraj Koer* 2 Pat 52 ref to *Shamu Patter* supra. As to the special rules relating to proof of attested documents under the Merchant Shipping Act see 17 & 18 Vic c 104 s 526.

(2) *Hudson v Parker* 1 Robert 26.

(3) *Stroud’s Judicial Dictionary* 146. 147 *Roberts v Phillips* 4 E & B 450. *Bryan v White* 2 Robert 315. *Sharp v Birch* 8 Q B D 111 [cited in *Girindra Nath v Bejoy Gopal* 26 C 246 248 (1898) *post* *Doe d Spilsbury v Burdett* 4 A & E 1 9 A & E 936 1 P & D 670. *Freshfield v Reed* 9 M & W 404. *Ranu v Laxmanrao* (1903) 33 B 44. *Badri Prasad v Abdul Kari* 35 A 254 (1913).

(4) *Padarath Halai v Ram Nain*, P

C 37 A 474 (1914), 42 I A 163, *Rukmini Koeri v Nilmony Bandopadhyaya*, 19 C W N 1309 (1915).

(5) *Girindra Nath v Bejoy Gopal* 26 C 246 248 (1898), followed in *Abdul Karim v Salimun* 27 C 190 (1899), and see *Bajjath Singh v Mt Biraj Koer*, 2 Pat 52.

(6) *Jagannath Khan v Bajrang Das*, 48 C., 61 (1921).

(7) *Dalchand Shibrum v Lotu Sakha Ram* 44 B 405.

(8) *post*.

(9) S 72 *ante*, see *Dastary Mahanto v Jugabundhoo* 23 W. R., 293, 295 (1875).

(10) 17 & 18 Vic., c. 125 s 26, and see 28 & 29 Vic. c. 18 ss 1, 7 (criminal cases).

(11) S 37.

party to a deed is not a competent witness to attest it(1), and in the case of a Will, it will not be considered as insufficiently attested by reason of any benefit thereby given, either by way of a bequest or by way of appointment to any person attesting it, or to his or her wife or husband, but the bequest or appointment will be void so far as concerns the person so attesting, or the wife or husband of such person however, under a Will confirms the Will (2) may be legally proved name, but not explicitly as an attesting witness on the margin, and has been present when the deed was executed (3) But in a later case in that High Court it has been held that to be an 'attesting witness' within the meaning of this section, the witness must have seen the document executed and must have signed it as a witness and that the scribe of a mortgage deed cannot be reckoned as an attesting witness merely because he has signed the deed, even though the deed may have been executed in his presence (4) More recently the Calcutta High Court has held that a person who is present and witnesses the execution of a mortgage bond and whose name appears on the document, though he is therein described merely as the writer of the deed is a competent witness to prove the execution of a mortgage bond (5) The Madras High Court formerly held that a document which is required by law to be attested, but which is unattested, is inadmissible in evidence for any purpose (6) But the Calcutta High Court has dissented from this view, holding that though a document may be invalid and inadmissible in so far as it purports to operate for a purpose for which attestation is required, it may be admissible for other purposes (7) And this view has now been rejected by a Full Bench decision of the Madras High Court (8) More recently the Calcutta High Court has held that section 68 does not permit the use of the attested instrument for any purpose whatever unless and until it is proved in strict accordance with the provisions of the section Only one exception is made to this rule by section 70 Section 68 is imperative It is not only applicable to cases where the attested instrument is the ground of action but to cases where it is used in evidence for collateral purposes The absence of objection is immaterial (9) But in a case in the Allahabad High Court a duly registered mortgage deed was sued on, but owing to the failure

(1) *Seal v Claridge* 7 Q B D 517 referred to in *Pentwarden v Roberts* 9 Ch D 137

(2) Act X of 1865 (Indian Succession) s 54 and see further Phipson Ev 5th Ed, 493 as to the signature of the directors and secretary of a company

(3) *Radha Kishen v Fateh Ali* 20 A 532 (1898) See *Krishna Iwa Tewari v Bishnath Kalkar*, 34 A 612 (1912), proof of handwriting of deceased scribe who had signed for two witnesses and himself

(4) *Badri Prasad v Abdul Karim* 35 A 254 (1913) following *Ranu v Laxman Rao* 33 B 44 (1908) *Shamu Patter v Abdul Kadir Ravuthan* P C, 35 M 607 (1912) (attestation under Section 59 of Transfer of Property Act) and *Burdett v Spisbury* 10 C & F 340 (1843) distinguishing *Radha Kishen v Fateh Ali Khan* (supra) and *Muhammad Ali v Jafar Khan* W N 146 (1897) and discussing *Raj Narain Ghosh v Abdul Rahim* 5 C W N 454 (1901) *Dinamoyee Debi v Bon Behari Kapur* 7 C W N 160

(1902) *Dali Chand Shubram v Lotu Sahharam* 44 B 405 See as to these cases *Jagannath Khan v Bajrang Das Agarwalla* 48 C 61 (1921)

(5) *Jagannath Khan v Bajrang Das Agarwalla* 48 C 61 (1921) foll *Raj Narain Ghosh v Abdul Rah* 5 C W N 454 (1901) *Dinamoyee Debi v Ban Behari Kapur* 7 C W N 160 (1902) dist *Shamu Patter v Abdul Kader Rasulan* 35 Mad 607 (1912) and diss from *Badri Prasad v Abdul Karim* 35 A 254 (1913) *Ram Bahadur Singh v Ajodhya Singh* 20 C W N 699 (1916) See *Nageshwar Prasad v Bachu Singh* 4 P L J 511

(6) *Madras Deposit Society v Ooma Malai Ammal* 18 M 29 (1894)

(7) *Sonatal Shah v Din Nath* 26 C, 222 (1898) s c 3 C W N 228

(8) *Putaka Veetil Muthalakula gora Kunhu Mosdu v Thiruthipella Madhaba Menon* F B (1908) 32 M 410

(9) *Sudanya Kumar Singha v Gour Chandra Pal* 35 C L J, 473

of the plaintiff to examine the attester, the document was rejected as inadmissible in evidence. *Held*, that it was admissible for the purpose of interpreting the rights and obligations of parties even though as an independent legal document it was itself inadmissible. It was held that by the terms of section 68 when its provisions are not complied with a document cannot be used as evidence at all as a document either requiring attestation or in fact attested, but this does not prevent it from being used in evidence as something else or for any other purpose. Section 68 is subject to the limitation viz, that if the document were produced in some other proceeding for the purpose of proving the handwriting of the scribe it could not be objected to on the ground that no attesting witness being called to prove it, it could not be used in evidence at all (1).

(a) *An attested document not required by law to be attested may be proved as if it was unattested* (2). The words "required by law" apply to documents of which attestation is required by some Act (3).

The rules with regard to the attestation of documents may be thus summarised

(b) *The Court shall presume that every document called for and not produced was attested in the manner required by law* (4). The Court in such a case shall presume, that is, it shall regard attestation as proved unless and until it is disproved. And the person so refusing to produce, if he be a party to the suit, cannot rebut this presumption by subsequent production of the document (5).

(c) *There is a presumption of due attestation in the case of documents thirty years old*. The Court may in such cases dispense with proof of attestation (6).

(d) *Where a document is required by law to be attested, and there is an attesting witness available, at least one attesting witness must be called* (7). When the original document is in the possession of another and not forthcoming after notice to produce, and secondary evidence is given of its contents the Court shall, as has been already observed (8), presume that the document was duly attested. It is not, however clear from the section whether the attesting witness, when producible must be called if the original document itself is not forthcoming (by reason of loss or the like) and is therefore not itself "used as evidence," but secondary evidence is offered of its contents under section 95, ante (9). The English rule requiring the production of the attesting witnesses, provided their names be known holds although the document is lost or destroyed (10). And the same rule would seem to apply under this Act since a document is "used as evidence" whether the mode of proof by which it is brought before the Court is primary or secondary only. Where one of the witnesses who have attested a mortgage bond is available, the execution of such bond cannot under section 68 be proved otherwise than by the evidence of such witness, even when the object of proving such execution has reference only to a personal covenant to pay which is severable from the security created by the bond (11). A witness must be available, that is, the production of the witness must not be legally or physically impossible. Thus if all the witnesses be proved

(1) *Moti Chand v. Lalla Prasad* 40 A 256 s c 44 I C 596

(2) S 72 ante corresponding with s 37 of the Repealed Act II of 1855 and with s 26 of the Common Law Procedure Act 1854

(3) Field Ev 6th Ed 237 as to the document of which attestation is necessary v ante

(4) S 89 post the rule is therefore not limited to the case of possession by the adverse party—see Taylor Ev § 1847

(5) S 164 post

(6) S 90 post

(7) S 68 ante

(8) S 89 post

(9) Field Ev 6th Ed 237

(10) *Gilhes v. Smithers* 2 Stark R 528 *Keeling v. Ball Peake* Add Cas 88 Taylor Ev § 1843 or the case in which the names are unknown v post

(11) *Iccappa Karundan v. Ramasami Karundan* (1907) 30 M 251

to be out of the jurisdiction of the Court, or dead, or incapable of giving evidence as if they be insane(1), the next following rule will be applicable

(e) *If there be no attesting witness available or if the document purports to be executed in the United Kingdom the attestation of at least one attesting witness and the signature of the person executing the deed must be proved by other evidence to be in their handwriting (2)*

This rule will apply when the document purports to have been executed in the United Kingdom, or the witnesses are dead, insane or out of the jurisdiction, or when they cannot be found after diligent enquiry, or have absented themselves by collusion with the opposite party (3). The degree of diligence required in seeking for the attesting witnesses to a document, the attestation of which is required to be proved by an attesting witness, is the same as in the search for a lost paper. The principle is in both cases identical (4). If an instrument be necessarily attested by more than one witness, the absence of them all must be duly accounted for in order to let in secondary evidence of the execution (5). In a case in which the attestation of one witness and all the marginal witnesses and the signatures of two of a presumption of due execution and was sufficient proof unless this was rebutted (6). And in another case in the same Court where a mortgage-deed purported to be attested by several witnesses and the mortgagee called one who gave evidence that he had seen the mortgagor sign, and had signed himself it was held that in the absence of question on this point or rebutting evidence the execution of the mortgage deed was sufficiently proved (7). As to proof of handwriting see sections 45 47 67, *ante* and section 73 *post*. Section 69 might seem to imply that the attestation of the attesting witness must be in his own hand writing which implication assumes that the witness knows how to write. As a matter of fact however the greater number of attesting witnesses in India are marksmen (8). The Act further contains no definition of the term signature. But having regard to the definition of the word given in the General Clauses Acts of 1887 and 1897 (9) Registration Act (10) and the Civil Procedure Code (11) and the general policy of our law (12) the term includes the affixing of a mark. In the case last cited it was argued that as the only attesting witness examined was a marksman, the bond in suit was not legally established as required by section 59 of the Transfer of Property Act and by section 68 of this Act which read with section 69, shows that an attesting witness must be one who can sign his name. It was, however, held

(1) Taylor Ev § 1851 with respect to capability of giving evidence it has been held in England that the attesting witness must be called though subsequently to the execution of the deed he has become blind and that the Court will not dispense with his presence on account of illness however severe *ib* § 1843 a but both of these decisions have been doubted or reluctantly followed and it is submitted that under this Act in both of these cases the witness would be incapable of giving evidence under the terms of the section.

(2) S 69 *ante* see Taylor Ev § 1851

(3) Taylor Ev § 1851

(4) *ib* § 1855 and cases there cited *v. ante* s 65

(5) *ib* § 1856 *Cumfere v Sefton* 2 East 183 *Bright v Doe d Tatham* A and C 111 *Stoclock v Musgrove* 1 C and M 511

(6) *Uttam Singh v Hukam Singh* 39

A 112 (1917) see *Wright v Sanderson* 9 P D 149 (1884)

(7) *Shib Dayal v Sheo Gulam* 39 A. 241 (1917) and see *Ram Des v Munna Lal* 39 A 109 (1917)

(8) Field Ev 6th Ed 236 the attesting witnesses to a will must affix their signatures and not merely their marks. *Nitje Gopal v Nagesh Nath* 11 C 229 (1885) *Fernandez v Alves* 3 B 387 (1879) and see *Bissonath Bindu v Dayaram Jana* 5 C 738 (1880) but see *Amayee v Yolumalai* 15 M 261 663 (1891)

(9) Act I of 1887 s 3 cl 12 Act X of 1897 s 3 cl 32

(10) Act XVI of 1908 s 3

(11) Act V of 1908 s 2 2nd Ed p 32 and see Act X of 1865 (Indian Succession) s 50

(12) *Fran Krishna v Jadu Nath* 2 C W 603 605 (1893)

that this contention was that a marksman cannot 59 of the Transfer of Property Act to the general policy of the Act no reason why the case further argued that mark even the mark, generally a cross, is not made by them, but is made by the writer of the deed. But it was held that in this case no question arose as to whether a mark made by a person other than the witness can be sufficient, the mark being shown to have been made by the witness himself (1). In a case in the Allahabad High Court where a mortgage deed purported to have been executed by three illiterate mortgagors (marksmen) and attested by more than two witnesses, and all the mortgagors and witnesses were dead, a later deed of usufructuary mortgage, executed by one of these mortgagors and by representatives of the other two and recognizing the genuineness of the said mortgage, was tendered (*inter alia*) in proof of its execution, and it was contended that this section 69 does not forbid indirect evidence and should be supplemented by the English rules, but it was held that this section reproduces part only of the English Law in this subject and does not permit a party to rely on presumption or other evidence if he is unable to comply with its provisions (2).

(f) *The admission of a party to the document will, so far as such party is concerned (3), supersede the necessity either of calling the attesting witnesses or of*

sion here spoken of which relates to the execution, must be distinguished from the admission mentioned in section 22, ante and from that mentioned in section 65, clause (b), ante which relate to the contents or to the existence, condition or contents of a document. Section 70 relates only to the admission of a party in the course of proceedings in which the document is produced, made (for instance) in the pleadings or by the party in his examination (6). It does not

The view here taken that the admission of a party (at any rate during the course of the trial) will dispense with the necessity of calling the attesting witnesses appears to be at variance with the undermentioned case (9) in which it was held that the only effect of section 70 is to make the admission of the

(1) *Ib* as to proof of marks *v* Index

(2) *Gobardhan Das v. Hari Lal* 35 A. 364 (1913)

(3) As against other parties the document must be proved in accordance with s. 68. *Nisaran Chandra Sen v. Ram Chandra Sen* 22 C. W. N. 444 s. c. 44 I. A. 984 so also execution must be proved against a minor. *Nageshwar Prasad v. Bachu Singh* 4 Pat. L. J. 511

(4) S. 70 ante which is the same as s. 38 Act II of 1855

(5) *Taylor* Ev. § 1843

(6) *Raj Mangal Misra v. Muthura Dobari* 38 A. 1 (1916). But see *Nageshwar Prasad v. Bachu Singh* 4 Pat. L. J. 511

(7) *Abdul Karim v. Sahibun* 27 C. 190 (1899) this case though in some respects

distinguishable appears in substance to be at variance with the decision in *Pranath Chatterjee v. Bissessur Dass* 1 C. W. N. cxxxii in which it was held that the admission of execution of a mortgage in the recitals of subsequent further charges rendered the calling of an attesting witness to the mortgage unnecessary the further charges having been proved in the usual way by the evidence of attesting witnesses. And see *Nageshwar Prasad v. Bachu Singh* 4 Pat. L. J. 511

(8) *Ib*

(9) *Jogendra Nath v. Nilai Churn* 7 C. W. N. 384 (1903). Ref. to in *Arjun Chandra Bhadra v. Kalas Chandra Das* 36 C. L. J. 373 (1921) but see *Asharfi Lal v. Nanhi* 19 A. L. J. 855 (1921), *post*

executant sufficient proof of execution and that the section is not sufficient to dispense with the necessity of proof of attestation to make a mortgage valid under section 59 of the Transfer of Property Act. It seems to have been assumed in *Abdul Karim v Salimun*(1) which was not referred to in the last case that provided the admission was made during the course of the trial it would have the effect here submitted. Section 70 is a special provision dealing with attested documents. If the admission of the executant has not the effect of dispensing with proof of attestation, there was no necessity for the section at all as recourse may be had to the general provisions of the Act relating to admissions if the admission of execution is to be used only in the sense of an admission of signing only. Attestation is only a form of solemn proof required in certain contested cases by special Legislative Enactment, and it is difficult to understand why witnesses should be called to prove a document against a party who formally admits that it is a valid document as against him. It is, therefore respectfully submitted that this decision, if it has the effect here attributed to it is erroneous. The observation moreover, was *obiter*, as in the case it was found that there was proof of attestation independent of the admission. It has more recently been held that section 70 was intended to dispense with the calling of attesting witnesses and with formally proving execution in a case where the party admitted it. Therefore where in the pleadings there was admission of execution of an attested document but the Lower Appellate Court found as a fact that none of the attesting witnesses had seen the executants put their signatures on the deed and therefore deemed it not proved its decision was reversed on appeal (2). It has been held that execution of a document means something more than mere signing by the party and includes delivery and signing in the presence of witnesses where witnesses are necessary. Admission in section 70 means admission of a party to a document which is on the face of it an attested document. No admission is effectual under this section unless it amounts to an acknowledgment of the formal validity of the instrument. Where the admission of execution is unqualified it may well be equivalent to an admission of due execution or a waiver of proof of due execution within the meaning of section 70 (3). When however the admission of signature by was signed in and call one attest instrument (4). In a case in the Calcutta High Court where one defendant a sole mortgagor admitted a mortgage but pleaded satisfaction and the other defendants, who were subsequent purchasers impeached the mortgage as fraudulent it was held that the effect of this section (70) is merely to supersede the necessity of evidence so far as the party admitting is concerned and that therefore it does not dispense with the necessity of complying with the provisions of these sections as against other parties (5).

(1) 27 C 190

(2) *Asharfi Lal v Nanhi* 44 A 127 s c 19 A L J 855 (1921) and see *Srimati Kabijan Bibi v Krishna Das Maity* 20 C W N xlviii where one attesting witness was examined by the defendant. In *Jagganath v Rayji* 47 B 137 s c 24 Bom L R 1296 it was held that the plaintiff was not put to proof of attestation *dist Dalziel v Lotu* 44 B 405

(3) *Per Richardson J in Arjun Chandra Bhadra v Kailas Chandra Das* 36 C L J 373 (1922) and *per Suhrawardy J* execution is used in the sense of due execution or execution in the way in which a particular document is required to be

executed. In *Jagganath v Rayji* 47 B 137 Crump J held that where a party admits execution he does not necessarily admit attestation

(4) *Arjun Chandra Bhadra v Kailas Chandra Das* 36 C L J 373 (1922) referring to *Jogendra Nath Mukhopadhyaya v Nitai Churn Bandopadhyaya* 7 C W N 384 (1903) *Satish Chandra Mitra v Jogendra Nath Mahalanabis* supra and *Nibaran Chandra Sen v Ram Chandra* 22 C W N 444 (1917)

(5) *Satish Chandra Mitra v Jogendra Nath Mahalanabis* 44 C 345 (1917) *per Woodroffe J* distinguishing *Jogendra Nath v Nitai Churn* (supra)

(g) If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence. In such case it is the same as if there were no attesting witness, and the execution may be proved by any other evidence obtainable (1) If one of two or more attesting witnesses being called, denies or does not recollect the execution of the document, it is not clear whether other evidence can be given to prove it, if there be another attesting witness alive, subject to the process of the Court and capable of giving evidence, who is not produced (2) In proving the execution of a document the attesting witness frequently states that he does not recollect the fact of the deed being executed in his presence, but that, seeing his own signature to it, he has no doubt that he saw it executed, this has always been received as sufficient proof of the execution (3) Where one of the attesting witnesses to a mortgage bond was dead at the time of the suit and the other stated that he had attached his signature to the document without knowing what it was and without witnessing its execution, *held* that the plaintiff was entitled under section 71 to succeed on the bond on proof of its due execution (4) A statement of the attesting witnesses to a mortgage deed that they signed the blank paper and not the completed deed is sufficient to attract the operation of section 71 and entitles the mortgagee to prove execution by evidence other than that of the attesting witnesses (5) As to the presumptions which may exist relative to this section, see section 114, *post*

73 In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal admitted or proved to the satisfaction of the Court to have been written or made by that person, may be compared (6) with the one which is to be proved, although that signature, writing or seal, has not been produced or proved for any other purpose.

Comparison of signature, writing or seal, with others admitted or proved

The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person

[This section applies also, with any necessary modifications, to finger-impressions] (7)

Principle—Facts which are not otherwise relevant to the issue are admissible when they can be shown to be for the particular purpose in hand identical with some relevant fact (8) It is on a similar principle that documents not

(1) See *Talbot v Hodson* 7 Taunt, 251 *Borinan v Hodson* L. R. 1 P. and M. 362 *Wright v Rogers* id. 678 the same rule applies where the instrument is lost and the names of the witnesses are unknown *Killing v Ball* Peale App. Cas. 88

(2) Field Ev. 6th Ed. 236

(3) *Roscoe* N. P. Ev. 135 and cases there cited

(4) *Lakshman Sahu v Gokul Maharana* 1 Pat. 154 (1922)

(5) *Dinabandhu Patra v Sanatan Danapat* 48 I. C. 624

(6) By comparison of handwriting is meant the examination of writings brought at the time into juxtaposition. *Lawson's*

Expert and Opinion Evidence 323 in order by such comparison to ascertain whether both were written by the same person *Starkie* Ev. Part IV. 654 As to evidence of experts and method of proving handwriting *Sarojini Dasi v Hari Das Chose* 49 C. 235 (1922)

(7) The words in brackets were added by s. 3 Act V of 1899 see s. 45 *ante*

(8) *Wills* Ev. 4th thus where the issue was as to the line of boundary of a particular estate evidence having been given that the estate was continuous with a certain hamlet evidence was admitted to prove the boundary of the hamlet *Thomas v Jenkins* 6 A. and E. 525

executant sufficient proof of execution and that the section is not sufficient to dispense with the necessity of proof of attestation to make a mortgage valid under section 59 of the Transfer of Property Act. It seems to have been assumed in *Abdul Karim v Salim*(1) which was not referred to in the last case that provided the admission was made during the course of the trial it would have the effect here submitted. Section 70 is a special provision dealing with attested documents. If the admission of the executant has not the effect of dispensing with proof of attestation, there was no necessity for the section at all as recourse may be had to the general provisions of the Act relating to admissions if the admission of execution is to be used only in the sense of an admission of signing only. Attestation is only a form of solemn proof required in certain contested cases by special Legislative Enactment, and it is difficult to understand why witnesses should be called to prove a document against a party who formally admits that it is a valid document as against him. It is, therefore respectfully submitted that this decision if it has the effect here attributed to it is erroneous. The observation, moreover, was *obiter*, as in the case it was found that there was proof of attestation independent of the admission. It has more recently been held that section 70 was intended to dispense with the calling of attesting witnesses and with formally proving execution in a case where the party admitted it. Therefore where in the pleadings there was admission of execution of an attested document but the Lower Appellate Court found as a fact that none of the attesting witnesses had seen the executants put their signatures on the deed and therefore deemed it not proved its decision was reversed on appeal (2). It has been held that execution of a document means something more than mere signing by the party and includes delivery and signing in the presence of witnesses where witnesses are necessary. Admission in section 70 means admission of a party to a document which is on the face of it an attested document. No admission is effectual under this section unless it amounts to an acknowledgment of the formal validity of the instrument. Where the admission of execution is unqualified it may well be equivalent to an admission of due execution or a waiver of proof of due execution within the meaning of section 70 (3). When however the admission is not unqualified it is not sufficient to establish the execution of the instrument (4). In a case in the Calcutta High Court where one defendant a sole mortgagor admitted a mortgage but pleaded satisfaction and the other defendants, who were subsequent purchasers impeached the mortgage as fraudulent it was held that the effect of this section (70) is merely to supersede the necessity of evidence so far as the party admitting is concerned and that therefore it does not dispense with the necessity of complying with the provisions of these sections as against other parties (5).

(1) 27 C 190

(2) *Asharfi Lal v Nanki* 44 A 127 s c 19 A L J 855 (1921) and see *Srimati Kabyan Bibi v Krishna Das Maity* 20 C W N xlviii where one attesting witness was examined by the defendant. In *Jagganath v Ravji* 47 B 137 s c 24 Bom L R 1296 it was held that the plaintiff was not put to proof of attestation. *dist Dalchand v Lotu* 44 B 405

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(4) *Arjun Chandra Bhadra v Kalas Chandra Das* 36 C L J 373 (1922) referring to *Jogendra Nath Mukhopadhyaya v Nilas Churn Bandopadhyaya* 7 C W N 384 (1903) *Satish Chandra Mitra v Jogendra Nath Mahalanabis* supra and *Nibaran Chandra Sen v Ram Chandra* 22 C W N 444 (1917).

(5) *Satish Chandra Mitra v Jogendra Nath Mahalanabis* 44 C 345 (1917) *per Woodroffe J* distinguishing *Jogendra Nath v Nilas Churn* (supra).

(g) If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence. In such case it is the same as if there were no attesting witness and the execution may be proved by any other evidence obtainable (1). If one of two or more attesting witnesses being called, denies or does not recollect the execution of the document, it is not clear whether other evidence can be given to prove it, if there be another

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he has no doubt that he saw it executed, this has always been received as sufficient proof of the execution (3). Where one of the attesting witnesses to a mortgage bond was dead at the time of the suit and the other stated that he had attached his signature to the document without knowing what it was and without witnessing its execution, held that the plaintiff was entitled under section 71 to succeed on the bond on proof of its due execution (4). A statement of the attesting witnesses to a mortgage deed that they signed the blank paper and not the completed deed is sufficient to attract the operation of section 71 and entitles the mortgagee to prove execution by evidence other than that of the attesting witnesses (5). As to the presumptions which may exist relative to this section see section 114, *post*.

73 In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal admitted or proved to the satisfaction of the Court to have been written or made by that person, may be compared (6) with the one which is to be proved, although that signature, writing or seal, has not been produced or proved for any other purpose.

Comparison
of signature,
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others
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proved

The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.

[This section applies also, with any necessary modifications, to finger-impressions] (7).

Principle — If a signature, writing or seal is admitted to be that of the person by whom it purports to have been written or made, it may be compared with some relevant signature, writing or seal.

(1) See *Talbot v Hodson* 7 Taunt 251; *Bourne v Hodson* L. R. 1 P. and M. 362; *Wright v Rogers* id. 678. The same rule applies where the instrument is lost and the names of the witnesses are unknown. *Keeling v Ball* Peake App. Cas. 88.

(2) Field Ev. 6th Ed. 236.

(3) Roscoe N. P. Ev. 135 and cases there cited.

(4) *Lakshman Sahu v Gokil Maharana* 1 Pat. 154 (1922).

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(6) By comparison of handwriting is meant the examination of writings brought at the time into juxtaposition. *Lawson v*

Expert and Opinion Evidence 323 in order by such comparison to ascertain whether both were written by the same person. *Starkie Ev. Part IV* 654. As to evidence of experts and method of proving handwriting *Sarojini Dasi v Hari Das Chose* 49 C. 235 (1922).

(7) The words in brackets were added by s. 3 Act V of 1899 see s. 45 *ante*.

(8) *Wills Ev.* 4 thus where the issue was as to the line of boundary of a particular estate evidence having been given that the estate was contemporaneous with a certain hamlet evidence was admitted to prove the boundary of the hamlet. *Thomas v Jenkins* 6 A. and E. 525.

otherwise relevant to the issue are admissible for the purpose of comparison of handwritings when proved to be in the handwriting of the party whose signature is in question (1) And see Note, *post*

s 3 ("Proved")

as 45, 46, 67 (Proof of handwriting)

s 3 (Court')

Steph D_o, Art 52, Taylor, Ev, §§ 1869—1874, Wharton, Ev, §§ 711—719, Roscoe N P Ev, 138—142, Rogers' Expert Testimony, §§ 130—144, Lawson's Expert and Opinion Evidence, 323—416, Harris, Law of Identification, 266—332

COMMENTARY.

"Purports"

The word "purports" in this section does not limit the scope of the section to such documents only as are signed or contain some intrinsic statements of the identity of the writer. Any document alleged by a party to be in the handwriting of a particular person may for the purpose of proof be compared with another writing or signature admitted or proved to the satisfaction of the Court to have been made or written by that person (2)

Comparison of hands

In addition to the modes of proving handwriting which have already been dealt with by section 47 and 45, *ante*, there remains direct comparison of the disputed document with one proved or admitted to be genuine under this section(3), which is in general accordance with the present English law(4) upon the subject as amended by Acts of the years 1854 and 1865. Although all proof of handwriting, except when the witness either wrote the document himself, or saw it written, is in its nature comparison(5), it being the belief which a witness entertains upon comparing the writing in question with an exemplar formed in his mind from some previous knowledge, yet the English law until the first of the abovementioned dates, did not allow the witness or even the jur^y, except under certain special circumstances, actually to compare two writings with each other, in order to ascertain whether both were written by the same person. But the English rule is now otherwise (6). By the terms of the section, any writing, the genuineness of which is admitted or proved(7) to the satisfaction of the Court, may be used for the purposes of comparison, although it may not be relevant or admissible in evidence for any other purpose in the cause (8). In applying this section, it is important to note its terms which do not sanction the comparison of any two documents but require that the signature, writing or seal which is to be proved *must purport* to be by the

(1) Wills Ev 2nd Ed 65

(2) *Veeraraghava Aiyangar v Soura Aiyangar* 35 M L J 608 s c 48 I C 68

(3) The section differs in its terms from the corresponding section (48) of the repealed Act II of 1855 which was as follows — On an inquiry whether a signature writing or seal is genuine any undisputed signature, writing or seal of the party whose signature writing or seal is under dispute may be compared with the disputed one though such signature writing or seal be on an instrument which is not evidence in the cause. As to s 48 of Act II of 1855 see *R v Amanoolah Mollah* 6 W R Cr 5 (1866)

(4) See 28 & 29 Vic c 18 ss 1 8, Taylor Ev §§ 1869—1874

(5) See p 43, *ante*

(6) Taylor Ev § 1869 Lawson *op cit* 3 4

(7) See *Sreemutty Phooder v Gobind Chunder* 22 W R 272 (1874), *R v Kartick Chunder* 5 R C & C R Crim. Rul 58 62 (1868), *R v Amanoolah Moolah* 6 W R, Cr, 5 (1866) *Purna Chunder v Grish Chunder* 9 W R Civ R 450 (1868) In *Tara Prasad v Lukhee Narain* 21 W R 6 (1873) certain ryots swore that they got the potahs from the hands of the persons who purported to sign them this was held to be sufficient proof under this section that the signatures were those of the lessor

(8) See *Birch v Ridgway* 1 Fost & Fin 270 *Cresswell v Jackson* 2 Fost & Fin 24, *Brookes v Tichborne* 5 Ex. 929 it makes no difference what the writing is which is proved for purposes of comparison it may be a love letter or it may be a testament Wharton Ev § 711

person in question, that is, must itself state or indicate that fact (1) The comparison can be made either by witnesses or by expert witnesses skilled in deciphering without the intervention of any witnesses at all, by the fact of there being no jury, by the Court (5) I have held that the use of a handwriting expert is only admissible under section 45 when the writing with which the comparison is to be made has been admitted or proved to be the writing of the person alleged and when the comparison is made in open Court and in the presence of such person (6) The genuineness of ancient documents, i.e., more than 30 years old, may be proved by comparison with other ancient documents which have been shown to have come from proper custody and to have been uniformly treated as genuine (7) The witness should generally have before him in Court the writings compared. It has, however, been held in America that where the loss of the original writing has been clearly proved, the opinion of an expert is receivable as to the genuineness of the signature to the lost instrument, he having examined the signature prior to its loss and compared his recollection of such signature with the admitted genuine signature of the same person on papers already in the case (8) The original and not the copy is what the Court must act upon. Copies of any kind, whether photographic or otherwise, are merely secondary evidence and cannot be used as equivalent to primary evidence. But when the use of photographic copies is not objectionable, as by the Court in *Barindra Kumar Ghose v R* (1909), they are as equivalent to primary evidence and of admitted weight in dispute and of admitted weight received in evidence. Copies were accurate in all respects except as to size and colouring (9) The party whose writing is in dispute may also be required to write, for purpose of comparison, in the Judge's presence, and such writing will then itself be admissible (10) Though this provision is useful, yet the comparison will often be less satisfactory, as a person may feign or alter the ordinary character of his handwriting with the very view of defeating a comparison (11) It is, moreover

(1) *Barindra Kumar Ghose v R* (1909), 37, C 91

(2) S 47 ante the witness need not be a professional expert or a person whose skill in the comparison of handwritings has been gained in the way of his profession or business such a question is one of weight only *R v Silverlock* (1894) 2 Q B 766 As to the opinions of native Judges on native writing see *Rajendra Nath v Jogendra Nath* 7 B L R 216 233 (1871)

(3) S 45 ante

(4) See *Cobbett v Kilminster* 4 Fost & Fin 490 and observations as to comparison by a jury in *R v Harney* 11 Cox 546 548

(5) *Taylor Ev* 1870

(6) *Suresh Chandra Sanjal v R* (1912), 39 C 606 and *v Debendra Nath Sen v Abdul Samed Seraj* (1909) 10 C L J 150 *Doe v Vickers* 4 Ad & E 782 *Doe v Stone* 3 C B 176

(7) *Taylor Ev* § 1873—1874

(8) *Rogers v Expert Testimony* § 139

(9) *Ib* § 140 In *Haynes v McDermott*, 82 N Y 41 the New York Court said "We may recognise that the photographic process is ruled by general laws that are

uniform in their operation and that almost without exception a likeness is brought forth of the object set before the camera. Still somewhat for exact likeness will depend upon the adjustment of the machinery upon the atmospheric conditions and the skill of the manipulator etc.

Other circumstances were mentioned in a preceding case (*Taylor Will case* 10 Abr Pr N S 300) such as the correctness of the lens the state of the weather the skill of the operator the colour of the impression the purity of the chemicals the accuracy of forming the angle at which the original was inclined to the sensitive plate the possible fraud of the operator etc.

(10) See second clause of section and *Cobbett v Kilminster* supra *Doe v Dine v Wilson* 10 Moo P C R 502 530 *Rogers op cit* § 142 In America it has been held that a party cannot be compelled in cross examination to write his name *ib* and the section says 'the Court may direct

(11) *Norton Ev* 256 see observations of the Privy Council in *Jarant Singh v Sheo Naran* 16 A 157 161 (1893), s c, 21 I A 58

to be observed with regard to documents not written in Court that many men are cap-
 object
 easier

for the express purpose of proving that no similitude exists between them and the writing in dispute (1) A comparison of writings, therefore, for these and other reasons is a mode of ascertaining the truth which ought to be used with very great caution (2), especially if no skilled witness has been called to make the comparison (3) So with regard to seals it has been judicially observed that "at the best, the test of comparison between the impression of one Native seal and another is but a fallible one and must always be received with extreme caution" (4) Writings which it is sought to use against accused persons for purposes of comparison should be *clearly* proved before being so used (5) Comparison of writings is one of those tests which, ordinarily, Appellate Courts are of first instance (6) "In all cases of comparison the jury, and the Court may respectively balance or difference of the writings produced in doing so, they will sometimes derive much aid from the evidence of experts with respect to the general character of the handwriting,—the forms of the letters, and the relative number of diversified forms of each letter—the use of capitals, abbreviations, stops and paragraphs,—the mode of effecting erasures or of inserting interlineations or corrections,—the adoption of peculiar expressions,—the orthography of the words,—the grammatical construction of the sentences,—and the style of the composition,—and also on the act of one or more of the documents being written in a feigned hand." (7) It has been held under the English Act that all the documents sought to be compared must be in Court (8) As to finger-impressions, see s 45, *ante*

(1) Taylor Ev § 1872, the method of proof dealt with by this section, commonly called by comparison of hands has met with strong opposition both in England and America from its doubtful value and supposed dangers Best Ev p 239

(2) *Sreemutty Phoodde v Gobind Chunder* 22 W R 272 (1874) *per* Markby and Romesh Chunder Mitter JJ see *Nobin Krishna v Rassick Lall* 10 C. 1047 1051 (1884) [evidence by comparison held not to be sufficient] *Kurali Prasad v Anantaram Hajra* 8 B L R 490 502 (1871) 16 W R P C 16 [finding of forgery on comparison of handwriting only disapproved]

(3) *R v Sil erlock* (1894) 2 Q B. 766 *R v Harvey* 101 Cox, 546

(4) *R v Amanoollah Mollah* 6 W R Cr 3 (1866), *per* Kemp and Seton Kerr JJ

(5) *R v Kartick Chunder*, 5 R. C. & C R Crim Rul., 362 (1868), *R v Amanoollah Mollah* 6 W R Cr 5 (1866)

(6) *R v Amanoollah* *supra* 6 and see *Sreemutty Phoodde v Gobind Chunder* 22 W R., 272 (1874)

(7) Taylor, Ev § 1871

(8) *Arbon v Fussell*, 3 F & Fr 152, *v ante*

PUBLIC DOCUMENTS

DOCUMENTS are of two kinds, public and private. Section 74 accordingly supplies a definition of the term "public document," and section 75 declares all documents other than those particularly specified to be private documents. The following sections (74—78) deal with (a) the nature of the former class of documents, and with (b) the proof which is to be given of them. Section 74 defines their nature, and sections (76—78) deal with the exceptional mode of proof applicable in their case, the proof of private documents, as defined by section 75, being subject to the general provisions of the Act relating to the proof of documentary evidence contained in sections (61—73).

An inquiry as to public documents may be directed (a) to the means of obtaining an inspection or copy of them, (b) to the method of proving them, (c) to their admissibility and effect (1).

With respect to (a) the means of obtaining an inspection or copy of a public document, the matter is one which is not dealt with by this Act. Section 74 defines public documents which the public provision as to the right of actment in force in British

India. Every person, however, has a right to inspect public documents, subject to certain exceptions, provided he shows that he is individually interested in them. When the right to inspect and to take a copy is expressly conferred by Statute, the limit of the right depends on the true construction of the Statute. When the right to inspect and take a copy is not expressly conferred, the extent of such right depends on the interest which the applicant has in what he wants to copy and in what is reasonably necessary for the protection of such interest. The common law right is limited by this principle (2). It may be inferred that the Legislature intended to recognise the right generally, that is the right to inspect public documents, for all persons who can show that they have an interest for the protection of which it is necessary that liberty to inspect cases in the absence of a Statutory re some special provisions applicable provisions do not generally contain ay be had if inspection or copies be

refused, yet an order in the nature of a mandamus directing the public officer concerned to do his duty in the matter may be obtained from the High Court under the provisions of Chapter VIII of the Specific Relief Act (4).

(b) The method of proving public documents is, as already observed, the subject of sections 76—78, *post*(5), and (c) the admissibility and effect of

(1) Taylor Ex. § 1479

(2) *R v. Arnungam* 20 M. 189 191 192 (1897) *per* Sulramania Ayyar and Davies JJ. Collins C. J. held that the accused was a person interested in the documents in question and that if they were public documents he would be entitled to inspect and have copies of them at p. 194. Shephard J. was of the same opinion as the referring Judges as to the right of inspection but held that two of the documents in question were not public

documents at p. 196

(3) *Chandi Charan v. Boistub Chara* 31 C. 24 293 (1904) *R v. Arnungam* 20 M. 189 196 (1897)

(4) Act I of 1877 Field Ex. 6th Ed. 240 242 as to the means of obtaining an inspection or copy in England see Taylor, Ex. § 1479—1482 and see *Greenleaf Ex.* p. 471

(5) See *post* and as to the English law, Taylor Ex. §§ 1523—1659 1747 A. *et seq.*

non judicial public documents is dealt with by sections 35—38, and of judicial public documents by sections 40—44, *ante* (1) The question of the admissibility and proof of a public document involves four points of consideration (a) The contents must relate to a fact in issue or a fact relevant under the earlier sections of the Act (b) If the contents are a statement of such facts and are not acts forming such facts, the statement must be relevant under sections 35—38, chiefly section 35 (c) The contents of the original document must be proved subject to, and with the benefit of, section 65, clause (e), and sections 76—78(4) The accuracy of the preparation of the original may be proved or presumed as provided by sections 80—87, and the correctness of certified copies may be presumed under section 79 In this connection section 57 relating to judicial notice should also be considered (2)

Firstly, as to the nature of public writings They have been defined to consist of "the acts of public functionaries, in the *Executive, Legislative and Judicial* Departments of Government, including under this general head the transactions which official persons are required to enter in books or registers in the course of their public duties and which occur within the circle of their own personal knowledge and observation To the same head may be referred the consideration of documentary evidence of the acts of State, the Laws and Judgments of Courts of Foreign Governments Public documents are susceptible of another division, they being either (a) judicial or (b) non judicial (3) Under the latter head come acts of State, such as proclamations and other acts and orders of the Executive of the like character, Legislative Acts Journals of the Legislature, which they are required to enter in the course of their public duties

the official proceedings of corporations and matters respecting their property if the entries are of a public nature, the books of the post office and custom house and registers of other public offices, prison registers, registers of births deaths and marriages, registers of patents designs, trade marks, copy rights, and other like documents, an enumeration of the whole of which would be practically impossible (4) Under the former head come all judicial writings whether domestic or foreign (5) Section 74 is in substantial accordance with the abovementioned definition, but also includes therein public records kept in British India of private documents In the case of *Sturla v Freccia* (6) it was said that "a 'public document' means a document that is made for the purpose of the public making use of it, especially where there is a judicial or quasi-judicial duty to enquire Its very object must be that the public, all persons concerned in it may have access to it" That case dealt with the admissibility of statements in public documents It will, however, be observed that under section 74 of the Act the question whether a document is or is not a public document, within the meaning of that section, is distinct from the question whether or not the public have a right to inspect it It is only of public documents which the public have a right to inspect that certified copies may be given in evidence, but it may well be that a document may be "public" within the meaning of this Act, and also one which is not open to the inspection of the public and of which, therefore, no proof by certified copy may be given

(1) See pp 390—419, *ante* and as to the English law Taylor Ev §§ 1660—1747 A *et seq* and see Greenleaf Ev § 522 *et seq*

(2) The Evidence Act by Kishori Lal Sarkar 2nd Ed p 174

(3) Greenleaf Ev § 470

(4) *Ib* §§ 479—484, Taylor, Ev. §

1600 n Powell Ev 9th Ed 260 261 Phipson Ev 5th Ed, 384—388 Roscoe N P Ev 125

(5) See Powell Ev, 9th Ed 253—260 Phipson Ev 5th Ed 388—393

(6) L R, 5 App Cas 639 642 643 *per* Lord Blackburn

Secondly, with regard to the *proof* of public documents As has been already observed(1), the contents of documents must be proved either by the production of the document, which is called primary evidence, or by copies or oral accounts of the contents, which are called secondary evidence Primary evidence is required as a rule, but this is subject to seven exceptions(2) in which secondary evidence may be given The most important of these are (a) cases in which the document is in the possession of the adverse party(3), and (b) cases in which certified copies of public documents(4) are admissible in place of the documents themselves (5) The grounds upon which the last mentioned exception rests are grounds of public convenience Public documents are, "comparatively speaking" little liable to corruption, alteration, or misrepresentation—the whole community being interested in their preservation and in most instances entitled to inspect them, while private writings, on the contrary, are the objects of interest but to few, whose property they are and the inspection of them can only be obtained if at all by application to a Court of Justice The number of persons interested in public documents also renders them much more frequently required for evidentiary purposes, and if the production of the originals were insisted on, not only would great inconvenience result from the same documents being wanted in different places at the same time, but the continual change of place would expose them to be lost and the handling from frequent use would soon insure their destruction For these and other reasons the law deems it better to allow their contents to be proved by derivative evidence, and to run the chance whatever that may be of error arising from inaccurate transcription, either intentional or casual But true to its great principle of exacting the best evidence that the nature of the matter affords, the law requires this derivative evidence to be of a very trustworthy kind and has defined with much precision the forms of it which may be resorted to in proof of the different sorts of public writings (6) Thus it must at least in general, be in a written form *ie*, in the shape of a copy(7) and as already mentioned must not be a copy of a copy In very few, if in any, instances, is oral evidence(8) receivable to prove the contents of a record or public book which is in existence (9) With regard to the proof of documents of a public character in England and the legislation relating thereto, *see the notes to sec*

cular modes referred to and allowed by that section When such proof has been offered certain presumptions arise in respect of the documents which form the subject of the third division of this Chapter of the Act (10)

(1) See Introd Ch V

(2) S 65 *ante*

(3) *Ib* cl (a)

(4) *Ib* cl (e)

(5) Steph Introduct 170 It will be noticed therefore that the so called best evidence rule has in strictness no application to the case of public writings a properly authenticated copy being a recognized equivalent for the original itself Best Ev Amer Notes 437 Greenleaf Ev 482

(6) B several modern Acts of Parliament special modes of proof are provided for many kinds of records and public documents *see* 31 and 32 Vic c 37 14 and 15 Vic c 99 8 and 9 Vic c 113 42 Vic c 11 45 Vic c 50 a large number of similar enactments are to be

found in the recent statute books *see* Taylor Ev §§ 1073—1090

() In England the principal sorts of copies used for the proof of documents are (1) Exemplifications under the great seal (2) Exemplifications under the seal of the Court where the record is (3) Office copies *ie* copies made by an officer appointed by law for the purpose (4) Examined copies as to which *see* s 8 *post* (5) Copies signed and certified as true by the officer to whose custody the original is entrusted This Act refers to certified copies (s 6) and certain other copies particularly specified (s 78)

(8) *See* Best Ev Amer Notes p 433

(9) Best Ev § 485 and *see* §§ 218 219 *ib* Starkie Ev 315

(10) *See* Introduction to ss 79—90, *post*

Public documents

74. The following documents are public documents—
- (1) documents forming the acts or records of the acts—
 - (i) of the sovereign authority,
 - (ii) of official bodies and tribunals, and
 - (iii) of public officers, legislative, judicial and executive whether of British India, or of any other part of Her Majesty's dominions, or of a foreign country;
 - (2) public records kept in British India of private documents.

Private documents

75. All other documents are private.

ss 3 ("Document")

ss 76 78 (Presumptions as to documents)

ss 79 90 (Proof of public documents)

COMMENTARY

Public and private documents

See Introduction, *ante*. It has been held that in construing section 74 it may fairly be supposed that the word "acts" in the phrase "documents forming the acts or records of the acts" is used in one and the same sense, that the act of which the record made is a public document must be similar in kind to the act which takes shape and form in a public document, that the kind of act which section 74 has in view is indicated by section 78 in which section the acts are all final completed acts as distinguished from acts of a preparatory or tentative character. Thus, the enquiries which a public officer may make whether under the Criminal Procedure Code or otherwise, may or may not result in action. There may be no publicity about them. There is a substantial distinction between such measures and the specific act in which they result and it is to the latter only that section 74 was intended to refer (1). Consult the definition given in the second section of the Civil Procedure Code of a "public officer" (2), and see the following sections for references to documents which are of a public nature,—sections 35 38, 57, 78, (3) as well as the following decisions which have nearly all been given under this Act. A certificate of sale granted under the Civil Procedure Code (Act VIII of 1859) and before section 107 of Act XII of 1879 was enacted is a document of title but is not a public document (4). The Loan Register of the Public Debt Office in the Bank of Bengal is a public document and under section 76 any person having an interest therein is entitled to inspect the same and obtain certified copies thereof (5). A certified copy of an order of a Probate Court granting letters of administration with the Will

(1) *R v Arumugam* 20 M 189 197 (1897) *per* Shephard J. So also Benson J at p 204 said. It may I think well be doubted whether the word 'acts' in s 74 is used in its ordinary and popular sense and not rather in the restricted and technical sense in which it is used in s 78 ' but see also remarks of S Aiyar J, at p 203 and note on this case *post*.

(2) A policeman is a public officer *R v Arumugam* 20 M 189 194 (1897) as to the Secretary of a Municipal Board see reference to Full Bench 19 A 293 2/5 (1897). The Gorant of a village is a public servant, *R v Suddu* 1 All L J 741 (1901), the following are public

officers—The Official Trustee *Shahbazadee Shahunshah v Ferguson* 7 C 499 (1881). Official Assignee, *Joorub Haja v Kemp*, 26 B, 809 (1902). The Administrator General since the passing of the Act of 1902, *Bholaram Choudhry v Administrator General* 8 C W N, 913 (1904), and under Act V of 1908 every member of the Indian Civil Service.

(3) Now represented by O I r 12 O III r, 3 O VII r, 10 and O V, r 15 of present Code (Act V of 1908).

(4) *Vasanji v Haribhai* 2 Bom L R 531 (1900) *per* Candy, J.

(5) *Chandi Charan v Boistab Charsa* 31 C 284 (1903), 8 C W N, 125

annexed is a public document under this section and admissible under section 66 (1) A *gamabandi* prepared by a Deputy Collector while engaged in the settlement of land under Regulation VII of 1822 has been held to be a public document on the ground that the act of the Collector is judicial or executive (it probably partaking of both characters), and that the record of such acts is a public document (2) But his decision has been since said to be open to some degree of doubt (3) In any case, however, it is evident that the question whether a document is admissible in evidence as a public document, and the question whether that which is in it is binding upon tenants without reference to the question of consent or notice, are entirely separate matters (4) An *anumatipatra*, or instrument giving permission to adopt, is clearly not a public document (5), nor is a *teis khana* register (so called from the number of columns in the statement or register), prepared by a *patuani* under rules framed by the Board of Revenue under the 16th section of Reg. XII of 1817, nor is the *patuani* preparing the same a public servant (6) It has been held that the record of a confession of an accused person recorded by the Magistrate of Bhind in Gwahar is probably a public document (7) Where a suit was compromised and a petition presented in the usual way, and the Court made an order confirming the agreement which with the order, as well as the power of attorney, were all entered upon record, it was held that these papers became as much a part of the record in the suit as if the case had been tried and judgment given between the parties in the ordinary way, and that that record

In the case

certified copy

parties as well

certified copies of the plaint and written statements were also tendered in evidence on the ground of their being public documents, and objected to. The plaint was admitted, but the written statement was rejected. The correctness, however, of this decision, so far as it held the plaint to be admissible has been for a long time doubted (10) and has not been followed on the Original Side of the Calcutta High Court. The decision is, it is submitted, erroneous, there being no principle upon which the case of a plaint can be distinguished from that of a written statement. Both are the acts or record of the acts of private parties and not of a public tribunal or its officers.

That class of documents which consists of plaints, written statements, affidavits and petitions filed in Court, cannot be said to form such acts or records of acts as are mentioned in the section, and are, therefore, not public documents. But depositions of witnesses taken by an officer of the Court are public documents (11) and so of course are judgments, decrees and other orders

(1) *Habiram Das v Hem Nath Sarma* 19 C W N 1068 (1915)

(2) *Taru Patil v Abinash Chander* 4 C 79 (1888)

(3) *Akshaya Kumar v Shama Charan* 16 C 586 590 (1889) *Ram Chunder v Banseedhur Naik* 9 C 741 743 (1883)

(4) *Akshaya Kumar v Shama Charan* supra at p 590

(5) *Krishna Kishori v Kishori Lal* 14 C 486 491 (1887) s c L R 14 1 A 71 nor of course are *kobalas* conveyances and the like *Hurechur Mo-oomdar v Churn Mahjee* 22 W R 355 (1874) *Hurish Chunder v Prasunno Coomar* 22 W R 303 (1874)

(6) *Baij Nath v Sukhu Mahton*, 18 C 534 (1891) *Samar Dosadh v Juggul Kishore* 23 C 366 (1895) in the judgment in which case s 35, ante is fully considered

(7) *R v Sunder Singh* 12 A 595 (1890)

(8) *Blagairn Megu v Gooroo Pershad* 20 W R 68 (1876)

(9) *Shazada Mahomed v Daniel Hedgesberry* 10 B L R App 31 (1873)

(10) *Field F.* 6th Ed 243 244 see as to the admissibility of quasi records, *Taylor Ex* § 1534

(11) *Haranund Roy v Ram Gopal*, 4 C W N 429 (1899) [Foreign Judicial

of the Court itself. In a suit for ejectment the defendant pleaded a compromise. As evidence of it he tendered a certified copy of a petition which bore an order of the Court on it. This document was rejected by the lower Court as not proved, but it was held by the High Court that the document did not require to be proved and was admissible in evidence under section 77 of this Act (1). A quinquennial register is a document of a public nature (2). Letters which have passed between district authorities are public documents forming a record of the acts of public officers (3). But the question whether a letter or report from one official to another is an entry in a public record within the meaning of section 75 will depend on the facts.

ments made by a public officer, is not admissible as a public document (5), or with a view to resumption made by Government Master's certificate granted

by the Board of Trade is not a public document (7). As to *ayalut* accounts prepared for administrative purposes by village officers see case below (8). Entries in a register made under (B C) Act VII of 1876 by the Collector are entries made in an official register kept by a public servant under the provisions of a Statute, and certified copies of such entries are admissible in evidence for what they are worth (9). It has been held by the Madras High Court that reports made by a police officer in compliance with sections 157 and 168 of the Criminal Procedure Code are not public documents, and that consequently an accused person is not entitled before trial to have copies of such reports (10). There is however, a difference of opinion in that Court whether the same rule applies to reports made in compliance with section 173 of the Criminal Procedure Code (11) or whether reports under that section are public documents of which an accused person is entitled under section 76 to have copies before trial (12). The fifth Clause of section 78 brings the records of the proceedings of a municipal body in British India within the second clause of the first sub section of section 74 as the record of the acts of an official body. The records of the proceedings of a Municipal Board is a public document and the officer who is authorized by the ordinary course of his official duties to give

Records] A witness's deposition is part of the records of the acts of an official tribunal within the meaning of s 74, Reg App No 110 of 1900 10 June 1902 Cal H C

(1) *Mangal Sen v Hira Singh* 1 All L J Part I p 101 (1904) 1 All L J 396 (1904) [Certified copy of application for compromise with an order of the Court on it is admissible in evidence under s 77 and need not be proved]

(2) *Sreemutty Oodoy v Bishonath Dutt* 7 W R 14 (1867) See *Kashee Chunder v Noor Chunder* S D A 1849 pp 113 116

(3) *Pirthee Singh v Court of Wards* 23 W R 272 (1875)

(4) *Mallikarjuna Dugget v Secretary of State* 35 M 21 (1912)

(5) *Nittyanund Roy v Abdur Raheem* 7 C 76 (1881)

(6) *Ran Chunder v Bunsheedhur Naik* 9 C 741 743 (1883) see *Duarka Nath v Tarita Moysi* 14 C 120 (1886)

(7) In the matter of a Collision between *The Ava and The Brenhilda* 5 C 568

(1879)

(8) *Sivasubramanya v Secretary of State* 9 M 285 294 (1884)

(9) *Shoss Bhoomun v Girish Chunder* 20 C 940 (1893)

(10) *R v Arumugam* 20 M 189 (1897) F B Subramania Aiyar J *dissentiente*. Whatever may be said upon the matter from the point of view of convenience and public policy which do not strictly touch the pure question of construction there is it is submitted great force in the argument of Subramania Aiyar J (at p 203) that even if such a document be not a record of at least some of the investigating officer's acts it is itself a document forming an act of his he being enjoined to act in a particular way that is to submit such a report.

(11) *R v Arumugam* 20 M 189 (1897) F B Subramania Aiyar J, *dissentiente per* Collins C J and Benson J

(12) *Ib per* Shephard J and Subramania Aiyar J

copies of public documents is for these purposes a public officer (1) In support of a claim instituted in a Court in British India for a share in her deceased father's estate, plaintiff tendered in evidence a document which purported to be a certified copy of the will executed by her late father at Colombo where he was said to have been at the date of the execution of the alleged will The document was filed as an exhibit in the suit, but the Subordinate Judge held that it was not admissible in evidence It bore an endorsement purporting to be signed by the Assistant Registrar General for Ceylon to the effect that it was a true copy of a last will and testament made from the Protocol of record filed in his office No evidence was tendered before the Subordinate Judge that the copy had been made from and compared with the original On the question of the admissibility in evidence of the said document, *held* that it was inadmissible, that it was not a public document within the meaning of clauses 1 (m) or 2 of this section, and that in the absence of evidence that it had been made from and compared with the original the provisions of that Act relating to secondary evidence of public documents were inapplicable (2) Census Registers are not public documents (3)

Public records kept in British India of private documents are also under the second Clause public documents within the meaning of the section Thus certain register books are directed to be kept in all registration offices (4) Under this clause entries of the copies of private documents in Books Nos 1, 3 and 4 of the Registration office being public records kept of private documents, are public documents, and as such may be proved by certified copies, that is certified copies may be offered in proof of those *entries*, but neither those entries nor certified copies of these entries, are admissible in proof of the contents of the original documents so recorded unless secondary evidence is allowable under the provisions of this Act (5) Section 91 *second exception* provides that Wills admitted to probate in British India may be proved by the probate Public documents are provable in the exceptional modes provided for in sections 76—78

All documents other than those specially mentioned in section 71 are private documents (6) and are provable under the general provisions of the Act relating to the proof of documents

76. Every public officer having the custody of a public document, which any person has a right to inspect (7), shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorized by law to make use of a seal, and such copies so certified shall be called certified copies

Certified
copies of
public
documents

Explanation—Any officer who, by the ordinary course of official duty, is authorised to deliver such copies, shall be deemed

(1) Reference to Full Bench under s 46 of Act I of 1879 19 A 293 295 (1897)

(2) *Ponnammal v Sundaram Pillai* 23 M 499 (1900)

(3) *R v Bha anrao Vithalrao* 6 Bom L R 535 (1904)

(4) See Act XVI of 1908 ss 51 57

(5) *v ait* s 65 cl (f)

(6) S 75

(7) *v ante* Intro to ss 74—78 see with reference to this and following section *Ali Khan v Indar Prashad* 23 C., 950 (1896) where certified copies of income tax returns were held to be inadmissible

to have the custody of such documents within the meaning of this section (1)

Proof of documents by production of certified copies

77. Such certified copies may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies (2)

Proof of other official documents

78 The following public documents may be proved as follows —

(1) Acts, orders or notifications of the Executive Government of British India in any of its departments, or of any Local Government, or any department of any Local Government—

by the records of the departments certified by the heads of those departments respectively,

or by any document purporting to be printed by order of any such Government,

(2) The proceedings of the legislatures,—

by the journals of those bodies respectively, or by published Acts or abstracts, or by copies, purporting to be printed by order of Government,

(3) Proclamations, orders or regulations issued by Her Majesty or by the Privy Council, or by any department of Her Majesty's Government,—

by copies or extracts contained in the London Gazette or purporting to be printed by the Queen's Printer (3)

(4) The Acts of the Executive or the proceedings of the legislature of a foreign country,—

by journals published by their authority, or commonly received in that country as such, or by a copy certified under the seal of the country or sovereign, or by a recognition thereof in some public Act of the Governor General of India in Council,

(5) The proceedings of a municipal body in British India—

by a copy of such proceedings, certified by the legal keeper thereof, or by printed book purporting to be published by the authority of such body (4),

(1) It is doubtful whether this section is applicable to copies given before the passing of the Act *Jakir Ali v. Raj Chunder* 10 C. L. R. 476

(2) As to the practice anterior to the Act see *Naraguntty Litchmeedatamah v. Vengama Idadoo* 9 M. I. A. 66 90 (1861)

(3) See *The Documentary Evidence Act 1868* 31 & 32 Vic. c. 37 which is

in force in every British Colony or Possession *subject* to any law that may be from time to time made by the Legislature of any such Colony and Possession

(4) See Reference under s. 46 Act I of 1879 19 A. 293 295 (1897) in which it was held that the record of the proceedings of a Municipal Board is a public document, and the officer who is authorised by the ordinary course of his official duties to

- (6) Public documents of any other class in a foreign country,—
by the original or by a copy certified by the legal keeper thereof, with a certificate under the seal of a Notary Public, or of a British Consul or diplomatic agent, that the copy is duly certified by the officer having the legal custody of the original, and upon proof of the character of the documents according to the law of the foreign country

Principle.—As one of the exceptions to the rule requiring primary evidence to be given rests on grounds of physical impossibility or inconvenience (1), so the objection to the production of public documents rests on the ground of moral inconvenience. They are, comparatively speaking, little liable to corruption, alteration or misrepresentation—the whole community being interested in their preservation, and, in most instances, entitled to inspect them. The number of persons interested in public documents also renders them much more frequently required for evidentiary purposes, and if the production of the originals were insisted on not only would great inconvenience result from the same documents being wanted in different places at the same time, but the continual change of place would expose them to be lost and the handling from frequent use would soon insure their destruction (2). For these and other reasons their contents are allowed to be proved by derivative evidence at the risk, whatever that may be, of errors arising from inaccurate transcription either intentional or casual (3).

Certified
copies of
public
documents

s. 3 ("Document")

s. 74 ("Public document")

ss. 63, CL. (1) & 65 CL. (e) (Secondary evidence by certified copies)

s. 3 ("Proof")

s. 79 (Presumptions as to certified copies)

ss. 80-90 (Presumptions as to other documents)

Taylor, Ev. Ch. IV, Part V (Matters evidenced by Public Documents), Phipson, Ev., 5th Ed., 507, Wills Ev., 2nd Ed., 422-463, Best Ev., 424-430, Roscoe, N. P. Ev., 96-130

COMMENTARY

The *Explanation* to section 76 declares who is to be considered the legal custodian under this section, which limits the right to obtain a copy of a public document from such custodian to such documents as the applicant has a right to inspect. This limitation saves and excludes all such documents as the Government has a right to refuse to show on the ground of State Policy, privileged communication and the like (4). Whether or not therefore a person will be entitled to a copy of a public document will depend upon the question whether or not he has a right to inspect it. In England the right to inspect public documents varies with respect to their nature. There is a Common Law right to inspect some. As to others the right rests upon particular Acts (5)

give copies of public documents is for these purposes a public officer

(1) As where characters are traced on a rock or engraved on a tombstone or the like see s. 65 cl. (d)

(2) See *Lady Dartmouth v. Roberts* 16 East 341. A proceeding in a Court of Justice is provable by an examined copy. This rule has arisen from the convenience of the thing that the originals may not be required to be removed from place to

place per Bayley J. and see *Doe v. Ross* 7 M. W. 106 per Lord Abinger

(3) Best Ev. § 485 and as to proof of general result of examination of public documents see *Sundar Kumar v. Chandesh* 10 Prasad Narain Singh (1907) 34 C. 293

(4) Norton Ev. 257

(5) See Taylor Ev. §§ 1480-1522 v. ante Introd. to ss. 4-8 as to the right of access

This Act is silent as to the right of inspection, and there is no general provision on the subject in any other enactment in force in British India, though there are certain special provisions applicable to particular circumstances only. Thus, Registers prepared under the provisions of Chapter IV of the Oudh Land Revenue Act, are declared to be public documents and the property of Government, and are declared to be open to public inspection (1). If a person is personally interested in a public document it would seem that in the absence of a right conferred by Statute, he has a common law right to inspect it. It may be inferred that the Legislature intended to recognise the right to inspect public documents generally for all persons who can show that they have an interest for the protection of which it is necessary that liberty to inspect such documents should be given. When the right to inspect and take a copy is expressly conferred by Statute, the limit of the right depends on the true construction of the Statute. When the right to inspect and take a copy is not expressly conferred the extent of such right depends on the interest which the applicant has in what he wants to copy and on what is reasonably necessary for the protection of such interest. If therefore a person has a right to inspect it becomes necessary to see what is the extent of his right to inspection. Every officer appointed by law to keep records ought to deem himself for the production of documents a trustee (2). An act may both give a right of inspection and provide a penalty and remedy in case of its refusal. Thus by Act VI of 1882 section 55 (Indian Companies Act) if inspection or copy of the Register of members is refused, the Company incur by such refusal a specific penalty and in addition to that penalty any Judge of a High Court may by order compel an immediate inspection of the Register. Where such Acts give a right of inspection but do not enact any particular remedy to which resort may be had if inspection or copies be refused an application may be made, in Presidency Towns, to the High Court under the Provisions of Chapter VIII of the Specific Relief Act. If there exists no such special provision, and the disclosure of the contents of any of the general records of the realm or of any other documents of a public nature, would, in the opinion of the Court or of the Chief Executive Magistrate, or of the head of the department under whose control they may be kept, be injurious to the public interests an inspection would certainly not be granted (3).

(1) Act XVII of 1876 s 67 so also the books of account of the Administrator General are open to public inspection Act III of 1913 s 44 (for present Act see Act V of 1907 and as to the right to inspection and to certified copies in the case of other public Registers see ante notes to s 35 Act XVI of 1908 as amended by Acts V and XV of 1917 (Registration) ss 18 51 55 57 Act XX of 1874 s 3 5 & 6 Vic c 45 s 11 25 & 26 Vic c 68 s 5 (Copyright) 46 & 47 Vic c 57 ss 23 55 87—89 Act V of 1888 ss 13 14 61 (Patents Designs and Trade-marks) (now see ss 20 71 of Act II of 1911 as amended by Acts XXVIII and XXIX of 1920) Act XXV of 1867 s 18 (Printing Presses) Acts V of 1865 XV of 1872 s 79 (Christ an Marriage) XV of 1865 as amended by Act XXVIII of 1920 (Parsi Marriage) III of 1872 s 14 (Marriage) Act VI of 1886 ss 7—9 35 (Registration Births Deaths and Marriages) as amended by Act XXXVII of

1920 Act I (B C) of 1876 (Mahomedan Marriage) Act XXI of 1860 s 19 (Societies) Act VI of 1882 ss 55 60 255 220 68 (Companies) now see Act VII of 1913 as amended by Acts X and XI of 1914 and Act XLII of 1920 ss 36 40 288 248 112 123 124 57 & 58 Vic c 60 ss 64 239 695 (2) (Merchant Shipping) Act VII of 1882 s 4 (Powers of Attorney) Calcutta High Court Rules of 1866 R 54 (Wind up of Company) (now see Calcutta High Court Rules of 1914 Ch XXXI r 10 p 307 as to the records of Courts) *post*

(2) *Chandi Charan v Bostab Charan*, 31 C 284 293 (1903) *Bank of Bombay v Suleman So*, 1 P C (1908) 32 Bom 466

(3) *Taylor Ex* § 1483 *Field Ex* 6th Ed 240 241. In the case first mentioned in the preceding note an application was made to Court in the suit calling upon the Bank of Bengal to comply with an order of Court.

The Civil Procedure Code provides that certified copies of judgments(1) shall be furnished to the parties. There is no express provision of copies of any other portions of the records of the Civil Courts but as a matter of practice, copies are usually given to any of the parties who may apply for them (3). The Calcutta High Court has, however, made the following rules on the subject—(a) A plaintiff or a defendant at any stage of the suit which have been put in by a party who has been ordered to file a written statement is not entitled to inspect or take a copy of a written statement filed by another party, until he has filed his own, (b) A stranger to the suit may after decree obtain, as of course, copies of the plaint, written statements, affidavits and petitions filed in the suit, and may, for sufficient reason shown to the satisfaction of the Court, obtain copies of any such

In criminal cases, an accused person, committed under the Code of Criminal Procedure to the High Court or the Court of Session, is entitled to a copy of the charge free of all expense, and, if he apply within a reasonable time, to copies of the deposition, these latter copies to be made at his expense unless the Magistrate see fit to give them free of cost (5). He is entitled free of cost to a copy of the evidence of any witness examined by a Magistrate (other than a Presidency Magistrate) after commitment (6). Under the provisions of the undermentioned section(7), "on the application of the accused a copy of the judgment, or when he so desires, a translation in his own language, if practicable, or, in the language of the Court shall be given to him without delay."

Such copy shall in any case other than a summons case, be given free of cost. In trials of the heads of the charge to the jury shall be given to him without delay and free of cost a judgment or order passed by a Criminal Court desiring to have a copy of the Judge's charge to the jury or of any order or deposition or other part of the record, he shall, on applying for such copy be furnished therewith, provided that he pay for the same, unless the Court for some special reason thinks fit to furnish it free of cost (8). A previous conviction or acquittal may be proved in addition to any other mode of proof of the charge, and the production of the warrant of commitment under which the punishment was suffered—together with in each of such cases evidence as to the identity of the accused person with the person so convicted or acquitted (9).

(1) In matters before the Calcutta Small Cause Court for judgment read 'Proceedings Notification of the 18th Feb 1889

(2) O X r 20 p 889 O LI r 36 2nd Ed p 1321 as to certified copies of decrees and orders in execution of Privy Council decrees and orders v sb, O LV r 15 2nd Ed p 1343

(3) Field Ex 6th Ed 242

(4) General Rules and Circular Orders

Part IV Ch XV rr 1—4 (1891)

(5) Cr Pr Code ss 210 548

(6) Ib s 219

(7) Ib s 371

(8) Ib s 548

(9) Cr Pr Code s 511 [See also as to certified copies of convictions Reg III of 1872] as to offences committed by European British subjects in Indian Allied States v sb s 189

Proof of documents

Private documents must generally be proved by the production of the originals connected with evidence of their handwriting, signature, or execution as the case may be (1) An exception to this rule exists under the Act in the case of Wills admitted to probate in British India which may be proved by the probate (2) The contents of public documents may be proved either by the production of certified copies (3) under section 77, or if they be documents of the kind mentioned in section 78, by the various modes described in that section The contents of private documents such as *lobalas*, conveyances, leases and the like, though filed in a Court or public office for purposes of evidence in a suit, are not provable in another suit by means of certified copies (4)

The word 'may' in section 77 is used only as denoting another mode, one, namely, the production of document within the meaning but no other kind of secondary Privy Council rejected a document proceeding which purported to be an authenticated copy of the original document, but was not certified to be a true copy as required by section 76, and was not shown to have been examined by any witness with the original (6) This last provision, however, must be read subject to the provisions of sections 78 and 82, *post*, and the last paragraph of the second section *ante* Thus by virtue of the provisions contained in section 82, *post*, a foreign and colonial document may be proved by an authenticated copy within the meaning of 14 and 15 Vic, c 99, s 7, such authenticated copies being declared by the Statute to be admissible in evidence without proof of seal, signature or judicial character of the person making such signature Secondary evidence, therefore, other than a certified copy, is admissible both in the cases expressly mentioned by this Act and in those where an unenacted or other Act has especially enacted that such other evidence shall be admissible (7) Section 79 raises a presumption of genuineness in the case of certified copies Proof of a special character may be offered as to the official documents which are the subjects of individual mention in section 78 In connection with the third clause of that section may be read the provisions of the Documentary Evidence Act, 1868, (8) as amended by the Documentary Evidence Act, 1882, (9) which, *subject* to any law that may be from time to time made by the Legislature of any British Colony or Possession (including therein India) is declared to be in force in every such Colony and Possession (10) As to the fifth Clause *v ante*, p 548, n 4 Fourth and sixth Clauses deal with foreign

(1) See s 59 61—73, *supra*

(2) S 91, Exception 2, *post*

(3) It is doubtful whether ss 76 and 79 apply to copies given before the passing of the Act *Jahir Ali v Raj Chunder*, 10 C. L. R. 476

(4) *Hureekur Mojoondar v Churn Mayhee*, 22 W. R. 355 (1874), as to the decision in *Shazada Mahomed v Wedgeberry*, 10 B. L. R. App 31, *ante*, notes to ss 74, 75 As to proof of order of Government sanctioning prosecution see *Muhammad Oziullah v Beni Madhab Chowdhury*, 36 C. L. J., 180 (1922)

(5) S 65 *ante*, the provisions of which appear to have been overlooked in *Norton Ev.*, 258

(6) *Krishna Kishori v Kishori Lal*, 14 C. 486 4901 (1887), s c, L. R. 14 I. A., 71

(7) So in cases governed by the Merchant Shipping Act 1894 (57 & 58 Vic. c 90 s 695), examined copies are admissible equally with certified copies The difference between a *certified* and an *examined* copy, is that the former is made by an official whose duty it is to furnish such copies to parties who have an interest in the subject matter, and a right to apply for them on payment or otherwise the latter are those which any private individual makes from the original with which having himself compared it by examination he is enabled to swear that it is a true copy *Norton Ev.*, 258

(8) 31 & 32 Vic., c 37

(9) 45 Vic. c 9

(10) See *Taylor, Ev.*, § 1527, *Field, Ev.*, 6th Ed. 245—247

public documents (1) The words "of any other class," in the sixth Clause mean "other than the documents mentioned in the fourth Clause" Where a
be a
court
a the
record, but such presumption may be displaced by proving the want of juris-
diction (2) As to the presumption declared by the Act with regard to certified
copies of foreign judicial records, see section 86, *post*, and for the presumption
as to documents admissible in England without proof of seal or signature, see
section 82, *post* See also Note to sections 74, 75, *ante*

(1) As to the proof of foreign judicial 429 (1899)
record v s 86 *post* and s 65 *ante* (2) Woodroffe & Ahs Civ Pr Code,
Haranund Roy v Ram Gopal 4 C W N s 14 2nd Ed p 101

PRESUMPTION AS TO DOCUMENTS

WHEN a document, whether private or public, has been offered in evidence, certain presumptions may arise in respect of it which are enumerated in the following sections (79—90). Those presumptions, however, are not conclusive. An inference is drawn from certain facts in supersession of any other mode of proof. That inference may be one which the Court is bound to accept as proved until it is disproved, in this case it is said that the Court "shall presume", or the inference may be one as to which the Court is at liberty either to accept it as proved until it is disproved, or to call for proof of it in the first instance, in this case it is said that the Court "may presume". All that the law does for this last class of inferences is to allow the Court to dispense with evidence should it think fit to do so. The two latter classes of inferences play an important part in the proof of documents. Sections 79—85, and section 89 provide for cases in which the Court shall presume certain facts about documents, sections 86—88, 90, provide for cases in which the Court may presume certain things about them. In the one case the Court, is bound to consider the presumption as proved until the contrary is shown, in the other, the Court may, if it pleases, regard the presumption as proved until the contrary is shown, or may call for independent proof in the first instance (1). Many classes of documents, which are defined in the Act, are presumed to be what they purport to be, but this presumption is liable to be rebutted. Two sets of presumptions will sometimes apply to the same document. For instance, what purports to be a certified copy of a record of evidence is produced. It must by section 79 be presumed to be an accurate copy of the record of evidence. By section 80 the facts stated in the record itself as to the circumstances under which it was taken *e.g.*, that it was read over to the witness in a language which he understood, must be presumed to be true (2). All the following sections, down to section 90 inclusive, are illustrations of, and founded upon, the principle, *omnia presumuntur rite esse acta* (3). The presumption which is directed to be raised by the last mentioned section is of great importance in obviating the effects of the lapse of time as to the proof of documents. As years go on, the witnesses who can personally speak to the attestation or execution of a document, or to the handwriting of those who executed or attested it, gradually die out. If strict proof of execution or handwriting were necessary, it would after a generation, become impossible to prove any document. On the

place in which, the Court may presume that the signature and every other part of such a document is in the handwriting of the person who executed it, and that it was executed in the manner in which it is shown to have been executed.

(1) Cunningham Ev. 45, 46, see ante notes to s. 4

(2) Steph. Introd. 170, 175

(3) Norton Ev. 260

(4) Cunningham Ev. 48, 49

may, of course, be raised under the provisions of section 114, as is indeed indicated by *Illustration (i)* to that section, according to which the Court may presume that when a document creating an obligation is in the hands of the

may have stolen it (1). There are many other presumptions as to documents, known to English law, for which no express provision is made in the Act, and which, therefore can be raised only under the general provision contained in section 114, *post*(2), under which section the more important of those presumptions will be found considered.

79. The Court shall presume every document purporting to be a certificate, certified copy or other document, which is by law declared to be admissible as evidence of any particular fact, and which purports to be duly certified by any officer in British India, or by any officer in any native State in alliance with Her Majesty, who is duly authorized thereto by the Governor General in Council to be genuine

Presumption as to genuineness of certified copies

Provided that such document is substantially in the form and purports to be executed in the manner directed by law in that behalf

The Court shall also presume that any officer by whom any such document purports to be signed or certified, held, when he signed it, the official character which he claims in such paper (3)

Principle.—*Omnia præsumuntur rite esse acta*—a maxim of peculiar force when applied to official acts and documents. The last clause of the section is also based upon the above quoted maxim. It is very old law that where a person acts in an official capacity, it shall be presumed that he was duly appointed and it has been applied to a great variety of officers and illustrated by many cases. For it cannot be supposed that any man would venture to intrude himself into the public station which he was not authorized to fill. See *Introduction, ante*, and *note, post*

s 3 (Court)	ss 68 (L (1) 65, CLs (e) (j) 76, 77 (Certified copies)
s 4 (Shall presume)	
s 3 (Document)	s 3 (Ex decr)

Norton, Ev 260 261 Field Ev 6th Ed, 248 Taylor Ev § 171

COMMENTARY

As is indicated by its terms, this section applies only to certificates(4), certified copies or other documents certified by officers in British India, or by duly authorized officers in allied Native States. Section 82 *post* provides for similar presumptions in the case of documents of a like character certified by

Genuineness of certified copies

(1) S 114 ill (i) *post*

(2) Cunningham Ev 272

(3) It is doubtful whether this section is applicable to copies given before the passing of the Act *Jakir Ali v Raj*

Chunder 10 C L R 46

(4) *Fg* a certificate given by a registering officer under s 60 Act III of 1877 and see Cr Pr Code ss 467 473 511

officers other than those specially designated in this section. The presumption that the document itself is genuine of course includes the presumption that the signature and the seal (1), where a seal is used, are genuine (2). The presumption to be raised by the section is however, made subject to the proviso that the document is substantially in the form, and purports to be executed in the manner, directed by law in that behalf.

This section, as indeed all the following sections down to section 90 inclusive is an illustration of and is founded upon, the principle *omnia rite esse acta*. But though the Courts are directed to draw a presumption in favour of official certificates, it is not a conclusive but a rebuttable presumption. It is but a *prima facie* presumption, and if the certificate or certified copy be not correct, such incorrectness may be shown (3). The presumption raised by the last clause also is a presumption which shall only stand *donec probatur in contrarium*—until the contrary be proved (4). And when a public officer is required by law to be appointed in writing, and it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved (5). So also as to documents admissible in England without proof of seal or signature, the Court shall presume that the person signing it held at the time when he signed it, the judicial or official character which he claims (6).

Presumption as to documents produced as record of evidence

80 Whenever any document is produced before any Court purporting to be a record or memorandum of the evidence, or of any part of the evidence, given by a witness in a judicial proceeding or before any officer authorised by law to take such evidence or to be a statement or confession by any prisoner or accused person, taken in accordance with law, and purporting to be signed by any Judge or Magistrate, or by any such officer as aforesaid, the Court shall presume—

that the document is genuine, that any statements as to the circumstances under which it was taken, purporting to be made by the person signing it, are true, and that such evidence, statement or confession was duly taken.

Principle—This section also gives legal sanction to the maxim "*Omnia presumuntur rite esse acta*" with regard to documents taken in the course of a judicial proceeding (7). When a deposition or confession is taken by a public officer, there is a degree of publicity and solemnity which affords a sufficient guarantee for the presumption that everything was formally, correctly, and honestly done (8). See Introduction, *ante*, and Notes, *post*.

- a. 3 ('Document')
- a. 3 ('Court')
- a. 3 ('Evidence')

- ss. 24 30 (Confessions)
- a. 33 (Relevancy of depositions)
- a. 4 ('Shall presume.')

COMMENTARY.

Scope of the section

The presumptions to be raised under this section (9) which deals with the subject of depositions of witnesses and confessions of prisoners and accused

- (1) See s 76 *ante*
- (2) Field Ev 6th Ed 248
- (3) Norton Ev 260 see s 4 *ante*
- (4) Taylor Ev § 171, Norton Ev, 260 261
- (5) S 91 Except (1) *post*
- (6) S 82 *post*

- (7) R v Vizan 9 M 271 272 (1895)
- (8) Norton Ev. 261 262
- (9) See the following cases as to the law prior to the Act R v Fat & Burras 1 B L R A Cr 13 (1868) R v Ja Poly 11 W R Cr 36 (1899) R v Musser Sheikh 14 W R. Cr 9 (18 0)

persons, are considerably wider than those under section 79. They embrace not only the genuineness of the document, but that it was duly taken and given under the circumstances recorded therein. This section, occurring as it does in that part of the Act which deals not with relevancy but with proof, does not render admissible any particular kind of evidence, but only dispenses with the necessity for formal proof in the case of certain documents taken in accordance with law, raising with regard to documents taken in the course of a judicial proceeding, the presumption that all acts done in respect thereof have been rightly and legally done (1). The law allows certain presumptions as to certain documents, and on the strength of these presumptions dispenses with the necessity of proving by direct evidence what it would otherwise be necessary to prove (2). As already observed (3) two sets of presumptions may apply to the same document. For instance, what purports to be a certified copy of a record of evidence is produced. It must by section 79 be presumed to be an accurate copy of the record of evidence. By the present section the facts stated in the record itself as to the circumstances under which it was taken *eg* that it was read over to the witness in a language which he understood, must be presumed to be true. As to the relevancy of depositions, *see* section 33 *ante*, and *notes* thereto.

The first portion of the section only refers to documents produced as a "Record of record of evidence." It is only a document which purports to be a record or memorandum of the evidence (4), or any part of the evidence given by a witness in a judicial proceeding or before any officer authorized by law to take such evidence with regard to which the presumptions prescribed by this section are to be made. Statements, therefore, made by persons to police officers during the course of a police inquiry do not come within the purview of this section. Chapter XIV of the Criminal Procedure Code deals with the powers of investigation of the police. A police officer making an investigation under this Chapter may examine witnesses and reduce their statements into writing (5). But no statements, officer in the evidence again^e son to a police- all be used as are not, and cannot have the effect of, depositions do not prove themselves and cannot be treated as evidence (7). The heading of a deposition descriptive only of the

other way (10)

The document, if it purports to be a statement or confession by any prisoner. Confession or accused person must have been taken in accordance with law. As to the confession

(1) *P v Varan* 9 M 224 227 (1886)
 (2) *R v Shitja* 1 B 219 222 (1876)
see for example Budree Lall v Bloosce
Khan 25 W R 134 (1876)
 (3) *Ante* Introduction to ss 79—90
Steph Introd 170 171
 (4) *See* S 3 *ante*
 (5) *Cr Pr Code* s 161
 (6) *Ib* s 162
 (7) *Roghuni Singh v R* 9 C 455
 458 (1882) s c 11 C L R 569 R v

Sitaran Kichal 11 B 657 (188) They
 may however be used for the purpose of
 refreshing memory *see* s 159 *post*
 (8) *Magbulan v Ahnada Hosain* 26 A
 108 (1903)
 (9) *Sadananda Mandal v Krishna*
Mandal 47 C 381 (1915)
 (10) *Elahi Buksh Khan v Emperor* 45
 C 82 s c 22 C W N 646 19 Cr
 L J 498 *see Unan Din v Niamut Ulla*,
 1 Lahore 351

provisions of the Criminal Procedure Code relating to the recording of confessions, *v. ante*, s. 24, and the cases cited in the notes to that section

"Judicial
proceed-
ing"

The section only raises a presumption in the case of documents taken in the course of a *judicial* proceeding. Therefore statements by way of a confession recorded by a Magistrate in his character of an Executive officer there being no law authorizing the taking of such statements, are not receivable under this section (1) *v. post*. As to statements made to the police, *v. ante*

Taken in
accordance
with law

The statements as to which this section says that certain presumptions are to be drawn are statements or confessions *taken in accordance with law*. This section does not render admissible any particular kind of evidence but only dispenses with the necessity for formal proof in the case of certain documents taken in accordance with law. If a document has not been taken in accordance with law, section 80 does not operate to render it admissible. The section merely gives legal sanction to the maxim "*Omnia presumuntur rite esse acta*," with regard to documents taken in the course of a judicial proceeding (2). So in the case last cited it was contended that when the confessions there in question were taken by the Deputy Magistrate, he was acting not under the Criminal Procedure Code but under the provisions of the Magilla Act (XX of 1859), it was, however, held that there was nothing in that Act authorizing the examination of a suspected person or the taking from him of any statement or confession and that though such a course might not be improper but even advisable, this section did not, therefore, apply. The Deputy Magistrate might have been acting in an Executive capacity under the orders of the District Magistrate, but the statement if recorded by him as an Executive officer were not receivable under this section (3). See also *ante*, Note to s. 24 and *post*. As to the manner in which evidence should be taken and recorded in Civil and Criminal Proceedings, see Civil Procedure Code, O. XVIII (4), Criminal Procedure Code sections 353—365. As to confessions, see sections 24—30 *ante* and the Criminal Procedure Code, sections 164, 364, 533.

Presump-
tions

With respect to these presumptions, *firstly*, if the provisions of the first clause of the section are fulfilled the Court must in all cases presume *that the document is genuine* viz. that it is, as it purports to be, a record of evidence given or of a confession made, and that the signature appended is that of the Judge Magistrate or other officer by whom it purports to be signed. This presumption is, however independent of the others. Thus, it may well be that the document is genuine in the sense above mentioned, and yet it may not have been duly taken under the general provision of the law regulating the recording of depositions and confessions. If there be no obligation to do an act, and it is not stated upon the document that such act has been done there may be a presumption of genuineness and due taking but there will be none as to that act having been done. Thus, before the deposition of a medical witness taken by a committing Magistrate, can under section 509 of the Code of Criminal Procedure be given in evidence at the trial before the Court of Session, it must either appear from the Magistrate's record, or be proved by the

so appear, or if it be
4, ill (c) of this Act
that the deposition was so taken and attested (5). There is no provision in the Code which makes the attestation of the deposition by the Magistrate in the presence of the accused obligatory. Unless it is made obligatory the concluding

(1) *R v Vram* 9 M., 224, 227, 228 (1886)

(2) *Id.*

(3) *Id.*

(4) Woodroffe & Amir Ali, pp 842—

849

(5) *Kachali Hari v R*, 18 C. 127 (1890) *R v Riding* 9 A. 720 (1887), *R v Foh Singh* 10 A. 174 177 178 (1887)

words of this section as to its having been "duly taken" cannot apply. The document may be genuine and yet not attested in the presence of the accused, and if there be no obligation to so attest the deposition, the statement might have been duly taken though not so attested (1). Though this section will not be of assistance in a case under section 509 of the Criminal Procedure Code where there are no "statements as to the circumstances under which the deposition was taken purporting to be made by the person signing it," yet if a Magistrate records a statement at the foot of the deposition to the effect that the deposition was taken in the presence of the accused and was attested by him, the Magistrate in the presence of the accused and signs such statement, the Court would be bound to presume that such statement was true and to admit the deposition under section 509 of the Criminal Procedure Code (2). If there be no such statement, it must be proved in such a case *aliunde* that the requirements of the Code have been fulfilled.

Secondly—The Court must presume that any statements as to the circumstances under which the document was taken purporting to be made by the person signing it are true. The memorandum endorsed upon or appended to the record of evidence on confession is to be taken as evidence of the facts stated in the memorandum itself (3). Thus if the evidence has been recorded in a different language from that in which the witness spoke the Court will presume that the records contain the equivalent of the words spoken by him if from the memorandum attached to the deposition it appears to have been read over to the witness in his own language and to have been acknowledged by him to be correct (4). There may be a presumption that the statements as to the circumstances under which the document was taken are true and none as to the document having been duly taken, for the circumstances, if assumed to be true, may not disclose a due taking (5). Such statements if made are to be taken as true whether or not there is any obligation either to do the acts recorded or to make a record of them (6).

Thirdly—The document must be presumed to have been *duly taken*. In certain cases the document will not be presumed to have been 'duly taken' unless it purports to give all the facts as to which such presumption is to be raised (7). In the case last cited it was said that the law allows certain presumptions as to certain documents and on the strength of these presumptions dispenses with the necessity of proving by direct evidence what it would otherwise be necessary to prove. One of these presumptions relates to confessions. This section says that such confession is to be presumed to be duly taken. But as a necessary basis for this presumption the document must purport to show all the facts of which it would otherwise be necessary for the Court to be satisfied by direct evidence before the confession could be used against the accused. Those facts are, *firstly*, that the confession was accurately taken down or repeated, *secondly*, that the confession was taken in the immediate presence of a

(1) *R v Polp Singh* supra 187

(2) *Kachali Hari v R* supra 133

(3) *R v Gonoari* 22 W R 2 (1874)

R v Nussuruddin 21 W R Cr 5 (1873) *Kachali Hari v R* 18 C 129 (1880)

(4) *R v Gonoari* 22 W R 2 (1874)

R v Mungal Dass 23 W R 28 (1875). In the former case the deposition of the prisoner had been taken in English. The only evidence offered for the purpose of satisfying the Court that this deposition represented a true translation of the words which the accused person actually spoke in Hindustani was an endorsement

or memorandum to be found at the foot of the deposition signed by the Magistrate in these words: "The above was read to the witness in Hindustani which he understood and by him acknowledged to be correct." It was held that the memorandum was evidence of the facts stated in the memorandum itself which facts themselves afforded some evidence that the translation was correct.

(5) *R v Nussuruddin* 21 W R Cr. 5 (1874)

(6) *Kachali Hari v R* 18 C 129 (1880)

(7) *R v Shivya* 1 B 219 222 (1876)

Magistrate; *thirdly*, that no inducement had been held out to the accused. If these three facts, *viz.*, the accuracy of the record, the presence of a Magistrate, and the voluntary nature of the confession, would otherwise have to be proved by direct evidence, they must all be stated on the face of the document before the Court can draw a presumption of their having occurred, and these are the very three facts which are stated in the memorandum and certificate mentioned in section 164 and 364 of the Criminal Procedure Code. If, therefore, such a memorandum and certificate in the terms required by the Code be not attached to the confession, no presumption will be raised, and it will not be admissible in evidence (1)

In other cases, however, the presumption of due taking may be raised independently of the question whether facts are expressly stated on the record which may form the basis of the presumption (2)

The distinction between these cases is that no presumption that a document is duly taken can arise when, on the face of the document, it appears that it has not been duly taken (3). Therefore (a) if the law expressly requires a statement of the circumstances under which a document was taken to be recorded and appended to that document (4), there will be, in the absence of such statement or of a perfect statement, no presumption of due taking (5). In such a case it appears on the face of the document that it has not been duly taken and that an express statutory provision has not been carried out. (b) Where the law casts no obligation upon the Magistrate or Judge to record the circumstances under which a statement was made and taken, it will be presumed that the statement was "duly taken," that is, that all the conditions required by law have been fulfilled, notwithstanding that the document does not purport to give the facts as to which such presumption is to be raised: for when the law creates an obligation to take a statement in a particular manner it will be presumed upon the maxim *omnia rite acta* that it has been duly taken.

y taken"
for, if the

(1) *Id.*, 222

(2) Cf. *Budree Lall v. Bhoossee Khan* 25 W. R. 134 (1876), *R v. Samiappa* 15 M. 63 (1891), *R v. Pohp Singh* 10 A. 174 (1887), *R v. Viram* 9 M. 224 (1886). The case however of *R v. Nus suruddin* 21 W. R. Cr. 5 (1874), does not appear to be in conformity with the text or the words of the section but the grounds of the decision in this case are not at all clear. A statement of a witness in the shape of a former deposition can only be used as evidence against an accused person if it was duly taken in his presence before the Committing Magistrate (Cr. Pr. Code s. 288). In this case a document purporting to be the deposition of a witness made before a Magistrate appeared on the record, but there was no evidence to prove that the document exhibited evidence of this witness duly taken by the Committing Magistrate in the presence of any of the persons who were tried in the Sessions Court and against whom it was used. The Court observed that a certificate was no doubt, appended to it initialed by some person and on the supposition that this person was a Magistrate that

certificate would under this section afford *prima facie* evidence of the circumstances mentioned in it relative to the taking of the statement. But this certificate was merely in these words—'Read to deponent and admitted correct and did not give any of the facts necessary to render a deposition admissible under s. 288 of the Criminal Procedure Code. It was held therefore that the presumption of due taking could not be raised under this section. But s. 353 of the Code requires all evidence (except when otherwise provided) to be taken in the presence of the accused. And though there was no evidence in the case to show that the deposition had been so taken this section should it would seem, have dispensed with the necessity of such proof. The statement in the Magistrate's certificate was a complete statement required by law for the purpose of affecting the witness himself and had nothing to do with any possible future use of the deposition against the prisoner.

(3) See *R v. Viram*, *supra* 240

(4) As in cases under ss. 164, 364 of the Criminal Procedure Code

(5) *R v. Shirya* 1 B., 222 (1876)

act be not obligatory, it may well be that the statement may have been duly taken and yet that that particular act has not been done (1)

One of the presumptions arising under this section is that the witness did actually say what is recorded. The section provides *inter alia* that the Court shall presume that the evidence was duly taken, and it cannot be considered to have been duly taken if it does not contain what the witness actually stated (2)

The presumptions raised by this section are applicable in the case of confessions recorded by Magistrates of Native States (3). All the presumptions are rebuttable (4), thus a person who questions the accuracy of the record will be at liberty to give evidence to show that the statements made and language used have not been accurately recorded. Witnesses confronted by their former depositions often swear that they were never explained to them before signature or that what they said has not been correctly taken down (5). Where a witness

It is conceived, however, that in such cases the presumption may still be operative

that the deposition was in fact duly taken (7)

Identity
of party
making
statement
s
1

and his evidence was recorded by the Magistrate. Subsequently, the pardon was revoked, and he was put in and the other accused. A Magistrate was put in and given that he was the Magistrate. It was held that the deposition was inadmissible without proof being given as to the identity of the accused with the person who was examined as a witness before the Magistrate (9)

81. The Court shall presume the genuineness of every document purporting to be the London Gazette or the Gazette of India, or the Government Gazette of any local Government, or of any colony, dependency or possession of the British Crown, or to be a newspaper or journal, or to be a copy of a private Act of Parliament printed by the Queen's Printer, and of every

Presumption
as to
Gazettes,
newspapers,
private Acts
of Parliament
and other documents

(1) *R v Pohn Singh*, 10 A 174 177
178 (1887) v ante

(2) *R v Samiappa* 15 M 63 65
(1891) The case of *R v Fatik Buxar*
1 B L R A Cr 13 (1868) is now of
no authority the decision having been
given before this Act and based upon the
ground of the non existence of any general
provision of the law such as is enacted by
the present section

(3) *R v Sunder Singh* 12 A 595
(1890)

(4) See s 4 definition of shall pre
sume

(5) *Norton Ex* 262

(6) *R v Nussuruddin* 21 W R Cr
5 (1873) The ground of this ruling and
the exact nature of the denial made by
the witness do not appear in the report
possibly there may have been a question
as to the identity of the deponent in which
case of course no presumption would
arise until that was proved v post

(7) See s 3 ante definition of "dis-
proved"

(8) See Cr I r Code s 339

(9) *R v Durga Soiar* 11 C., 580
(1885)

document purporting to be a document directed by any law to be kept by any person, if such document is kept substantially in the form required by law and is produced from proper custody.

Principle—*Omnia præsumuntur rite esse acta*—the documents mentioned are official documents or in the nature of such. See Introduction ante

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|---|--|
| a. 3 ("Court") | a. 57, CL. (2) (Judicial notice of Acts) |
| a. 4 ("Shall presume") | a. 35 (Entries in public records) |
| a. 3 ("Document") | a. 90 (Definition of "proper custody") |
| a. 37 (Relevancy of statements in Gazettes) | |

COMMENTARY

Gazettes, news papers, private Acts and documents directed by law to be kept

The presumption effects a *prima facie* inference of genuineness which may be rebutted (1) In the case cited it has been held that where there is proof that a certain person is the publisher of a certain newspaper, this section raises a presumption that a newspaper bearing that particular name is the newspaper in question and that every copy of it was issued by him (2) See as to the relevancy of statements made in notifications appearing in the Gazette, section 37, ante, and as to notifications in the Gazettes of the appointment of public officers section 57, seventh clause, ante (3) All public Acts are the subject of judicial notice, as are also all local and personal Acts directed by Parliament to be judicially noticed (4) The last part of the section refers to and includes the documents mentioned in section 35, ante, and most of which are declared to be public documents by section 74 As to the meaning of "proper custody" reference should be made to the *Explanation* to section 90, post, which is declared by that section to apply also to this According to that *Explanation*, documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be, but no custody is improper, if it is proved to have had a legitimate origin, or if the circumstances of the case are such as to render such an origin probable

Presumption as to document admissible in England without proof of seal or signature

82 When any document is produced before any Court, purporting to be a document which, by the law in force for the time being in England or Ireland, would be admissible in proof of any particular in any Court of Justice in England or Ireland, without proof of the seal or stamp or signature authenticating it, or of the judicial or official character claimed by the person by whom it purports to be signed, the Court shall presume that such seal, stamp or signature is genuine, and that the person signing it held, at the time when he signed it, the judicial or official character which he claims,

and the document shall be admissible for the same purpose for which it would be admissible in England or Ireland (5)

(1) S. 4 ante, "shall presume"
 (2) *Jeremiah v. Vas* 36 M. 457 (1912)
 But Benson C. J. doubted whether this section is not confined to public documents
 (3) See p. 472 ante, as to proclamations orders and regulations contained in the *London Gazette* see s. 78, cl. 3, and as

to the King's Print 45 Vic. c. 9 II 2
 4
 (4) S. 57 cl. 2 and see ante notes on that clause
 (5) See 14 & 15 Vic. Cap. 99 ss. 9-11, and post, notes to this section

Principle.—See Introduction, ante, and notes, post

κ. 3 ('Document') s 3 ("Court") s 4 ('Shall presume')

8 & 9 Vic Cap 113 s 1, 14 & 15 Vic Cap 99 ss 9—11 14, Steph Dir, Arts 79 80, Wills Fv 2nd Ed 407—412 Taylor, Ev, 10th Ed, pp 1147—1158, Phipson, Ev, 5th Ed 507 Poscoe N P Ev 96—100

COMMENTARY.

This section which reproduces the provisions of the 9th and 10th sections of 14 & 15 Vic Cap 99 a Statute making certain documents admissible throughout the Queen's Dominions(1) lays down a rule both of presumption and admissibility with regard to the documents therein mentioned. The Court must presume (a) that the seal or stamp or signature is genuine and (b) that the person signing the document held at the time when he signed it the judicial or official character which he claims. But over and beyond such presumptions which are the proper subject matter of this portion of the Act the section further enacts that the document shall be admissible in India for the same purpose for which it would be admissible in England or Ireland. As the documents which are the subject matter of the section are documents admissible in England without proof of seal(2) stamp or signature it is necessary shortly to consider the provisions of the abovementioned Statute and the English law anterior thereto in respect of the proof of documents of a public character.

Documents admissible in England or Ireland without proof of seal stamp signature or official character.

At Common Law when a document was of such character that its preservation and settled custody was of concern to the public at large or to a considerable section of the public, the production of the original was generally either excused or disapproved of by the Court and the document was admitted to proof by means of a copy. The ordinary mode of proof of such document was by means of an examined copy that is a copy taken on behalf of the party generally by some clerk or other private person who produced it in the witness box and proved that he had examined it with the original and that it was correct. It was however a matter of doubt what evidence if any it was necessary in such case to give of the original but it seems that whereas judicial notice would be taken of the existence authenticity and custody of those of wide public importance such as the journals of the Houses of Parliament some evidence would be necessary on these points with regard to documents of less notoriety such as the Roll of a Manor Court. In cases of the latter description

Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody and no Statute exists which renders its contents provable by means of a copy any copy thereof or extract therefrom shall be admissible in evidence in any Court of Justice or before any person now or hereafter having by law or by consent of parties authority to hear receive and examine evidence provided it purports to be whose custody the original is and is a true and correct copy or extract on payment of a reasonable sum for the same not exceeding four pence for every folio of ninety words.

It will be observed that this section does not define what is intended by the words 'of such a public nature as to be admissible in evidence on its mere

(1) Steph Dir Art 80
(2) As to the seals of which English Courts take judicial notice see ante s 37, cl 6 and notes on that clause

in Taylor, Ev, pp 1056, 1057, *ib*, 10th Ed, pp 1150—1151, certain documents relating to Companies (8 & 9 Vic, Cap 16, § 60, 25 & 26 Vic, Cap 89, §§ 61, 174 rr 4, 5, 8; 40 & 41 Vic, Cap 26 § 6), Copyright Registers (5 & 6 Vic, Cap 45, § 11, 7 & 8 Vic Cap 17 § 8, 25 & 26 Vic, Cap 68, §§ 4, 5), Orders in Lunacy (53 Vic, Cap 5 §§ 144, 152, Lunacy Orders, 1883 Order CIX), Newspapers Proprietors' Register (44 & 45 Vic, Cap 60, § 15), Patent Office Registers (46 & 47 Vic, Cap 57, §§ 89, 100), Registers and other Documents under the Merchant Shipping Act, 1891 (57 & 58 Vic, Cap 60, *see* Taylor, Ev, 10th Ed, pp 1157—1159). Official books and registers may be proved either by production of the originals or copies. In practice they are now always proved by means of examiners or certified copies unless the circumstances render it necessary that the Court should examine the original entry (1). Other documents are provable by examined or certified copies under the general provisions of 14 & 15 Vic Cap 99 section 14 (*ante*) (2) or by certified copies under the provisions of particular Statutes.

In the case of a document tendered in evidence under this section the question for determination will be whether the fact to be proved thereby is a relevant fact, the England in proof of that fact then the document is admissible, the Court must raise it are declared by this section

sible in England must be determined by reference to the particular Statute governing the case, or if there be none to the general provisions of 14 & 15 Vic, Cap 99 section 14, abovementioned. If under either Statute proof by means of an authenticated document is admissible, then under 8 & 9 Vic Cap 113, no proof of the authentication is necessary, and the document is one which in England is the subject of the provisions of sections 9, 10, and 11 of 14 & 15 Vic, Cap 99 and in India the present section (3).

Thus the Chief Magistrate of the City of Glasgow being a person lawfully authorised to administer oaths, a declaration as to the execution of a power-of-attorney taken before him and authenticated by his certificate and the common seal of the City of Glasgow, and by a Notarial certificate, was held to be sufficient proof of the execution of the power (4). Both declarations in this case were made under section 16 of the Statutory Declarations Act, 1835 (5). It was held that since a declaration as to the execution of a power taken under this Act or the Probate and Letters of Administration Amendment Act, 1859 (6) at any place to which the Act extends before a person "lawfully authorised to administer oaths" would be admissible in England or Ireland as evidence of the execution of the power, it should for that purpose, if both conditions be fulfilled, be also admissible in this country under the provisions of the present section (7).

(1) Taylor Ev § 1595 and *see* notes to those paragraphs as to the principal instances in which it is necessary to produce the original document itself. *Quare* whether this is so in regard to such documents in India.

(2) *See* Taylor Ev § 1600.

(3) *Id*, § 1601.

(4) In the goods of *Henderson* deceased 22 C 491 (1895).

(5) 5 & 6 Will IV Cap 62.

(6) 21 & 22 Vic Cap 95.

(7) It is not clear why in this case it should have been considered necessary in

the matter of the seals appended to the certificates to have recourse to the provisions of s 57 cl (6) (judicial notice of seals) since if the document in question was one which was admissible in England without proof of seal or signature (and only in such case was the evidence offered within the scope of this section) the Court was bound to presume the genuineness of the seal and signature under the provisions of the present section wholly independent of the question whether the seal was one which came within the purview of s 67, cl (6).

In the following cases(1) decided on the Original Side of the High Court at Calcutta, similar evidence was held to be admissible. A power of attorney executed in England in the presence of the Mayor of Lyme Regis and the Mayor of Godalming, each of whom made a declaration under the Statutory Declarations Act, 1835, before a Commissioner to administer oaths in the Supreme Court, and a power of attorney executed in England in the presence of a clerk in his service, and the Mayor of the Borough of Guildford, who was also a Justice of the Peace, and who authenticated the declaration by his certificate and official seal, was accepted as proved (3). A power of attorney executed in Scotland in the presence of a writer to the signet and a law clerk and certified by a declaration of the writer to the signet, and which declaration was authenticated by a certificate of the Lord Provost of Edinburgh under the seal of the Corporation of the City of Edinburgh, was rejected as not having been executed before, and authenticated by, any of the persons mentioned in section 85 of this Act (4). The present section does not appear to have been considered. It is submitted however with reference to the

it being pointed out that in arriving at this decision, Norris, J, seems to have assumed contrary to the fact that the provision contained in section 85 is of an exhaustive character, and that no other mode of proving the execution of a power is admissible. So on an application for letters of administration with the will annexed made by the attorney of the executors therein named it appeared that the applicant's power of attorney was not executed in the presence of a Notary Public but with regard to the execution by each of the executors one of the attesting witnesses had made a declaration before a Notary Public to the effect that he witnessed the execution of the power of attorney by one of the executors and that the signature of the other attesting witness was the proper signature of the person bearing that name, and such declaration was signed, sealed and certified by a notary public, it was held that the power of attorney was sufficiently proved (5). In another case an application for Letters of Administration was made under a power of attorney executed in England in the presence of unofficial witnesses one of whom made a declaration as to the execution of the power before the "Lord Provost and Chief Magistrate of Aberdeen". The declaration was authenticated by the certificate of the Lord Provost under his signature and seal of office and the Lord Provost's certificate was authenticated by the certificate of a Notary Public under his hand and official seal. The declaration was accepted (6). An application for Letters of Administration was made under a power of attorney executed in England in the presence of unofficial witnesses one of whom under the Statutory Declarations Act 1835 made a declaration as to the execution of the power before a Notary Public who authenticated the declaration by a certificate under his signature and official seal. The declaration was accepted (7). An original will executed in England was sent to Calcutta with a power of attorney authorizing the person named therein to apply to this Court for Letters of Administration with a copy of the will annexed. The power was executed in England before

(1) The authors are indebted for the notes of these cases to Mr Belchambers the late Registrar of the High Court Original Side.

(2) In the goods of John Eliot deceased December 15th 1886 per Trevelyan J.

(3) In the goods of William Abbott deceased November 19th 1887 per

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(4) In the goods of *Primrose* deceased 16 C 776 July 13th 1889 per Norris J see s 85 post.

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In the case of a document tendered in evidence under this section the question for determination will be whether, assuming that the fact to be proved thereby is a relevant fact, the document is or is not one which is admissible in England in proof of that fact without proof of its authentication. If it is so then the document is admissible in India to prove that fact, and if so admissible, the Court must raise it. — are declared by this section

sible in England must be governing the case, or if there be none to the general provisions of 14 & 15 Vic Cap 99 section 14, abovementioned. If under either Statute proof by means of an authenticated document is admissible, then under 8 & 9 Vic Cap 113 no proof of the authentication is necessary, and the document is one which in England is the subject of the provisions of sections 9, 10 and 11 of 14 & 15 Vic, Cap 99, and in India the present section (3).

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before a Notary Public to the effect that he witnessed the execution of the power of attorney by one of the executors, and that the signature of the other attesting witness was the proper signature of the person bearing that name, and such declaration was signed sealed and certified by a notary public, it was held that the power of attorney was sufficiently proved (5) of Administration was made under in the presence of unofficial witnesses

execution of the power before the "Lord Provost and Chief Magistrate of Aberdeen". The declaration was authenticated by the certificate of the Lord Provost under his signature and seal of office and the Lord Provost's certificate was authenticated by the certificate of a Notary Public under his hand and official seal. The declaration was accepted (6) An application for Letters of Administration was made under a power of attorney executed in England in the presence of unofficial witnesses one of whom under the Statutory Declarations Act 1835 made a declaration as to the execution of the power before a Notary Public who authenticated the declaration by a certificate under his signature and official seal. The declaration was accepted (7) An original will executed in England was sent to Calcutta with a power of attorney authorizing the person named therein to apply to this Court for Letters of Administration with a copy of the will annexed. The power was executed in England before

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(6) In the goods of *Henderson* deceased April 6th 1892 *per Hill J.*

(7) In the goods of *Henry Packer* deceased June 20th 1892 *per Hill J.*

two solicitors. One of the attesting witnesses, who was also an attesting witness to the will, made a declaration as to the execution of the power under the Statutory Declarations Act, 1835, before a Notary Public who authenticated the declaration by a certificate under his signature and official seal. The only evidence of the execution of the will was a declaration made under the Statutory Declarations Act, 1835, before a Commissioner to administer oaths in the Supreme Court of Judicature in England. The will and the power were both (as they would have been in England or Ireland) deemed to have been sufficiently proved (1) An application for Letters of Administration with a copy of the will annexed was made under a power of attorney executed in England before two persons described as solicitor's clerks. One of these persons made a declaration as to the execution of the power under the Act above mentioned before the Lord Mayor of London. The declaration authenticated by a certificate of the Lord Mayor under his signature and seal of office was accepted (2) An application for Letters of Administration with a copy of the will annexed was made under a power of attorney executed in England before a solicitor who made a declaration as to the execution of the power under the Statutory Declarations Act, 1835, before the Lord Mayor of London. This declaration authenticated by a certificate of the Lord Mayor under his signature and seal of office was accepted (3) An application for Letters of Administration with the will annexed was made under a power of attorney executed in England. In order to furnish proof of the execution of the power one of the attesting witnesses made a declaration under the above mentioned Acts of the facts before a notary public who authenticated the declaration by a certificate under his signature and the official seal. It was held that as a certificate of a Notary Public in the Queen's Dominions authenticating a declaration made before him as to the execution of the power would be admissible in England or Ireland in proof of the execution of the power such a declaration was also admissible for the same purpose under the present section (4) In the case cited it has been held that a Register of Births and Deaths kept under Madras Act III of 1899 is a public document and a certified copy of an entry in it is admissible under this section and section 35(5)

It is to be noted that the provisions of this section are, as are also those of section 85, *post*, cumulative (*v. ante*). Thus in addition to the mode of proof here admitted other methods are, in particular cases, provided for by section 78 *ante*.

83. The Court shall presume that maps or plans purporting to be made by the authority of Government were so made, and are accurate, but maps or plans made for the purposes of any cause must be proved to be accurate.

Principle.—The presumption in this, as in other sections, is based on the maxim *omnia rite esse acta*, for it will be presumed that Government in the preparation of maps and plans for public purposes will appoint competent officers to execute the work entrusted to them, and that such officers will do their duty. Survey maps are official documents prepared by competent persons and with such publicity and notice to persons interested as to be admissible and valuable evidence as to the state of things at the time that they were prepared. They are not, however, conclusive and may be shown to be wrong.

(1) In the goods of *H W Agar*, deceased Aug 31st 1892 *per Hill J*

(2) In the goods of *William Cornell* deceased Sept 16th 1892 *per Pigot J*

(3) In the goods of *Henry Francis* deceased May 2nd 1893 *per Sale J*

(4) In the goods of *Anna Hinde de* ceased January 11th 1895 *per Amcotts J*

(5) *Krishnamachariar v Krishnamachariar* 38 M 166 (1915)

Presumption as to maps or plans made by authority of Government

but in the absence of evidence to the contrary, they are judicially receivable as correct when made (1) But maps and plans made for the purposes of any cause are not the subject of such a presumption being made *post litem motam*

See Note, *post*.

a. 3 ('Court')

plans made under the authority of Government.)

a. 4 ('Shall presume')

a. 36 (Relevancy of statements in maps or

Field, Ev., 6th Ed., 166—171, 252, Norton, Ev., 200 201

COMMENTARY.

The map must purport to have been made by the authority of Government, that is, by the Government, as such for public purposes. This section does not deal with the admissibility of a private map which will depend on whether it is otherwise relevant (2). Therefore a map prepared by an officer of Government, while in charge of a *Khas mehal* Government being at the time in possession of the *mehal* merely as a *private proprietor*, is not a map purporting to have been made under the authority of Government within the meaning of this section, the accuracy of which is to be presumed, but such a map may be evidence under the 13th section of this Act (3). The maps and plans mentioned in the section are maps and plans made by the Government for public purposes, as for instance a Government survey map (4), and a map or plan made by the Government for private purposes or where the Government is acting otherwise than in a public capacity, is not the subject of this section (5). In the case which is undermentioned a map was tendered in evidence purporting to be a map of the silted bed of the river Sankho. It was held that, as the map upon the face of it was neither a *thal* map nor a survey-map, such as is made by or under the authority of Government for public purposes, and as it appeared to have been made by Government for a particular purpose which was not a public purpose namely the settlement of the silted bed of a certain river, the provisions of section 36 and of the present section were not applicable to this map (6). But though in the case of a map not coming within this section no presumption of accuracy can be made the mode in which the case has been dealt with and the absence of objection may lead to the inference that any objection to want of proof of its accuracy has been waived (7).

The word "accurate" in this section means accuracy of the drawing and correctness of the measurement. It may be assumed that the map was correctly drawn according to the scale on which it is said to have been prepared but that is all (8). Thus the accuracy of a *thalbust Ameen's* map, which may be

(1) *Maung Thin v Ma Zi Zan* 44 I C 247

(2) *Sib Charan Dey v Nulkantha Mahto* 17 C L J 642 (1913)

(3) *Junnajoy Mullick v Duarka Nath* 5 C 287 (1879) s c 4 C L R 574
Ravi Chander v Bunseedhur Naik 9 C 741 743 (1883)
Kanto Prasad v Jagat Chandra 23 C 335 338 (1895)
D no moni Choudhrani v Brojo Mohini 29 C 191 199 (1901) in which the map was held to be sufficiently proved but see *Tarucknath Mookerjee v Mahendronath Ghose* 13 W R 56 (1870)

(4) *Jogessur Singh v Bysunt Nath* 5 C 822 (1880)
Omrita Lall v Kalce Pershad 25 W R 179 (1876)
Niamut oollai Akhadai v Hinmu Ali 22 W R.

519 520 (1874) survey maps and survey proceedings being public documents are provable by certified copies (see ss 74—77) sometimes however these copies and occasionally the maps made by public officers are prepared with little skill. See observations in *Field Ev* 4th Ed p 221 note and in *Protab Chunder v Ranee Surnomoyee* 19 W R 361—364 (1873)

(5) *Ram Chunder v Bunseedhur Naik*, 9 C 743 supra.

(6) *Kanto Prasad v Jagat Chandra* 23 C 335 338 (1895)

(7) *Madhab Sundari v Gaganendra Nath* 9 C W N 111 113 (1904)

(8) *Omrita Lall v Kalce Pershad* 25 W R 179 (1876)

two solicitors. One of the attesting witnesses, who was also an attesting witness to the will, made a declaration as to the execution of the power under the Statutory Declarations Act, 1835, before a Notary Public who authenticated the declaration by a certificate under his signature and official seal. The only evidence of the execution of the will was a declaration made under the Statutory Declarations Act, 1835, before a Commissioner to administer oaths in the Supreme Court of Judicature in England. The will and the power were both (as they would have been in England or Ireland) deemed to have been sufficiently proved (1) An application for Letters of Administration with a copy of the will annexed was made under a power of attorney executed in England before two persons described as solicitors' clerks. One of these persons made a declaration as to the execution of the power under the Act above mentioned before the Lord Mayor of London. The declaration authenticated by a certificate of the Lord Mayor under his signature and seal of office was accepted (2) An application for Letters of Administration with a copy of the will annexed was made under a power of attorney executed in England before a solicitor who made a declaration as to the execution of the power under the Statutory Declarations Act 1835, before the Lord Mayor of London. This declaration authenticated by a certificate of the Lord Mayor under his signature and seal of office was accepted (3) An application for Letters of Administration with the will annexed was made under a power of attorney executed in England. In order to furnish proof of the execution of the power one of the attesting witnesses made a declaration under the above mentioned Acts of the facts before a notary public who authenticated the declaration by a certificate under his signature and the official seal. It was held that as a certificate of a Notary Public in the Queen's Dominions authenticating a declaration made before him as to the execution of the power would be admissible in England or Ireland in proof of the execution of the power such a declaration was also admissible for the same purpose under the present section (4) In the case cited it has been held that a Register of Births and Deaths kept under Madras Act III of 1899 is a public document and a certified copy of an entry in it is admissible under this section and section 35(5).

It is to be noted that the provisions of this section are, as are also those of section 85 *post*, cumulative (*v ante*). Thus in addition to the mode of proof here admitted other methods are, in particular cases, provided for by section 78 *ante*.

83. The Court shall presume that maps or plans purporting to be made by the authority of Government were so made, and are accurate, but maps or plans made for the purposes of any cause must be proved to be accurate.

Principle.—The presumption is *maxim omnia rite esse acta*, for it is based on the preparation of maps and plans for officers to execute the work entrusted to them, and that such officers will do their duty. Survey maps are official documents prepared by competent persons and with such publicity and notice to persons interested as to be admissible and valuable evidence as to the state of things at the time that they were prepared. They are not, however, conclusive and may be shown to be wrong.

(1) In the goods of *H W Agar*, deceased Aug 31st 1892 *per* Hill J

(2) In the goods of *William Cornell* deceased Sept 16th 1892 *per* Pigot J

(3) In the goods of *Henry Francis* deceased May 2nd 1893 *per* Sale J

(4) In the goods of *Anna Hinde de- ceased* January 11th 1895 *per* Ameer Ali J

(5) *Krishnamacharar v Krishnamacharar* 38 M 166 (1915)

Presumption as to maps or plans made by authority of Government

which corresponds with the 12th section of the preceding Act, lays down a rule of presumption in relation to such books which is however rebuttable and dispenses with proof of the genuineness of the books of any country containing laws and rulings. Section 57, first and second clauses *ante* requires Courts to take judicial notice of the existence of all laws and Statutes in British India and in the United Kingdom. Section 74 *ante* declares statutory records to be public documents, and section 78 *ante*, enacts a method of proof in the case of Acts and Statutes.

85. The Court shall presume that every document purporting to be a power-of-attorney, and to have been executed before, and authenticated by, a Notary Public, or any Court, Judge, Magistrate, British Consul or Vice-Consul, or representative of Her Majesty, or of the Government of India, was so executed and authenticated (1)

Presumption as to powers of attorney

Principle—See Introduction *ante*. The fact of execution before and authentication by persons of the position and office of those in the section mentioned affords a guarantee and *prima facie* proof of such execution and authentication respectively.

§ 3 (Court) § 4 (Shall presume) § 57 CLS (6) (7) (Judicial notice)

Act VII of 1882 (Powers of attorney) Act XXI of 1908 as amended by Act IV of 1914 and Acts V and XV of 1917 ss 32 33 (Registration) 22 & 53 Vic Cap 10 s 6

COMMENTARY

A power of attorney is a writing given and made by one person authorizing another who in such case is called the attorney of the person (or donee of the power) appointing him to do any lawful act in the stead of that person as to receive rents debts to an officer of registration (3) to do all acts or to do some give the attorney the full power and authority of the maker to accomplish the acts intended to be performed and its scope may be interpreted by implication of the nature of the business with which the attorney is entrusted (5). Provision is made for these in the Act of 1908 which among other things of attorney has been duly

Powers of attorney

(1) See s 69 of the earlier Act which contained a restriction which is not in the present section *etc.* that the power should have been executed at a place distant more than 100 miles from the place of production in order that its execution and authenticity could be presumed.

(2) See O III r 2 p 631 Woodroffe & Ameer Ali Civ Pr Code 2nd Ed.

(3) See as to powers-of-attorney executed in favour of persons authorized hereby to present documents for registration Act XI of 1908 ss 32 33. By the terms of the latter section any power of attorney mentioned therein may be proved by the production of it without further proof when it purports on the face of it to have been executed before and

authenticated by the person or Court therein before mentioned. Except for registration purposes there is no presumption as to the genuineness or otherwise of a registered power-of-attorney. Field Ex 6th Ed 252 and mere registration is not itself sufficient evidence of its execution. *Sal matis Fatma v Koylashpai* 17 C 903 (1890) dissenting from the report in *Krsto Nath v Brown* 14 C 176 180 (1886).

(4) Wharton Law Lexicon *sub voce*. See also Belchambers *Practice of the Civil Courts* p 405.

(5) *Bank of Bengal v Ranathan Chetty* P C 43 C 57 (1915) cf *Bryant Pous and Bryan v Banque de Peuple* A C 170 (1893).

assumed under this section, does not refer to the laying down of boundaries

pages shown in the map, as the *Ameen* who made it had no authority to determine what lands were *debutter* but only to lay down, and to map, boundaries (?) The presumption in regard to the accuracy of a map is in no way affected by the fact that such map has been superseded the same authority, and by an order of the prove the presumption to show that the because it is quite consistent with that order that the actual bearing of the land in suit should be correct (3) Where a Civil *Ameen* makes a local inquiry as to the situation of certain disputed lands with reference to the Collectorate map put in by the plaintiffs and not objected to by the defendants who are present and recognise the boundary as that whereon the inquiry is to be based the map must be taken to be one which the parties recognise as correct and trustworthy irrespective of the question whether it was prepared with the authority of Government (4)

Maps or plans made for the purposes of any cause must be proved to be accurate They must be proved by the persons who made them There are *post litem motam* and lack the necessary trustworthiness Where maps are made for the purposes of a suit there is, even apart from fraud which may only be counter rights of property totally different purpose and a purpose totally irrelevant to the subject of the dispute between them (6)

Presumption as to collections of laws and reports of decisions

84 The Court shall presume the genuineness of every book purporting to be printed or published under the authority of the Government of any country, and to contain any of the laws of that country,

and of every book purporting to contain reports of decisions of the Courts of such country

Principle—See Introduction, *ante*, and notes to section 38, *ante*

s. 3 ('Court')

s. 4 ('Shall presume')

s. 38 (Relevancy of statements as to any law contained in law books)

COMMENTARY.

Law-books and reports

When the Court has to form an opinion as to a law of any country, any statement of such law contained in a book purporting to be printed or published under the authority of the Government of such country and to contain any such law, and any report of a ruling of the Courts of such country contained in a book purporting to be a report of such rulings, is relevant (7) This section

(1) *Id*

(2) *Jaroo Kismari v Laloonmoni* 18 C 22 (1890) s. c. 17 I A 145

(3) *Jaggessur Singh v Hycunt Nath* 5 C 822 (1880) s. c. 6 C L R 519

(4) *Cunga Narain v Radhika Mohun* 21 W R 115 (1873)

(5) *Norton v* 200 201

(6) *John Kerr v Nurzi Mahomed* 2 W R (P C) 29 (1864)

(7) S. 28 *ante* see *ante* notes to that section and Act XVIII of 1873 (Indian Law Reports)

which corresponds with the 12th section of the preceding Act, lays down a rule of presumption in relation to such books which is, however, rebuttable, and dispenses with proof of the genuineness of the books of any country containing laws and rulings. Section 57, first and second clauses *ante*, requires Courts to take judicial notice of the existence of all laws and Statutes in British India and in the United Kingdom. Section 74, *ante*, declares statutory records to be public documents, and section 78, *ante*, enacts a method of proof in the case of Acts and Statutes.

85. The Court shall presume that every document purporting to be a power of attorney, and to have been executed before, and authenticated by, a Notary Public, or any Court, Judge, Magistrate, British Consul or Vice-Consul, or representative of Her Majesty, or of the Government of India, was so executed and authenticated (1)

Presumption as to powers-of-attorney

Principle.—See Introduction *ante*. The fact of execution before and authentication by persons of the position and office of those in the section mentioned affords a guarantee and *prima facie* proof of such execution and authentication respectively.

s 3 (Court) s 4 (Shall presume) s 57 CLS (6) (7) (Judicial notice)

Act VII of 1882 (Powers of attorney) Act XVI of 1908 as amended by Act IV of 1914 and Acts V and XV of 1917 ss 32 33 (Registration) 52 & 53 Vic Cap 10 s 6

COMMENTARY

A power of attorney is a writing given and made by one person authorizing another, who in such case is called the attorney of the person (or donee of the power) appointing him to do any lawful act in the stead of that person as to receive rents, debts, to make appearance and application in Court(2) before an officer of registration(3) and the like (4). It may be either general or special to do all acts or to do some particular act. The nature of this instrument is to give the attorney the full power and authority of the maker to accomplish the acts intended to be performed and its scope may be interpreted by implication of the nature of the business with which the attorney is entrusted (5). Provision is made for these instruments in the Act of 1908, which, among other things, of attorney has been duly

Powers-of-attorney

(1) See s 69 of the earlier Act which contained a restriction which is not in the present section *viz* that the power should have been executed at a place distant more than 100 miles from the place of production in order that its execution and authenticity could be presumed.

(2) See O III r 2 p 631 Woodroffe & Ameer Ali Civ Pr Code 2nd Ed.

(3) See as to powers-of-attorney executed in favour of persons authorized hereby to present documents for registration Act XVI of 1908 ss 32 33. By the terms of the latter section any power of attorney mentioned therein may be proved by the production of it without further proof when it purports on the face of it to have been executed before and

authenticated by the person or Court therein before mentioned. Except for registration purposes there is no presumption as to the genuineness or otherwise of a registered power-of attorney. Field Ls 6th Ed 252 and mere registration is not itself sufficient evidence of its execution. *Sal mat il Fatima v Koylashpati* 17 C 903 (1890) dissenting from the report in *Kristo Nath v Brown* 14 C 176 180 (1886).

(4) Wharton Law Lexicon *sub voce*. See also *Belchambers Practice of the Civil Courts* p 405.

(5) *Bank of Bengal v Ramanathan Chetty* P C 43 C 577 (1915) cf *Bryant Powis and Bryan v Banque du Peuple* A C 170 (1893).

assumed under this section, does not refer to the laying down of boundaries

in that of their agents (1) Nor can a *thalbusi* map be regarded as raising a presumption of correctness as to the amount of *debutter* land in one of the villages shown in the map as the *Ameen* who made it had no authority to determine what lands were *debutter* but only to lay down and to map, boundaries (2) The presumption in regard to the accuracy of a map is in no way affected by the fact that such map has been superseded by a later survey map made under the same authority, and by an order of the Board of Revenue It does not disprove the presumption to show that the general survey has been set aside because it is quite consistent with that order that the actual bearing of the land in suit should be correct (3) Where a Civil *Ameen* makes a local inquiry as to the situation of certain disputed lands with reference to the Collectorate map put in by the plaintiffs and not objected to by the defendants who are present and recognise the boundary as that whereon the inquiry is to be based the map must be taken to be one which the parties recognise as correct and trustworthy irrespective of the question whether it was prepared with the authority of Government (4)

Maps or plans made for the purposes of any cause must be proved to be accurate They must be proved by the persons who made them They are *post litem motam* and lack the necessary trustworthiness Where maps are made for the purposes of a suit there is even apart from fraud which may exist, a tendency to colour, exaggerate, and favour which can only be counteracted by swearing the maker to the truth of his plan (5) The rights of property as between two parties cannot be affected by a map drawn for a totally different purpose and a purpose totally irrelevant to the subject of the dispute between them (6)

Presumption as to collections of laws and reports of decisions

84 The Court shall presume the genuineness of every book purporting to be printed or published under the authority of the Government of any country, and to contain any of the laws of that country,

and of every book purporting to contain reports of decisions of the Courts of such country

Principle—See Introduction *ante* and notes to section 38, *ante*

s 3 (Court)

s 4 (Shall presume.)

s 38 (Relevancy of statements as to any law contained in law-books)

COMMENTARY.

Law books and reports

When the Court has to form an opinion as to a law of any country, any statement of such law contained in a book purporting to be printed or published under the authority of the Government of such country and to contain any such law and any report of a ruling of the Courts of such country contained in a book purporting to be a report of such rulings is relevant (7) This section

(1) *Ib*

(2) *Jaroo Kumari v Lalomoni* 18 C 22 (1890) s c 17 I A 145

(3) *Joggesur Singh v Bycunt Nath* 5 C 822 (1880) s c 6 C L R 519

(4) *Gisga Narain v Radhika Mohan* 21 W R 115 (1873)

(5) *Norton v* 200 201

(6) *John Kerr v Nu'ur Mahomed* 2 W R (P C) 29 (1864)

(7) S 28 *ante* see *ante* notes to this section and Act XVIII of 1875 (India Law Reports)

the person named therein is unnecessary (1) A power of attorney executed in England before a Justice of the Peace and authenticated by his signature alone without his official seal was, in the undermentioned case, accepted (2) The presumption raised by the section is rebuttable (3)

86. The Court may presume that any document purporting to be a certified copy of any judicial record of any country not forming part of Her Majesty's dominions is genuine and accurate, if the document purports to be certified in any manner which is certified by any representative of Her Majesty or of the Government of India [in or for] (4) such country, to be the manner commonly in use in that country for the certification of copies of judicial records

Presumption as to certified copies of foreign judicial records

[An officer who, with respect to any territory or place not forming part of Her Majesty's dominions, is a Political Agent therefor, as defined in section 3, clause (40) of the General Clauses Act, 1897 (5), shall for the purposes of this section, be deemed to be a representative of the Government of India in and for the country comprising that territory or place] (6)

Principle.—See Introduction, *ante* In addition to the presumption of accuracy, which exists in the case of the certified copy itself, there is an additional guarantee afforded by the authenticating certificate

s 3 (' Court)

s 4 (May presume)

s 78, CL. (6) (Proof of foreign public document)

COMMENTARY

This section says that if a copy of a foreign judicial record purports to be certified in a given way, the Court But it has recently been pointed out the section does not exclude other brought in a certain foreign Court between *R* and *C*, one *B* was examined who deposed that in his presence the evidence of *C* was taken by the Judge and the suit was adjudicated and the order passed He also put in a document which

Foreign judicial record

(1) In the goods of *Myline*, 9 C W N 986 (1905)

(2) In the goods of *Bridson* Nov 19th 1889 *per* Wilson J In another case (In the goods of *Honfray* June 27th 1891 *per* Wilson J) a power of attorney executed in England in the presence of an official witnesses and accompanied by an original letter from the person who executed the power which letter was proved by the affidavit of the applicant was accepted But this was apparently under the provisions of s 82 *ante*

(3) See s 4 *ante* shall presume

(4) These words in s 86 were substituted for the original words by Act III of 1891 s 8

(5) The words in brackets were substituted by s 4 Act V of 1899 for the words of the Foreign Jurisdiction and Extradition Act 1879 and section 190 of

the Code of Criminal Procedure 1887

According to the General Clauses Act 1897 the term Political Agent includes

(a) the principal officer representing the Government in any territory, or place beyond the limits of British India and (b) any officer of the Government of India or of any Local Government appointed by the Government of India or the Local Government to exercise all or any of the powers of a Political Agent for any place not forming part of British India under the law for the time being in force relating to foreign jurisdiction and extradition As to the position of Political Agents see Sir William Harcourt's argument in *Damodar Gordian v Deora Kanji* 1 B 443 (1876)

(6) This para., other than the words added by s 4 Act V of 1899, was added to s 86 by Act III of 1891, s 8.

of Rangoon, a certified copy of such instrument shall, without further proof be sufficient evidence of the contents of the instrument and of the deposit hereof in the High Court. This section enacts a presumption of due execution and authentication in favour of powers of attorney executed before, and authenticated by, the persons therein mentioned. The Court may be required to take judicial notice of the seals, signatures and office of the persons so authenticating the power (1). A Notary Public has by the law of nations credit everywhere (2). There is in India no general law relating to Notaries Public (3). It has been said

not however, draw any such distinction. In order to comply with the provisions of this section, by one of the administration

to whose estate one *P* had been appointed executor *dativo qua* Father the application being made by one *A* under a power of attorney granted by *P*, such power not having been executed and authenticated in the manner prescribed by this section it was held that the application must be refused (6). Though the power of attorney was not admissible under this section it seems to have been assumed that the provision herein contained is of an exhaustive character and that no other mode of proving the execution of a power is admissible. That assumption

been intended

a document, p

before and authenticated by a Notary Public is produced before the Court an affidavit of identification as to the person purporting to make the power being

(1) See s 57 cls (6) and (7) *ante*

(2) *Hutcheson v Mannington* 6 Ves 823

(3) But under Act XXVI of 1881 as amended by Act V of 1914 and by Act VIII of 1919 (Negotiable Instruments s 138) the Governor General is empowered to appoint any person to be a Notary Public under this Act and to make rules for such Notaries Public. See also ss 399 100—102 *ib* under the first of these sections a Notary Public is defined to also include any person appointed by the Governor General in Council to perform the functions of a Notary Public under this Act. As to Notarial acts by persons abroad and judicial notice of the seal and signature of such person see 52 & 53 Vic Cap 10 s 6 Taylor Ev §§ 1567 1568

(4) Taylor Ev § 6 and cases there cited which are not uniform. But see *Armstrong v Storkla* 24 L J Ch 176 in which a power of attorney executed in British Honduras and in the presence of a Notary Public was proved in England under the Chancery Procedure Act by the production of the Notary's certificate under his hand and official seal. See also *Hayward v Stephens* 36 L J Ch 135. A distinction has however been drawn between foreign Notaries Public in countries not under the King's Dominions and Notaries Public within the King's Dominion. In the former case proof is

required in verification of the signature of the Notary Public. *Lord Kinnaird v Lady Saltoun* 1 Maddock 227 *Gartey v Hubbard* 1 J & W 180 5 D M & G 910. In re *Earls Trusts* 4 K & J 390. In re *Davis' Trusts* L R 8 Eq 98. *Cook v Wilby* L R 25 Ch D 769. In the other case no proof is required. See also *Nye v MacDonald* L R 3 P C 331.

(5) In the goods of *A J Primrose* deceased 16 C 776 779 the judgment in that case says executed before or be authenticated by the section how ever says executed before and authenticated by

(6) *Id* referring to *Anonymous case* in *Fulton* 72 (1837) in the goods of *Macgouan Morton* 370 (1841) see how ever observations on this case in notes to s 82 *ante* the notes of cases referred to under s 82 and in re *Sladen* 21 M 492 (1898) in which case the power of attorney was not executed in the presence of any of the persons designated in this section. There is a clear distinction between the two modes of proof. There declarations of execution having taken place were made before Notaries Public in the case of the present section the power must be executed before and authenticated by the Notary Public to be admissible.

(7) In re *Sladen* 21 M 492 494 (1898) v *ante* s 82

- s. 3 ("Relevant")
 s. 3 ("Fact")
 s. 57 (Documents of reference)

- s. 83 (Maps or plans made by the authority of Government)
 s. 90 (Maps or plans 30 years old)

COMMENTARY.

In all the cases when the Court is called upon to take judicial notice of a fact, and also in all matters of public history, science or art, the Court may resort for its aid to appropriate books or documents of reference (1) The Court under this section may presume (2) that such books were written and published by the person, and at the time and place by whom or at which, they purport to have been written or published. Further, statements of facts in issue, or relevant facts, made in published maps or charts generally offered for public sale, or in maps or plans, made under the authority of Government, as to matters usually represented or stated in such maps, charts, or plans, are themselves relevant facts (3). Under this section the Court may presume (4) that any published map or chart was written and published by the person and at the time and place by whom or at which, it purports to have been written or published. The section raises no presumption of accuracy, but this might, if the case were a proper one, be presumed under the general provisions contained in section 114, *post*. In the case however, of maps and plans purporting to be made by the authority of Government, the Court must presume that they were so made and that they are accurate, but maps or plans made for the purposes of any cause, that is, maps specially prepared for that purpose and with a view of their use in evidence must be proved to be accurate (5). In the case of any map 30 years old the Court may presume that the signature and every other part of it which purports to be in the handwriting of any particular person is in that person's handwriting (6).

Books.
 Maps,
 Charts

Presump-
 tion as to
 telegraphic
 messages

88 The Court may presume that a message, forwarded from a telegraph office to the person to whom such message purports to be addressed, corresponds with a message delivered for transmission at the office from which the message purports to be sent, but the Court shall not make any presumption as to the person by whom such message was delivered for transmission (7).

Principle—See Introduction and Notes, *post*

- s. 3 ("Court")
 s. 4 ("May presume")
 s. 15 (Course of Business)
 s. 114 ILLUSTR (f) (General presumptions)

Roscoe, N P Ev, 43, Wharton, Ev, §§ 76 1323, 1329, Wood's Practice Ev, 2
 A Treatise on communication by Telegraph by Morris Gray (Boston), 1880 Chapters X—XII

COMMENTARY.

If a telegraphic message is forwarded, that is, delivered by the office to the person to whom such message purports to be addressed, the Court may make the presumption mentioned. The section itself therefore does not, in the first

Telegraph
 messages

- (1) See s. 57, penultimate clause, and *ante*, notes on that clause
 (2) See s. 4, *ante*.
 (3) S. 36 *ante* see notes on that section, *ante*
 (4) See s. 4 *ante*
 (5) S. 83, *ante*

- (6) S. 90, see s. 3 *ante* *illustr*. A map or plan is a "document"
 (7) Nor in this respect does the Act contain any special provision as to Government Telegrams. *Varadarajulu Naidu v King Emperor*, 42 M, 885, s. c. 20 Cr L J, 455

he swore was a copy of *C*'s deposition and was in the handwriting of one of the officers. In that manner he proved the deposition of *R* in that this evidence on the ground that it did not conform to the present section. But it was held that this section does not exclude other proof than that provided by it. That the statement of *B* that *R* sued *C*, and that *C* gave evidence in his presence was primary evidence of those matters. That the depositions of *C* and *R* were public documents under section 74 and the proof of those records by *B* was secondary evidence, and as such admissible under sections 65 and 66 (1). Foreign judicial records are provable in this country under the provisions of section 78 6th clause *ante*. The present section enacts a presumption in the case of certified copies of such records when authenticated in the manner mentioned therein. Having regard to the definition of "may presume" (2), the Court may either regard the genuineness and accuracy of such copies as proved unless and until it is disproved or it may call for proof of it. In a recent case in which a copy of a document which had been proved in a German Court was

document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a Court of competent jurisdiction unless the contrary appears on the record, but such presumption may be displaced by proving want of jurisdiction (5).

The substitution in the first clause of this section of the words 'in' and 'for' in place of 'resident in,' occasioned by the ruling in the case that there was no representative residing in the State of Kuch Behar, and that consequently certified copies of judicial records of that State could not be received in evidence in the Courts of British India under the provisions of this section as then framed. In the case cited below (8) a copy was admitted of a judgment of the Court of a French Colony, at which neither Her Majesty nor the Indian Government had a representative, on the testimony of a witness who was acquainted with the handwriting of the Registrar of such Court, and who swore that such Registrar was the keeper of the Court's records and had duly signed and sealed the document.

87 The Court may presume that any book to which it may refer for information on matters of public or general interest, and that any published map or charts, the statements of which are relevant facts, and which is produced for its inspection, was written and published by the person, and at the time and place, by whom or at which it purports to have been written or published.

Principle.—See *Introduction and Notes* to sections 36, 57, *ante*

s 3 ('Court')

s 4 ('May presume')

s 36 (Relevancy of statement in maps, charts and plans)

(1) *Haranund Roy v. Chetlangia Ram*, 4 C W N 429 (1899) s c 27 C, 639, see s 65 *ante*

(2) S 4 *ante*

(3) In the matter of *Rudolf Stallman* (1911) 39 C 164

(4) *Hurish Chunder v. Prosunno Coomaz* 22 W R 303 (1874)

(5) Civil Procedure Code s 14 2nd Ed p 101

(6) By s 8 of Act III of 1891

(7) *Ganee Mahomed v. Torini Charu* 14 C 346 (1847)

(8) *Mannohiney Dossee v. Greesh chunder Bose* 8 Mad L J 14 (1873)

Presump-
tion as to
books, maps
and charts

s. 3 ("Relevant")

s. 3 ("Fact")

s. 57 (Documents of reference)

s. 83 (Maps or plans made by the authority of Government)

s. 90 (Maps or plans 30 years old)

COMMENTARY.

In all the cases when the Court is called upon to take judicial notice of a fact, and also in all matters of public history, science or art, the Court may resort for its aid to appropriate books or documents of reference (1) The Court under this section may presume (2) that such books were written and published by the person, and at the time and place by whom, or at which, they purport to have been written or published. Further, statements of facts in issue, or relevant facts, made in published maps or charts generally offered for public sale, or in maps or plans, made under the authority of Government, as to matters usually represented or stated in such maps, charts, or plans, are themselves relevant facts (3). Under this section the Court may presume (4) that any published map or chart was written and published by the person and at the time and place by whom, or at which it purports to have been written or published. The section raises no presumption of accuracy, but this might, if the case were a proper one, be presumed under the general provisions contained in section 114, *post*. In the case, however, of maps and plans purporting to be made by the authority of Government, the Court must presume that they were so made and that they are accurate, but maps or plans made for the purposes of any cause, that is, maps specially prepared for that purpose and with a view of their use in evidence must be proved to be accurate (5). In the case of any map 30 years old the Court may presume that the signature and every other part of it which purports to be in the handwriting of any particular person is in that person's handwriting (6).

Books,
Maps,
Charts

88 The Court may presume that a message, forwarded from a telegraph office to the person to whom such message purports to be addressed, corresponds with a message delivered for transmission at the office from which the message purports to be sent; but the Court shall not make any presumption as to the person by whom such message was delivered for transmission (7).

Presump-
tion as to
telegraphic
messages

Principle—See Introduction and Notes, *post*

s. 3 ("Court")

s. 4 ("May presume")

s. 15 (Course of Business)

s. 114 ILLUST (f) (General presumptions)

Roscoe, N P Ev, 43, Wharton, Ev, §§ 76, 1323, 1329, Wood's Practice, Ev, 2
A Treatise on communication by Telegraph by Morris Gray (Boston), 1893, Chapters X—XII

COMMENTARY.

If a telegraphic message is forwarded, that is, delivered by the office to the person to whom such message purports to be addressed, the Court may make the presumption mentioned. The section itself therefore does not, in the first

Telegraph
messages

(1) See s. 57, penultimate clause, and *ante*, notes on that clause

(2) See s. 4, *ante*.

(3) S. 36 *ante*, see notes on that section *ante*

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(6) S. 90, see s. 3, *ante*, *illust*. A map or plan is a "document"

(7) Nor in this respect does the Act contain any special provision as to Government Telegrams *Varadarajulu Naidu v King Emperor*, 42 M, 885, s. c., 20 Cr L. J. 455

he swore was a copy of *C*'s deposition and was in the handwriting of one of the officers of the foreign Court. In the same manner he proved the deposition of *R* in that suit. The High Court rejected this evidence on the ground that it did not comply with the provisions of the present section. But it was held that this section does not exclude other proof than that provided by it. That the statement of *B* that *R* sued *C*, and that *C* gave evidence in his presence was primary evidence of those matters. That the depositions of *C* and *R* were public documents under section 74, and the proof of those records by *B* was secondary evidence, and as such admissible under sections 65 and 66 (1). Foreign judicial records are provable in this country under the provisions of section 2, 6th clause *ante*. The present section enacts a presumption in the case of certified copies of such records when authenticated in the manner mentioned therein. Having regard to the definition of 'may presume' (2) the Court may either regard the genuineness and accuracy of such copies as proved unless and until it is disproved or it may call for proof of it. In a recent case in which a copy of a document which had been proved in a German Court was admitted it was held that there might be cases in which a copy would not suffice and¹.

This section is an instance of documents to

And now section 14 of the Civil Procedure Act presumes upon the production of any document purporting to be a certified copy of a foreign judgment that such judgment was pronounced by a Court of competent jurisdiction unless the contrary appears on the record, but such presumption may be displaced by proving want of jurisdiction (5).

The substitution in the first clause of this section of the words 'in and for in place of' resident in, as also the addition of the second clause (6) were occasioned by the ruling in the case under mentioned (7) in which it was held that there was no representative of Her Majesty or of the Government of India residing in the State of Kuch Behar, and that consequently certified copies of judicial records of that State could not be received in evidence in the Courts of British India under the provisions of this section as then framed. In the case cited below (8) a copy was admitted of a judgment of the Court of a French Colony at which neither Her Majesty nor the Indian Government had a representative on the testimony of a witness who was acquainted with the handwriting of the Registrar of such Court and who swore that such Registrar was the keeper of the Court's records and had duly signed and sealed the document.

Presumption as to books maps and charts

87 The Court may presume that any book to which it may refer for information on matters of public or general interest, and that any published map or charts, the statements of which are relevant facts, and which is produced for its inspection, was written and published by the person, and at the time and place, by whom or at which it purports to have been written or published.

Principle.—See *Introduction* and *Notes* to sections 36, 57, *ante*

s 3 (Court)

s 4 ('May presume.')

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(1) *Haranund Roy v. Chellangia Ram*
4 C W N 429 (1899) s c 27 C 639,
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(5) Civil Procedure Code s 14 *nt*
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(6) By s 8 of Act III of 1891

(7) *Gance Mahomed v. Torani Churn*
14 C 346 (1847)

(8) *Hannoli ey Dossee v. Gresh*
chunder Bose 8 Mad L J 14 (1873)

been properly stamped(1), attested(2), and executed. Evidence to the contrary that the document was not properly stamped, attested or executed may be given. So it was held that if secondary evidence be tendered to prove the contents of an instrument either *lost* or *detained* by the opposite party after notice to produce(3), it will be presumed that the original was duly stamped, unless some evidence to the contrary, as for example that it was unstamped, when last seen(4) can be given (5). But this power of giving rebutting evidence is subject to the rule enacted by section 164 *post*, namely, that, when a party refuses to produce a document which he has had notice to produce he cannot afterwards use the document as evidence without the consent of the other party or the order of the Court. Thus *A* sues *B* on an agreement, and gives *B* notice to produce it. At the trial *A* calls for the document, and *B* refuses to produce it. *A* is allowed to produce the document, or in order to show that it was stamped unless and until evidence to the contrary is given (7). Under this Act also in the case of documents not coming within the terms of this section either by reason of notice not being necessary, or the document having been lost or the like the Court has power in a proper case to make a similar presumption under the provisions of section 114 *post* (8).

90. Where any document, purporting(9) or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

Presump-
tion as to
documents
thirty
years old

Explanation—Documents are said to be in proper custody if they are in the place in which and under the care of the person with whom, they would naturally be, but no custody is improper if it is proved to have a legitimate origin(10) or if the circumstances of the particular case are such as to render such an origin probable. This explanation applies also to section 81.

Illustrations

(a) *A* has been in possession of landed property for a long time. He produces from his custody deeds relating to the land showing his titles to it. The custody is proper.

(1) *Hart v Hart* 1 Hare 1 Taylor Ex § 117

(2) *Taylor Ex* § 1847 in this case a party who is driven to give secondary evidence of the contents of the document need not call an attesting witness.

(3) See ss 65 cl (a) 66 ante

(4) *Marine Investment Co v Harris & Co* L R 5 H L 674

(5) *Taylor Ex* § 148 and cases there cited Steph Dig Art 86

(6) S 164 *post* Illust

(7) *Taylor Ex* § 148

(8) In *Markby Ex* 67 68 the opinion

is expressed that the section is restricted to cases where a notice to produce is delivered to the adverse party and that it does not extend to cases where a summons to produce is delivered to a stranger to the suit. See *Ahmed Raia v Abd Husain* P C 38 A 494 (1916) (document lost in the Mutiny).

(9) That is stating itself to be so 68. See *Clarittar Rai v Kaulash Behari*, 3 Pat. L J. 306 s c 44 J C. 422.

(10) See *Sharfud n v Gorind* 27 B. 452 462 (1902) s c sub voc *Tajudin v Gorind* 5 Bom L R. 144.

place raise any presumption of *delivery* but assumes on the contrary that such delivery has taken place. But in the case of the post office there is a presumption that a letter properly directed and posted will be delivered in due course (1) and this presumption will be extended to postal telegrams now that the inland telegraphs form part of the Government postal system (2). Proof that the message was sent over the wires addressed to a particular person at a particular place he being shown to be at the time resident at such a place may present a *prima facie* case of the receipt on of such telegram by the sender (3). Such a presumption may be raised under section 114 *post* [see *Illustration (f)*] and where there is a question whether a particular act was done the existence of any course of business according to which it would naturally have been done is a relevant fact and may be proved (4). But the sending of a telegram addressed to a person at a given place and the receipt of an answer purporting to be from him in due course are not admissible to prove that he was in the place at the time in question (5). Though if it were shown that he was in the place at the time in question the receipt of an answer would be evidence of the delivery of the message (6). The presumptions raised by this section are of a two fold character *firstly* a presumption of conduct that the due course of business has been followed (*omnia rite esse acta*) viz that the officials of the telegraph office have forwarded a message which is in the same terms as that which they have received for transmission *secondly* a presumption based upon an experience of a physical law viz that the message as sent by wire from the office of transmission corresponds with that which has been received at the office of despatch. The Court shall not however make any presumption as to the person by whom such message was delivered for transmission (7). Presumably this refers to the entries on telegrams indicating the persons by whom they are sent. It is obvious that there is no guarantee that the person named in the telegram as the sender thereof was in fact the actual sender. As to the proof of the contents of telegrams see section 91 *post*.

89 The Court shall presume that every document called for and not produced after notice to produce was attested stamped and executed in the manner required by law

Principle—See Notes *post*

s 3 (*Court*)

ss 68—72 (*Attestation*)

s 4 (*Shall presume*)

s 164 (*Using documents production of*)

ss 65 Cl (a) 66 (*Notice to produce*)

which was refused on notice)

Steph D., Art 86 Norton Ev 26, Taylor Ev §§ 1171 1847 148

COMMENTARY

There is here not only a presumption in favour of innocence whence it may be assumed that everything has been done which the law required but a presumption which is or is *torum* from the non production refusing or neglecting to produce

(1) See *Brillat and American Telegraph*
Co v Colson L. R. 6 Ex 122 per
Bramwell B. *Stocken v Colson* 7 M &
W 515 Roscoe, N P Ev 43 Wharton
Ev § 1323

(2) Roscoe N P Ev 43

(3) Wharton E. § 76 and see ib §
1323 1329

(4) S 16 see notes to that section

(5) Wharton Ev § 76 The rule with
regard to replies by telegram appears to
stand on a different footing from that
relating to letters see Woods Practice
Ev 2 note (3)

(6) See b § 1328

(7) S 83 See as to mode of proof of
telegrams Burr Jones Ev § 209

(8) Norton Ev 265

tendered in support of ancient possession it has been said "These are often the only attainable evidence of ancient possession, and, therefore, the law yielding to necessity allows them to be used on behalf of persons claiming under them, and against persons in no way privy to them, provided that they are not mere narratives of past events, but purport to have formed a part of the act of ownership, exercise of right, or other transaction to which they relate. This species of proof demands careful scrutiny, for first, its effect is to benefit those from whose custody they have been produced, and who are connected in interest with the original parties to the documents, and next the documents are not proved but are only presumed to have constituted part of the *res gestæ*. Forgery and

forgery and fraud cannot be said to be of rare occurrence, and where, therefore, this reason for the rule has not the same weight in this country as it is supposed to have in England. Here, therefore, less credit should be given to ancient documents which are unsupported by any evidence that might free them from the suspicion of being fabricated, since even in England this evidence when unsupported is of very little weight (2). Should the genuineness of the document be for any reason doubtful, it is perfectly open to the Court or Jury to reject it, however ancient it may be. Even if proper custody be also shown, the Court has still power to reject the document if it is of opinion that it is a fabrication (3). The section only says that the Court may raise the presumptions mentioned in it not that it must do so, and experience shows that "may presume" in such instances ought generally to be construed in the more rigorous of the senses allowed by the fourth section of this Act (4). And in the under-mentioned case it was held that when a document which is over thirty years old has been tendered under this section it is for the Court to determine (which is a matter for judicial discretion) whether it will make the presumption mentioned in this section or call upon the party to offer proof of the document stating its reason in the latter event and in the former whether the presumption has been rebutted or not (5). In the Madras Presidency the practice is that the Court marks a document as an exhibit if *prima facie* evidence of custody and age is produced and at a later stage of the proceedings gives the hostile party an opportunity of producing evidence to rebut the presumption under this section (6).

(1) Taylor Ex § 658 Best Ev § 499

(2) *Tra lockva Nath v Shurno Chun* gon 11 C 539 541 542 (1885) per Garth C J. *Mussamat Phool v Gour Surin* 18 W R 485 493 (1872) per Couch C J. [Accordingly it was not allowed to prevail in this case in which there was other evidence inconsistent with the title the documents professed to create.] *Field Ex* 412 *ib* 6th Ed 256 *Boikunt Nath v Lukhun Majhi* 9 C L R, 475 429 per Field J. *Shah Husain v Govardhandas Purmanandas* 20 B 1 S (1895).

[We are fully aware of the danger of treating old documents as established merely because they are 30 years old and come from the proper custody.] per Farran C J. See *Jaso Lal v Ganga Dets* 48 P.

R C J 81 p 289 (1915) *Shripuja v Khanhajpalat*, 15 N L R, 192, s c, 53 I C 947.

(3) *Gooroo Pershai v Bykunto Chun der* 6 W R 87 (1886) *Uggrakant Chowdhry v Huro Clunder* 6 C, 209 (1880).

(4) *Timanga da v Ranganga da* 11 B 94 98 (1878) cf s 4 ante. The Court has a discretion in this matter with which the Appellate Court will be slow to interfere. *Mahomed Usman v Rahim Baksh*, 57 P W R s c 41 I C 559.

(5) *Srinath Patra v Kuloda Prosad Banerjee* 2 C L J, 592.

(6) *Ranwiven v Vecraffudyana*, 37 M 455 (1914).

Where a document more than 30 years old purporting to come from proper custody, is required by the Court before which it is produced to be proved and is left unproved and there are circumstances, both external and internal which throw great doubts upon the genuineness of the document, the Court can in the exercise of the discretion vested in it under s. 90, decline to admit it in evidence without formal proof, and their Lordships of the Privy Council will be always slow to overrule the discretion exercised by a Judge under s. 90 (1). A Judge should not reject a document without giving the party producing it an opportunity of supporting the presumption (2). The rule of law which requires the party tendering in evidence an altered instrument to explain its appearance does not apply to letters and ancient documents coming from the right custody merely because they are in a mutilated or imperfect state (3). In a suit for redemption of a mortgage the plaintiffs tendered in evidence a certified copy of the mortgage bond which was executed in 1876. The plaintiffs had not given notice to the defendants calling on them to produce the original deed. *Held* that the presumption allowed by this section applies to the certified copy of the mortgage deed and the original deed being presumably in the possession of the defendants the plaintiffs were entitled to give secondary evidence of the contents without notice to the defendants in as much as they must have known that they would be required to produce it in the suit for redemption (4).

The presumptions raised by the section are confined to handwriting execution and attestation (5), so where a document more than thirty years old purports to be signed by an agent on behalf of a principal, no presumption arises as to the agent's authority, which must be proved (6). Where an old deed purported to be an appointment under a special power and to be executed by the attorney of the donee of the power, the Court presumed only the execution of the deed but not in the absence of the power or evidence thereof the authority of the solicitor to execute it (7). The presumption arising under this section can be applied to a deed executed by an illiterate person whose signature has been made by some other person on his behalf (8). This section merely allows a party to ask the Court to presume that a document which is more than thirty years old and purports to have been prepared or signed by a particular person was in fact prepared or signed by such person. But when a party producing such a document cannot show and the document itself does not purport to show who prepared or signed it, the mere fact of the document being more than thirty years old does not make it admissible without proof under this section (9).

Secondary evidence

The use by the Legislature of the words "when any document is produced" does not limit the operation of the section to cases in which the document is actually produced in Court, and, consequently, secondary evidence of an ancient document is admissible without proof of execution of the original when the

(1) *Musammat Shafiq-un-nissa v. Shaban Ali* 6 Bom. L. R. 750 (1904) s. c. 26 A. 581 9 C. W. N. 105.
 (2) *Isrit Chamar v. Sibdari Pandey* 17 C. W. N. 108 (1911).
 (3) Taylor Ex. § 1838. As to the effect of the alteration of a document in effect particular see *Mangal Sen v. Mithu* 25 A. 580 (1903).
Slonker Shahan Singh v. Ramanand 1907 s. c. 17 All. L. J. 114.
 (4) *D. Arka v. Ubadhya* 41 A. 11. See s. 66 Prov. (2).
 711 51 I. C. 295 (1901).
 (5) See *Kalagash*

Sorish car Blattacharya 33 C. L. J. 392 (1921).

(6) *Ubitack Rai v. Dallal Ra* 3 C. 507 (1878). *Tiakoor Pershad v. Musam* 111 Bushmully 24 W. R. 428 (1875).
Uggralant Cloudlry v. Huro Clunder, C. C. 209 (1880).

(7) *Re Arcy* 1 Ch. 164 (1897).

(8) *Sher Ahad v. Ibraim* 52 I. C., 314.

(9) *Claristar Rai v. Kalash Belari* 3 Pat. L. J. 306 s. c. 44 I. C. 422.

document is shown to have been lost and to have been heard of last in proper custody (1)

The Madras High Court observed with reference to a document of which secondary evidence had been permitted to be given(2), but in respect of which there was no evidence of execution —“ It is not necessary to consider whether it should be prepared to follow the decision in *Khetter Chunder Mookerjee v* been shown, as it was in that case that reduced by reason of its having been lost to show that the original document which custody of the Zamorin, could not have been produced if proper steps to procure its production had been taken’ and it, therefore, refused to raise the presumption mentioned in this section though the original document of which a copy was admitted purported to be more than thirty years old. It is to be noted with respect to this case that though the grounds of admissibility are not stated, secondary evidence was permitted to be given and that though the original document in the Calcutta case was in fact lost, there is nothing in that decision which limits the applicability of this section to one only of the cases in which secondary evidence is allowed, viz, loss of the original. No presumption can be made in favour of any document unless such document itself is produced before the Court invited to make the presumption. The production of a copy is insufficient (4). Where however, the production of the original document is impossible the Court is entitled to presume regarding the same on the production of a certified copy (5). In the case cited(6) a *darmakarari* lease was granted in 1830. The original of this document was not in existence and a copy which was taken in 1881 was produced in Court as it has been so produced on several previous occasions. There was no proof of execution of the original. *Held* that the presumption was applicable to the copy produced. It is open to a party when producing an old document to rely on the presumption under this section and also on its proof, and a Court may presume a deed to be genuine even though it is not satisfied with the evidence tendered to prove its execution (7).

The period of thirty years is to be reckoned, not from the date on which the document is filed in Court but from the date on which, it having been tendered in evidence its genuineness or otherwise becomes the subject of proof (8). It is not until the case comes on for hearing and the party producing the document is called upon to prove it, that the Court, after being satisfied that it comes from proper custody, can be asked to make the presumptions allowed by this section (9).

Ancient documents are *admissible* under this section without proof of any acts, transactions or state of affairs necessarily, properly, or naturally referrible to them. Inconsiderable (if any), weight, however, will be attached to documents, which though ancient, are not corroborated by evidence of ancient or modern enjoyment or by other equivalent or explanatory proof (10).

(1) *Khetter Chunder v Khetter Paul*, 5 C 886 (1880) followed in *Ishri Prasad v Lalli Jas* 22 A 294 (1900)

(2) *Appathura Lathar v Gopala Panikkar* 25 M 674 (1901)

(3) 5 C 886 (1880)

(4) *Shripurja v Kanhaipalal* 15 N L R 192 s c 53 I C 947

(5) *Raj Bahadur Lal v Bindeshri* 50 L J, 219 s c 46 I C, 344

(6) *Banwari Lal v Duarkanath Misser*, 29 C L J 577, s c, 52 I C, 825

(7) *Duarka v Makka*, 49 I C 419

(8) *Minu Sirkar v Rhedoy Nath* 5

C L R 135 (1879)

(9) Field Ev 6th Ed 259

(10) *Taylor, Ev*, §§ 665 666 Field Ev 6th Ed 257, Markby Ev 68 69, *Boikunt Nath v Lakhun Majhi* 9 C L R 425 429 (1881), *Anund Chunder v Mookta Keshce* 21 W R 130 (1874), *Grant v Bijnath Tewaree*, 21 W R, 279 (1874) *Sreekunt Bhattacharjee v Raj Narain* 10 W R 1 (1868) *Bisheshur Bhattacharjee v Lamb*, 21 W R, 22 (1873) *Timongavda v Rangangarda* 11 B 94 98, 102 (1877) *Hari Chintaman v Moro Lakshman* 11 B., 89 (1886)

12. condition of admission must generally be proved by some evidence. Where a party offers documents of such an age as to be incapable of being proved by direct evidence he is bound to prove their custody (1). Though it is for the discretion of the Court to decide whether to prove custody this discretion is limited by the *Explanation* given of the section which itself follows the rule of English law laid down in the case of the *Bishop of Meath v Marquis of Wrexham* (9). The observations of Tindal C.J. in that case have been adopted as a leading authority in this country (10). In that case

under
ably be expected to be found safe and this is precisely the custody which gives authenticity to documents found within it for it is not necessary that they should be found in the best and most proper place of deposit (11). If documents continued in such custody there never would be any question as to their authenticity but it is when documents are found in other than their proper place of deposit that the investigation commences whether it was reasonable and natural under the circumstances in the particular case to expect that they should have been in the place where they are actually found for it is obvious that while there can be only one place of deposit strictly and absolutely proper

(1) Some evidence may be required to be given of the early existence and publicity of the document. *Alluck v Kasher Chunder* 1 W. R., 131 (1864).

(2) *Boikunt Nath v Lakhon Majhi* supra.

(3) P. C. (1909) *Abhram Gorram v Sityama Chaman Nand* 36 C. 1103.

(4) *Fulada Prasad Deghoria v Kalda Das Nath* 42 C. 536 (1915) citing English cases.

(5) *Grant v Bajra h Texra ce* 21 W. R. 27 (1874). *Sreekanth Bhuttacha jee v Ra Nath* 10 W. R. 1 (1868).

(6) *Hari Chandra v Moro Lalshwan* 11 B. 89 (1886).

(7) *Trangarda v Rangangarda* 11 B. 94 98 99 (1886) per West J.

(8) *Gaur Faroy v Hooma Sardarjee* 17 W. R. 47 (1869).

(9) 3 B.N. C. 183 200 10 E. 346.

(10) *Travoka Nath v Sherno Chhangon* 11 C. 539 547 (1885).

(11) Followed in *Sharfudin v Gornal* 11 B. 457 467 (1907) s. c. sub voce. *Tandun v Gornal* 5 B.N. L. R. 144.

there may be various and many that are reasonable and probable, though differing in degree, some being more so, some less, and in those cases the proposition to be determined is, whether the actual custody is so reasonably and probably to be accounted for, that it impresses the mind with the conviction that the instrument found in such custody must be genuine. That such is the character and description of the custody, which is held sufficiently genuine to render a document admissible, appears from all cases." Many decisions have been given both in England(1) and in India(2) as to the conditions which constitute proper custody, but each case must depend upon its own particular circumstances, it being impossible to lay down any rule which shall apply to all(3). Thus in a suit to eject a tenant who had been in possession of a small homestead for forty years, the tenant produced a *pottah* purporting to be sixty years old granted to her father who had held possession under it, for twenty years until his death. It appeared that her father had left an infant grandson who was his sole heir, but who had never either before or after attaining his majority made any claim to the property. The Court held that her custody of the *pottah* was a natural and proper one within the meaning of this section(4). When property had been in the possession of the plaintiffs father, and documents relating to the property were found among the papers of a deceased *gomastah* who had been in the father's employ and had managed the property for the plaintiff during his majority this was held to be a proper custody(5). And although a person appointed manager of the property of an insane person by the Court does not, of this

section(6). The mere fact that an ancient document is produced from the records of a Court does not raise any presumption that it was filed for a proper purpose and that, consequently, the Court's custody was a proper custody. The document must be shown to have been so filed in order to the adjudication of some question of which that Court had cognizance and which had actually come under its cognizance(7). In the undermentioned case, the Privy Council observed as follows: "With reference to the argument as to the evidence in support of the bond and particularly with respect to the custody of the bond, it is in their Lordships' opinion sufficient to state that the bond was produced in the usual manner by the persons who claimed title under the provisions of it and who therefore were entitled to the possession of it, so that the bond must be held to have come from the proper custody"(8).

No custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable. This provision is applicable to those cases in which the custody is

(1) See Taylor Ev §§ 660—664
Phipson Ev 5th Ed 497—499

(2) *vide post*

(3) Norton Ev 267. For meaning of custody under Indian Penal Code section 2 see *Emperor v Fateh Chand Agarwalla* F B 44 C 477 (1917) (possession on behalf of another)

(4) *Trailokya Nath v Shurno Chun* 11 C 539 (1885)

(5) *Hari Chintaman v Moro Lalshman*, 11 B 89 (1886)

(6) *Shyama Charan Nundy v Abhiram Goswami* 3 C L J 306 10 C W N, 738 33 C, 511

(7) *Guddadur Paul v Bhayrub Chun* der 5 C 518 (1880)

(8) *Devaji Gaja v Godabhai Godbhai* 2 B L R P C 85 86 (1869), s c 11 W R P C 35 see also as to proper custody *Thakoor Pershad v Bashantty Koor* 24 W R 428 (1875) *Ekarrie Singh v Kojlash Chunder* 21 W R 45 (1874) *Mussumut Fureedoomissa v Ram Onagra* 21 W R 19 (1873) *Chunder Kant v Brojo Nath*, 13 W R, 109 (1870) *Gour Paroy v Wooma Soondaree*, 12 W R 472 (1869) *Gurudas Day v Sambhu Nath* 3 B L R 258 (1869), *Sreekanth Bhaktacharyee v Raj Narain*, 10 W R, 1 (1868) *Mahomed Azizadd v Shaffi Mulla* 8 B L R 26 29 (1871) *Vital Mahadeb v Mahummad Husen*, 6 Bom H C R 90 (1869)

not, perhaps, that where it might be most reasonably expected, but is yet sufficiently reasonable to constitute such custody not improper. Thus in the two first *illustrations* to the section the documents are produced from their natural place of custody, in the third *illustration* the documents ordinarily would be with the owner *B* but under the circumstances *A*'s custody is proper (1)

In the undermentioned case (2) Batty, J, was of opinion that the section read with the explanation seemed to insist only on a satisfactory account of the *origin* of the custody and not in the history of its continuance and that possibly the origin of the custody was alone regarded as material because it is intelligible that ancient documents may be overlooked and left undisturbed notwithstanding a transfer of old, or creation of new interests

(1) Norton Ev 26~

462 (1902) s c sub voc *Tajudin v*

(2) *Sharfudin v Govind* 27 B 452

Govind 5 Bom L R 144

CHAPTER VI

OF THE EXCLUSION OF ORAL BY DOCUMENTARY EVIDENCE

IN so far as the present Chapter deals not only with cases in which oral evidence is excluded by documentary evidence but also with those in which oral evidence is admissible notwithstanding the existence of a document its subject matter may properly and in conformity with the English text book be described as the admissibility of extrinsic evidence to affect documents a branch of the law of evidence which is perhaps of all the most difficult of application. The construction of a document is a question of law to be determined by grammar or logic the primary organs of interpretation aided when necessary by evidence to make the words which are used fit the external things to which the words are appropriate (s 92 Proviso 6) and by evidence of the character mentioned in sections 95 to 98. When the meaning of a document has been truly ascertained that document itself is evidence of the intention of the writer. Intention is a psychological fact and can be proved under section 14 when the existence of intention is in issue or relevant provided that the collateral fact is not too remote (1).

It is necessary in the first place to bear in mind in this connection that (as has been already provided by the Act) the *contents* of all documents whatever be their nature whether dispositive or non dispositive (*in post*) must be proved by the production of the document itself except in those cases in which secondary evidence is admissible (sections 61—65). If however the question is not primarily as to the contents of a document but as to the existence of matters of fact of which documents form the record and proof other considerations come into play which are the peculiar subject matter of this portion of the Act. The question then arises whether the fact of such record excludes other evidence of the matters which are so recorded and whether these matters can and if so in what manner be affected by such other evidence. To fully comprehend this distinction it is necessary to distinguish between *dispositive* (or in the language of Bentham pre determined) documents or documents which are uttered *dispositively* i.e. for the purpose of disposing of rights and *non dispositive* (or in the language of Bentham casual) documents or

Admissibility of extrinsic evidence to affect documents

itself
agree

in this that as far as concerns the parties to the case in which they are offered they were not prepared for the purpose of disposing of the rights of the party from whom they emanate. Dispositive documents such as contracts grants of property and the like on the other hand are deliberately prepared and are usually couched in words which are selected for the purpose because they have a settled legal or business meaning. Such documents are meant to bind the

party uttering them in both his statements of fact and his engagements of further action, and they are usually accepted by the other contracting party (or, in case of wills, by parties interested), not in any occult sense, requiring explanation or correction, but according to the legal and business meaning of the terms (1)

The Chapter commences by of dispositive documents and of form of a document (whether given, except the document itself, or secondary evidence thereof when admissible. The very object for which writing is used is to perpetuate the memory of what is written down and so to furnish permanent proof of it. In order to give effect to this the document itself must be produced. Assuming that the document has been produced as required, the next section, with certain provisos excludes oral evidence for the purpose of contradicting, varying, adding to, or subtracting from its terms. To give full effect to the object with which writing is used not only is it necessary that the document itself should be put before the Judge for his inspection, but also in cases where the document purports to be a final settlement of a previous negotiation, as in the case of a written contract it is essential that the document shall be treated as final and not be varied by word of mouth. If the first of these rules were not observed, the benefit of writing would be lost. There is no use in writing a thing down unless the writing is read. If the second rule were not observed people would never know when a question was settled as they would be able to play fast and loose with their writings (2). But though extrinsic evidence is thus inadmissible (a) to supersede (section 91) or (b) to control, that is to contradict, vary, add to or subtract from the terms of the document (section 92), it may yet (c) be admissible in aid of, and to explain, the document (section 92 sixth proviso, sections 93—100).

It is proposed to shortly observe upon these three rules, which form the subject matter of this Chapter of the Act. The general distinction between the sections just quoted is that sections 91, 92, define the cases in which documents are *exclusive evidence* of transactions which they embody, while sections 93—100 deal with the *interpretation* of documents by oral evidence. The two subjects are so closely connected together that they are not usually treated as distinct, but they are so in fact. Thus A and B make a contract of marine insurance on goods and reduce it to writing. They verbally agree that the goods are not to be shipped in such reservation. They leave business of insurance, and they of which is not commonly known.

It does permit (6th proviso), and that for another,

it shall not be regarded as exclusive evidence of the terms of the actual agreement between the parties. It also allows the technical term to be explained (section 98), and in so doing it interprets the meaning of the document itself. The two operations are obviously different and their proper performance. The first depends upon the principle that the written form is to take security against bad on writing is presumed as a general rule to embody the final and considered determination of the parties to it. The second

(1) Wharton Ev. § 920 this distinction is recognized by Sir J. Stephen in substance though not in terms in s. 91 of this Act and in Art. 90 of his Digest of Evidence. The classification is not however entirely exclusive with reference

to the subject matter of s. 91 for matters which the law requires to be reduced to writing may (e.g. mortgages) or may not (e.g. depositions of witnesses) constitute depositions of rights.

(2) Steph. Introd. 171, 172.

depends on a consideration of the imperfections of language and of the inadequate manner in which people adjust their words to the facts to which they apply. The rules contained in this Chapter of the Act are not perhaps difficult to state to understand or to remember but they are by no means easy to apply inasmuch as from the nature of the case an enormous number of transactions fall close on one side or the other of most of them. Hence the exposition of these rules and the abridgment of all the illustrations of them which have occurred in practice occupy a very large space in the different text writers (1) and hence also the difficulty not infrequently experienced of reconciling apparently conflicting cases the facts of which upon which the decision rested are seldom if ever fully reported.

When a transaction has been reduced into writing either by requirements of law or agreement of the parties the writing becomes the exclusive memorial thereof and no extrinsic evidence is admissible to independently prove the transaction (section 91). Oral proof cannot be substituted for the written evidence. Some of the grounds of the rule have already been considered. Others are that in the case of dispositive documents the written instrument is in some measure the ultimate fact to be proved and it has been tacitly treated by the parties themselves as *the only repository and the appropriate evidence of their agreement*. The instrument is not collateral but is of the very essence of the transaction and consequently in all proceedings civil or criminal in which the issue depends in any degree upon the terms of the instrument the party whose witnesses show that the disposition was reduced to writing must either produce the instrument or give secondary evidence thereof (2). So also in the case of instruments which the law required to be in writing the law having required that the evidence of them can be substituted for that so the party. Accordingly parol agreements or private formal documents such as wills and other dispositions of property which the law requires should be reduced to the form of a document. To admit inferior evidence when the law requires superior would be to repeal the law (3).

Extrinsic evidence is inadmissible to control the document

Extrinsic evidence is not only inadmissible to supersede the document but also to control that is to contradict vary add to or subtract from the terms of the document though the contents of such document may be proved either by primary or secondary evidence according to the rules stated in the preceding sections of the Act. This Common Law rule may be traced back to a remote antiquity. It is founded on the inconvenience that might result if matters in writing made by advice and on consideration and intended finally to embody the entire agreement between the parties were liable to be controlled by what Lord Coke calls the uncertain test of the parties which have deliberately put their mutual obligations into writing. It is not introduced into the written instrument every material term and circumstance. Consequently extrinsic or as it is often loosely called parol evidence is equally inadmissible in this connection whether it consists of casual conversations declarations of intention oral testimony documents (provided they are of inferior solemnity to the writing in question) or facts and events not in the nature of declarations and whether such conversations were previous or subsequent to or contemporaneous with the date of the principal document. Such evidence while deserving far less credit than the writing itself would inevitably tend in many instances to substitute a new and different contract for that really agreed upon and would thus without any corresponding benefit work infinite mischief.

Extrinsic evidence is inadmissible to supersede the document

(1) Steph Digest pp 184 185

(2) Taylor Ev § 401

(3) Id, § 399

mischief and wrong (1) The rule equally applies in the case of dispositions reduced to writing by the agreement of parties and of those which have been so reduced in obedience to the requirements of the law in that respect The rule, however, only applies as between the parties to any such instruments or their representatives in interest Persons who are not parties to a document or their representatives in interest may give evidence of any facts tending to show a contemporaneous agreement varying the terms of the document (section 99) The rule is subject further to certain provisos which will be found dealt with in the notes to section 92, *post*

Extrinsic evidence is admissible in aid and explanation of the document

It has been already observed that extrinsic evidence is inadmissible either to *supersede* or to *control* the document, that is, the document itself only must be produced in proof of the transaction which it embodies, and when so produced its terms may not be contradicted, added to, or varied by, other evidence But on its production it becomes necessary to construe the document Putting a construction upon a document means ascertaining the meaning of the signs or words made upon it and their relation to facts (2) Construction may be effected from an inspection and consideration of the terms of the document itself or from such an inspection and consideration coupled with a consideration of certain classes of extrinsic evidence admissible in *aid*, *explanation*, and *interpretation* of documents (3)

The construction of a document before the Court is a question of law to be determined by Grammar and Logic, the primary organs of interpretation aided where necessary by the subsidiary one of usage (section 98), where admissible to throw light upon the meaning of the words used (4) To construe a document oral evidence of its author as to his intention is not admissible, though accompanying circumstances (section 92, prov. 6) may be shown and considered (5) The effect of a document depends on the intention of the parties as gathered from the terms of the instrument and from the surrounding circumstances (6) In construing mercantile instruments, it is particularly the duty of a Court of Justice to regard the intention rather than the form and to give effect to the whole instrument The intention must be collected from the instrument, but resort may be had to mercantile usage (section 98) in certain cases as a key to its exposition (7) In a case in the House of Lords it was said by Lord

(except where the words have acquired a special conventional meaning) namely, what do the words mean on a fair reading of the whole document" (8) *As for*

(1) Taylor Fv §§ 1132 1148, Philipson Ev 5th Ed 544

(2) Steph Dig Art 91

(3) See *Raboo Rambuddan v Rance Kunjar* W R 1864 Act X 22 42 (though undoubtedly a document may be explained by oral evidence the latter cannot be admitted to vary the terms of a written instrument which terms are in themselves clear and undoubted)

(4) *Mahalachmi Ammal v Palani Chetti* 6 Mad H C R 245 246 247 (1871) In re *Amrita Bazar Patrika Press Ltd* 47 C 190

(5) *Beti Maharani v Collector of Etawah* 17 A. 198 209 P C (1894) *Balkishen Das v Legge* 4 C W N 153 (1899) s c 22 A 149

(6) *Succaram Morari v Kalidas Kalani* 18 B 611 (1894) *Balkishen*

Das v Legge *supra* See *Mathura Prosad v Rukmini Koer* 17 C L J 87 (1913) (*ekranama*) *Artyanoni Dass v Lahan Chandra Sen* 43 C 660 (1916) (deed of covenant) *Bank of Bengal v Ramanatha Chetty* P C 43 C 527 (1915) (power of attorney) *Vissanji Sons & Co v Shapurji Burjorji* P C 36 B, 387 (1912) *Doorga Prosad v Gosta Behari Nandi* 17 C L J 53 (1913)

(7) *Braddon v Abbott* Taylor's Report 342 356 (1848) Supreme Court Plea Side per Sir L Peel C J

(8) *Nelson Line v Nelson & Sons* H L (1907) Com cases pp 13 104, & see also *Sheik Mahamad Ratuther v British India Steam Navigation Co*, 32 M 95 & *Price & Co v Union Lighter age Co* (1903) 1 K B, 750

documents executed in the Mofussil, it was held in another later case⁽¹⁾ that these came within the statement of the Privy Council, in *Hanumanpersaud Panday's Case*⁽²⁾ that deeds and contracts of the people of India ought to be liberally construed

In the citations now made, two important classes of extrinsic evidence are alluded to viz., proof of *surrounding circumstances* and of *usage*. Firstly, the document must be applied to the facts. In order that the Court may be placed as nearly as possible in the position of the author of the instrument, evidence is enable it to identify retain the nature and prov 6) Secondly, evidence may be given when necessary, of the meaning of the words and signs made upon a document, for without such a knowledge it would be impossible to understand and construe a document⁽³⁾ (section 98). But evidence may not be given to show that common words, the meaning of which is plain and which do not appear from the context to have been used in a peculiar sense, were in fact so used⁽⁵⁾. Under this heading will come the testimony both of experts and non experts as to the meaning, but not as to the construction of the language and evidence of usage to explain the terms of the document⁽⁶⁾. In the undermentioned case, it was held that in construing a Hindu deed of compromise the situation of the parties and their rights at the time the deed was executed must be considered⁽⁷⁾. Usage is admissible not only to *explain* but to *annex unexpressed incidents* to a document, provided they are not expressly excluded by, nor inconsistent with, the terms thereof (section 92, prov. (5) (8).

The abovementioned class of extrinsic evidence will have to be resorted to in the case of documents apart from the question of ambiguity properly so-called. Another set of rules comes into play where there is an ambiguity in the document. But as these latter rules depend upon the existence of some ambiguity, it is clear that when the words of a document are free from ambiguity and external circumstances do not create any doubt or difficulty as to the proper application of the words, extrinsic evidence for the purpose of explaining the

which would have the effect of materially changing those terms. The language used must be given effect to⁽¹⁰⁾. In a case where a vendor had purported to convey all his right, title, and interest, but contended that he only meant

⁽¹⁾ *Ianardan v. Anant* (1908), 32 B. 586

⁽²⁾ *Hanumanpershad Panday v. Mt. Baboe Munraj Koonaree* (1856) 6 Moo I A 411 *Aidham Singh v. Sham Singh*, 48 P R C J 40 p 155 (1913)

⁽³⁾ See cases cited in the notes to s 92 prov (6) *Succaram Morari v. Kalidas I aliasji* 18 B 631 (1894), *Janki v. Bharon* 19 A 133 (1896) *Rani Meva v. Hules Karcor* 13 B L R 312 (1874), and see notes to s 92 Proviso (6) *post*, *Balbislen Das v. Legge* 22 A, 149, 156 (1899) *Jafar Husen v. Ranjit Singh* 21 A 4 (1898), *Phipson Ev*, 5th Ed., 598—601

⁽⁴⁾ See s 98 *post*

⁽⁵⁾ *Steph Dig* Art 91, cl (2) So evidence may not be given to show that

the word 'boats' in a policy of insurance means 'boats not slung on the outside of the ship on the quarter' *Blacket v. Royal Exchange Co*, 2 C & J, 244

⁽⁶⁾ *Phipson Ev*, 5th Ed., p 580, s. 98, *post*

⁽⁷⁾ *Sambas v. Ayyar v. Visham Ayyar* (1907) 30 Mad 356 & see *Dinonath Muberry v. Gopal Churn Muberry*, 8 C L R 57, & *Ganpat Rao v. Ram Chandar*, 11 All, 296, & *Sreenulthy Rabutti Dossee v. Sibehunder Mullick*, 6 Moo I A, 1.

⁽⁸⁾ See notes to s 92 prov (5) *post*.

⁽⁹⁾ See s 94 *post*, *Shore v. Wilson*, 5 Scott N R, 598 1037

⁽¹⁰⁾ *Mussumat Bhugbutti v. Chowdhry Bholanath*, 21 I A 256 (1875), *Shore v. Wilson* *supra*

to convey as beneficial owner, (being then under the belief that he was beneficially entitled) and not as an executor, it was held by the Privy Council that the plain legal interpretation of a document could not be affected by speculation as to what particular rights were present in the mind of a party, and that in the circumstances he had conveyed as executor (1) There may, however be an ambiguity which again may be either patent or latent In the case of a patent ambiguity, no extrinsic evidence in explanation of the instrument will be admissible (section 93, *post*) (2) If on the other hand, there be a latent ambiguity extrinsic evidence will be admissible (sections 95—97, *post*) (3) When extrinsic evidence is thus admissible in explanation of latent ambiguities all forms of evidence including declarations of intention by the author of the instrument (1), will be receivable

So the conduct and acts of, and course of dealing between, the parties will be admissible in aid of the interpretation of documents the meaning of which is doubtful (5) It was held by the Privy Council that though a power of attorney did not expressly authorize certain transactions, the authority was implied by the nature of the business with which the attorney was entrusted (6) And in another it was held by the Privy Council that all the facts and circumstances taken in conjunction with the statements in a document showed that it was not part of a *bona fide* family arrangement (7) In the case of *Purmanandas Jeeandas* (8) the admissibility of this form of evidence was observed upon as follows —“The authorities in favour of interpreting the lease by the acts of the parties are summed up in Bloom’s *Legal Maxims* (3rd edition, 608), under the title ‘*Contemporanea expositio est optima et fortissima in lege*’ The rule is that ambiguous words may be properly construed by the aid of the acts of the parties See *Doe d Pearson v Ries* (9), per Tindal, C J, and *Chapman v Bluck* (10) *per* Park, J The widest effect given to the acts of parties as assisting the interpretation of written instruments is in the case of ancient grants and charters, specially in determining what passed thereunder,

(1) *Bijraj Nopani v Fara Sundary Dasce* P C 42 C 56 (1915) see *Para Sundary Dasce v Bijraj Nopani* 37 C 362

(2) See s 93 *post*

(3) See ss 95—97 *post*

(4) See *ib post*

(5) In *re Pirmanandas Jeeandas* 7 B 109 116 (1882) *Mohan Lall v Urno poorna Dossee* 9 W R 566 569 (1868) [evidence as to the mode in which the parties had dealt with the property in dispute] *Baboo Ranbuddun v Raneer Kunowar* W R 1864 Act X 22 24 [evidence of subsequent dealings between the parties] *Baboo Dhunput v Sheikh Jossalar* 8 W R 157 153 (1867) see s 8 ante p 145 and cases cited in note 5 on that page and in *Plipson Ev* 5th Ed 580—581 but see also *Ford v Yates* 2 M & Gr 549 *Lockett v Niclin Exch* 30 *Jafar Husen v Ranjit Singh* 21 A 4 (1878) [in construing a mortgage deed the terms of which are of a doubtful character the intention of the parties as deducible from their conduct at the time of execution and other contemporaneous documents executed between them is to be looked at] In a case before the Privy Council in which the document was unambiguous the committee held that the

legal effect of an unambiguous document such as that in suit could not be controlled or altered by evidence of the subsequent conduct of the parties *Balkrishen Das v Pa i Narain* 30 C 738 (1903) and *Vissanji Sois v Shapurji Burjorji Bhorsocho* P C (1912) 36 B 387 and for construction of a doubtful grant in favour of the grantee see *Higgins v Nobin Chander* 11 C W N 809

(6) *Bank of Bengal v Ramanathai Chetty* P C 43 C 527 (1915) see *Bryant Pous and Bryant v Banque du Peupl* A C 170 (1893)

(7) *Nityamon: Dossee v Lokias Chandra Sen* P C 43 C 660 (1916)

(8) 7 B 109 116 (1882)

(9) 8 Bing 178 181 [Upon the general and leading principle in such cases we are to look to the words of the instrument and to the acts of the parties to ascertain what their intention was if the words of the instrument be ambiguous we may call in aid the acts done under it as a clue to the intention of the parties]

(10) 4 Bing N C 187 195 [The intention of the parties must be collected from the language of the instrument and may be elucidated by the conduct they have pursued] *Morgan v Bissell* 1 T R, 735 *Baxter v Brown* 2 W Bl 973 1

a matter naturally hard to discover from the instrument itself after the lapse of many years. The case of *Waterpark v Feunel*(1) seems to be the one which goes furthest in this direction, in which case the word village was held to include a mountain. On the other hand the rule is plain that the acts of parties cannot be allowed to affect the construction of written instruments if that construction be in itself unambiguous, the cases of *Moore v Foley*(2) and *Iguldien v May*(3) already cited on the first point reserved are also authorities on this point (4). Thus where an ancient document is not ambiguous its interpretation cannot be affected by evidence that the parties have for a long time acted as if they understood it otherwise (5). In a case in the Privy Council it was said that *contemporanea expositio* as a guide to the interpretation of a document is often dangerous and that great care must be taken in its application (6).

The English practice on this point is now much modified. The modern rule allows circumstantial evidence of intent in all cases of ambiguity, patent or latent, provided the former be not inherently incurable but confines direct declarations of intent strictly to equivocations (7).

The Indian Succession Act in Part XI contains similar provisions to some of those in this Chapter, which it is declared (section 100) is not to be taken to affect any of the provisions of the former Act relating to the construction of Wills(8), and section 68 of that Act has now been incorporated in the Hindu Wills Act.

The Indian Succession Act

91. When the terms of a contract, or of a grant(9) or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence(10) shall be given in proof of terms of such contract, grant or other disposition of property, or of such matter,(11) except the

Evidence of terms of contracts, grants and other dispositions of property reduced to form of document

(1) 7 H L Cal 684

(2) 6 Ves 232

(3) 9 Ves 325 and 7 Fast 237

(4) In *re Piriaiasdas Jeeandas* 7 B 109 116 (1887). So in *Balksi v Das v Ran Narayan* 7 C W N 58 (1903) the Privy Council held that it would not be right to hold that the legal construction or legal effect of an unambiguous document like the *chharnai* in that case could be controlled or altered by evidence of the subsequent conduct of the parties and that the case of *Baboo Doorga v Mussamat Kundun* 1 I A 55 (1873) was no authority for such a proposition.

(5) *Kulada Prasad Deghore v Kali Das Naik* 42 C 536 (1915).

(6) *Raghoebarao Saieb v Lakshmanrao Saheb* P C 36 B 639 17 C L J 17 (1913).

(7) See *Plipson* 5th Ed 580 581—Thayer p 424 Hawkins 2 Jur Soc Pap 298 *Colpoys v Colpoys* Jacob 451 & Theobald on Wills 7th edition (1908) p 123 and Jarman on Wills 6th edition p 516.

(8) See ss 93—104 *post* and for operation of Hindu Transfers and Bequests Act Madras Act I of 1914 see *Muthusamy Ayyar v Kalayam Ammal* 40 M

818 (1917).

(9) In *Somasindara Mudaly v Durgasani Mudalar* 27 M 30 (1903) the question was referred to whether the word grant in this section meant a grant of property only or whether it refers to other grants also in which latter case it was doubted whether the authority to adopt set up in that case could be proved. For meaning of grant in India where relating to property see *Shashi Blusan Misra v Jyoti Prasad Singh* P C 44 C 585 (1917) (it has not the special and technical meaning assigned to it in English Law). See *Hari Narayan Singh Deo v Srivats Chakravarti* P C 37 C 723 (1910) 37 I A 136 *Durga Prasad v Braja Nath Bhoose* P C 39 C 696 (1912) 39 I A, 133 and for construction of grant see *Secretary of State v Srimasa Charia* 40 M 268 (1917).

(10) Evidence may however be taken where a Criminal Court finds that a confession or other statement of an accused person has not been recorded in manner prescribed—See Act V of 1898 s 533 and *post*.

(11) Where an unregistered lease is rejected evidence may be given as to the relationship of landlord & tenant *Nago*

document itself, or secondary evidence(1) of its contents in cases in which secondary evidence is admissible under the provisions herein-before contained.

Exception 1.—When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.

Exception 2.—Wills [admitted to probate in British India](2) may be proved by the probate.

Explanation 1.—This section applies equally to cases in which the contracts, grants or dispositions of property referred to are contained in one document, and to cases in which they are contained in more documents than one.(3)

Explanation 2—Where there are more originals than one one original only need be proved.(4)

Explanation 3.—The statement, in any document whatever, of a fact other than the facts referred to in this section, shall not preclude the admission of oral evidence as to the same fact.(5)

Illustrations

(a) If a contract be contained in several letters, all the letters in which it is contained must be proved

(b) If a contract is contained in a bill of exchange, the bill of exchange must be proved (6)

(c) If a bill of exchange is drawn in a set of three, one only need be proved

(d) A contracts, in writing with B, for the delivery of indigo upon certain terms. The contract mentions the fact that B had paid A the price of other indigo contracted for verbally on another occasion

Oral evidence is offered that no payment was made for the other indigo

The evidence is admissible

(e) A gives B a receipt for money paid by B

Oral evidence is offered of the payment The evidence is admissible

Principle.—It is a cardinal rule of evidence, not one of technicality but of its (7)
necessity of
matter

v. *Tukaram*, 49 I C, 843 Again a document may not be admissible to prove a transfer but may be used to show nature of possession taken *Varada Pillai v Jecra Ratnammal*, 24 C W. N 346

(1) *E.g.*, see *Entisham Ali v Jamna Prasad* 24 Bom L R 675 (1922)

(2) These words in brackets in s 91 *Exception (2)* were substituted for the original words by Act XVIII of 1872, s 7

(3) See *Illusts (a) & (b)*

(4) See *Illust (c)*

(5) See *Illusts (d) & (e)*

(6) This illustration does not prevent a plaintiff from resorting to his original consideration in cases of unstamped documents in a suit on the consideration where there is an independent admission of the loan *Krishnaji v Rajmal*, 24 B, 360 364 (1899)

(7) *Dinomayi Debi v Roy Luchmiput*, 7 I A, 8, 15 (1879).

which
ever
or by
other evidence is excluded from being used either as a *substitute* for such instruments, or to *contradict* or *alter* them. This is a matter both of principle and policy, of principle, because such instruments are in their nature and origin entitled to a much higher degree of credit than parol evidence of policy, because it would be attended with great mischief, if those instruments upon which men's rights depended were liable to be impeached by loose collateral evidence. Where the terms of an agreement are reduced to writing, the document itself, *being constituted by the parties as the expositor of their intentions*, is the only instrument of evidence in respect of that agreement which the law will recognise, so long as it exists for the purpose of evidence "(1) The very object for which writing is used is to perpetuate the memory of what is written down and so to furnish permanent proof of it. Unless the rule required the production of the document, the benefit arising from a written record of past transactions would be lost (2) See Introduction, *ante* and Notes, *post*.

s 3 ('Document')

s 3 ("Evidence")

s. 63 ("Secondary evidence")

ss 65, 66 (Cases in which secondary evidence is admissible)

s 92 (Exclusion of evidence of oral agreement)

ss. 92—100 (Admissibility of extrinsic evidence to affect documents)

s 144 (Objection to oral evidence as to matters in writing)

Steph. Dig., Art 90, pp 184, 185, Taylor, Ev., §§ 398—427. Best, Ev., § 223, Roscoe, N P Ev., 1—4

COMMENTARY.

The cases under the rule requiring the contents of a document to be proved by the document itself if its production be possible, may be arranged in three classes(3) the first class containing all writings, other than those contained in the second and third classes, material to the issue, the existence or contents of which are disputed (4) This class is provided for by section 64, *ante*, which enacts that documents must be proved by primary evidence, except in the cases thereafter mentioned (5) The second and third classes are provided for by the present section. The second class contains those instruments which the parties themselves have put in writing, and the third, those instruments which the law requires to be in writing. As to the cases in which secondary evidence may be given, see sections 65, 66, *ante*.

Extrinsic evidence inadmissible to supersede the document.

When it is stated that oral testimony cannot be substituted for any writing included in either of the three classes abovementioned, a tacit exception must, in England, perhaps be made in favour of the parol admissions of a party and of his acts amounting to admissions, both of which species of evidence are always received as primary proof against himself, and those claiming under him, although they relate to the contents of a deed or other instrument which are directly in issue in the cause (6) On this point the Indian Evidence Act introduces a stricter rule, oral admissions of the contents of documents not being admissible as primary but only as secondary evidence (7) Written admissions

(1) Starkie Ev., pp 648, 655, cited in *Kasheenaib Chatterjee v Chundy Churn*, 5 W R 68 60 (1866)

(2) Step Intro 171 172, Steph Dig., pp 184, 185, Best, Ev., § 223

(3) Taylor, Ev., § 398

(4) Taylor, Ev., § 398

(5) v *ante*, notes to s 64, and Taylor, Ev. § 409

(6) Taylor Ev., §§ 410, 411

(7) S 22, *ante*

of the existence, condition or contents of a document, are admissible under cl (b), section 65, *ante*, without notice, proof of loss or the like, but they are only secondary and not primary evidence (1) A witness may, however give oral evidence of statements made by other persons about the contents of documents if such statements are in themselves relevant facts (2) As to the taking of objection to the giving of evidence excluded by this section, *see* section 144 *post*

Matters reduced to the form of a document by the agreement of parties

In the first place, oral proof cannot be substituted for the written evidence of any contract, grant or other disposition of property, which the parties have put in writing. It is the ultimate fact and in all cases of ties themselves as

agreement (3) In every country certain negotiations almost invariably take place before a contract is reduced to writing, and it is usual that the terms of the contract should, with more or less accuracy, be agreed on verbally before the written instrument embodying them is prepared. But when a contract has once been put in writing and signed by the parties, the written instrument contains, and is, the only evidence of the contract and the parties cannot give it the go by, and fall back upon the original verbal agreement (4) The written contract is not collateral, but is of the very essence of the transaction (5) and consequently in all proceedings civil or criminal, in which the issue depends in

that
good
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tiffs
must

either produce it, or account for its absence (6) So, if a landlord were to bring an action against a tenant for rent and non repair, and it should appear that the parties had agreed by parol that the tenant should hold the premises on the terms contained in a former lease between the landlord and the stranger a

(1) S 65 cl (b)

(2) S 144 *post*

(3) Taylor Ev § 401 cited in *Benarasi Das v Bhikkhari Das* 3 A 17 721 722 (1881)

(4) *Jivandas Keshavji v Framji Nana bhai* 7 Bom H C R. O C G 45 68 (1870) *Pothu Reddi v Velazudaswan* 10 M 94 97 95 (1886)

(5) See *R v Castle Morton* 3 B & A 590 *per* Abbott C J. The principles on which a document is deemed part of the essence of any transaction and consequently the best or primary proof of it are thus explained by Domat — The force of written proof consists in this men agree to preserve by writing the remembrance of past events of which they wish to create a memorial either with a view of laying down a rule for their own guidance or in order to have in the instrument a lasting proof of the truth of what is written. Thus contracts are written in order to preserve the memorial of what the contracting parties have prescribed for each other to do and to take

for themselves a fixed and immutable law as to what has been agreed on. So testaments are written in order to preserve the remembrance of what the party who has a right to dispose of his property has ordained concerning it and thereby to lay down a rule for the guidance of his heir and legatees. On the same principle are reduced into writing all sentences judgments edicts ordinances and other matters which either confer title or have the force of law. The writing preserves unchanged the matters entrusted to it and expresses the intention of the parties by their own testimony. The truth of written acts is established by the acts themselves that is by the inspection of the originals — See Domat's Civ Law L. 3, Tit. 6 § 2

(6) Taylor Ev § 401 *Brewer v Palmer* 2 Esp 213 *per* Lord Eldon *Fenn v Griffith* 6 Bing., 533 4 M & P 299 S C *Henry v M of Westmeath* Ir Cir R 809 *per* Richard B *Thunder v Earren* 8 Ir Law R. 181 *Rudge v McCarthy* 4 id 161

nonsuit would be directed unless this lease could be produced (1) Where it was alleged that an oral agreement to pay was made when a promissory note was executed, it was held that the latter could alone supply evidence of the agreement, and since it was inadmissible through default in stamping no proof could be tendered (2)

The same strictness in requiring the production of the written instrument has prevailed where the question at issue was simply what amount of rent was payable by the actual party to whom a demise had come into possession (5), and in an action where it appeared that the work was commenced under an agreement in writing but the plaintiff's claim was for extra work, it has been several times held that, in the absence of positive proof that the work in question was entirely separate from that included in that agreement, and was in fact done under a distinct order, the plaintiff was bound to produce the original document, since it might furnish evidence not only that the items sought to be recovered were not included therein, but also of the rate of remuneration upon which the parties had agreed (6) On like principles where an auctioneer delivered to a bidder to whom lands were let by auction, a written paper signed by himself containing the terms of the lease, the landlord was held bound, in an action for use and occupation, to produce this paper duly stamped as a memorandum of an agreement (7) A deed of partition was executed among three brothers C, N & B, on the 19th March 1867, but was not registered It recited that, some years previously to its date, a division of the family property with the exception of three houses, had been effected, and it purported to divide these houses among the brothers In a suit brought by C's widow for the recovery of the house which fell to C's share, it was held that, although the deed did not exclude secondary evidence of the partition of the family property previously divided yet it affected to dispose of the three houses by way of partition made on the day of its execution and, therefore, secondary evidence of its contents was inadmissible by the terms of the present section (8) Oral evidence of the fact of partition is admissible even when the deed embodying the terms of the partition is inadmissible in default of registration (9)

The fact that in cases of this kind, the writing is in the possession of the adverse party, does not change its character, it is still the primary evidence of the contract and its absence must be accounted for by notice to the other party to produce it or in some other legal mode, before secondary evidence of its contents can be received (10)

(1) *Id* *Turner v Power* 7 B & C 625 M & M 131 S C

(2) *Ganga Ram v Amir Chand* 66 P R (1901) and see *Azimut Singh v Kalwant Singh* 71 P R (1906)

(3) *Ib* § 402 *R v Merthyr Tydvil* 1 B & Ad 29 *Augustine v Challis* 1 Ex R 280 where Alderson B observed 'You may prove by parol the relation of landlord and tenant but without the lease you cannot tell whether any rent was due' See as to this *Nago v Tukaram* 49 I C 843

(4) *Ib* *R v Rauden* 8 B & C 703, 3 M & R, 426, S C

(5) *Ib* *Doe v Harcey*, 8 Bing, 239, 1 M & Sc. 374 S C

(6) *Taylor Ex*, § 401 *Vincent v Cole*, M & M 257 per Lord Tenterden 3 C. & P, 481 S C, *Burton v Cornish*, 1

Dowl & L 585, 12 M & W 426 S C.; *Jones v Hoxell* 4 Dowl 176, *Holbarn v Stephens* 5 Jur 71 Bail C per Williams J *Parton v Cole*, 6 Jur 370 Bail C, per Patteson J see *Reid v Batte*, M & M, 413, and *Edie v Kingsford* 14 Com B 759

(7) *Ib* *Ramsbottom v Morley* 2 M & Sc 445 See *Ramsbottom v Tunbridge*, ib 434 See also *Haukins v Warre* 3 B & C. 697, where Abbott C J draws the distinction between papers signed by the parties or their agent and those which are unsigned

(8) *Kachubadbin Gulabchand v Krishna baikom Babaji* 2 B 635 (1877)

(9) *Chhotal Aditram v Bai Mahakore*, 41 B, 466 (1917)

(10) *Taylor, Ex*, § 404

It has been held, however, both in England(1) and in this country(2) that if a plaintiff can establish a *prima facie* case without betraying the existence of a written contract relating to the subject matter of the action, he cannot be precluded from recovering by the defendant subsequently giving evidence that the agreement was reduced into writing, but the defendant, if he means to rely on a written contract, must produce it as part of his evidence, and in the event of its turning out to be unstamped or insufficiently stamped, he must pay the duty and penalty (3) In practice what usually happens is that so soon as the plaintiff begins to give parol evidence of an agreement which the defendant knows to be in writing, objection is taken by the defendant and the plaintiff is forced by the Judge to produce the agreement under penalty of having the parol evidence excluded (4) When the plaintiff's case has been closed the defendant is not to get rid of it by suggesting the existence of a writing which he is unable legally to produce, and on the subject of which he might have cross examined the plaintiff's witnesses In the case last cited, the facts were as follows — The plaintiffs alleged that in 1866 the defendant's father had let land to their predecessor in title in perpetuity on *fazendari* tenure for building purposes subject to a certain rent They complained that the defendant sought to eject them and they prayed for a declaration that they were entitled to the land in perpetuity suit held that they be ordered to plaintiffs made

there was any agreement of lease Before the case had concluded, however, a document was produced which was said to be a counterpart of the agreement of letting made in 1866 It was not registered, and was, therefore, inadmissible in evidence It was not tendered, but it was shown to the defendant in cross examination, and he denied that it was a genuine document In this case it was held that, as the document was not referred to in the plaint, written statement or issues, and was not before the Court, the evidence should be looked at to ascertain the terms of the tenancy by which the plaintiffs and their predecessors in title held the property (5) It has been held by a Full Bench of the Madras High Court that an agreement to execute a sub lease and have it registered at a future date affects immovable property as a lease within the meaning of section 3 of the Indian Registration Act (III of 1877) and cannot if unregistered be received in evidence of the transaction (6)

Moreover, where the written communication or agreement between the parties is *collateral* to the question in issue, it need not be produced Thus if during an employment under a written contract, a verbal order is given for separate work, the workman can perhaps recover from his employer the price of this work, without producing the original agreement provided he can show distinctly that the items for which he seeks remuneration were not included therein, as, for instance, if it clearly appears, that whilst certain work was in progress in the inside of a house under a written agreement, a verbal order was

(1) Taylor Ev § 404 *Reed v Deere* 7 B & C 261 *Stevens v Pinney* 8 Taunt 327 *Fidler v Ray* 6 Bing 332 *R v The Inhabitants of Padstow* 4 B & Ad 208 *Marston v Dean* 7 C & P 13 *Magway v Knight* 1 Man & Gr 944 followed in the case cited in next note

(2) *Yeshwadabai v Ramchandra Tukaram* 18 B 66 74 (1893)

(3) And this even though a notice to produce the document has been served on

the plaintiff Taylor Ev § 404 and cases there cited

(4) Taylor Ev § 404

(5) *Yeshwadabai v Ramchandra Tukaram* 18 B 66 74 (1893)

(6) *Naryenan Chetty v Muthiah Sertai* F B 35 M 63 (1912) distinguished *Raja Venkatagiri v Narayana Redd* 17 M 456 (1894) and overruled *Konduru Srinivasa Charyulu v Gothumukkala Venkataraj* 17 M L J 218

given to execute some alterations or improvements on the outside (1) So also the fact of the existence of a particular relationship may be shown by parol evidence, though the terms which govern such relationship appear to be in writing. The section only excludes other evidence of the terms of the document. Thus, if the fact of the occupation of land is alone in issue, without respect to the terms of the tenancy, this fact may be proved by any competent parol evidence, such as payment of rent, or the testimony of a witness who has seen the tenant

was under an agreement
or written rules, but the
did not produce these rules

in an action of trespass under a plea denying his possession, because such plea only renders it necessary for the plaintiff to prove the extent of the tenant's term, which, having been agreed to by parol, does not depend upon the written rule (3) Where money is lent and a promissory note is given therefor, held *per curiam* that the creditor can sue for the money due as on the original contract of loan if the promissory note can not be proved. *Per Pratt, J.* If the promissory note is given at the time the loans were taken the presumption would ordinarily be that there was no cause of action independently of the note. This, however, is matter of evidence and if in any particular case there is a cause of action on the loan independently of the promissory note the plaintiff can sue on the original contract (4) The fact of partnership may be proved by parol evidence of the acts of the parties without producing the deed (5), and the fact of partition though the partition deed

And the fact that a party has agreed
established by oral testimony, though
commission have been reduced into

case it was held that there is nothing in this section to depart from the rule of English Law that in an action on a written contract oral evidence is admissible to show that the party liable on the contract contracted for himself and partners are liable to be sued on the contract (8) In a case in the Calcutta

, which was inadmissible because

unregistered there was evidence that the defendant who was acknowledged to be in possession of

that such evidence
tenant existed (apar

fied (9). And in another case in the same High Court it was held that where the terms of a contract for payment of interest were reduced to writing and such writing was excluded from evidence by section 10B of the Court of Wards

It was held
landlord and
was as speci-

(1) Taylor Ev § 405 *Reid v Batie* M & M 413 *per Lord Tenterden* commented on by Pattenon J in *Parton v Cole* 6 Jur 370 Bail C See *Vincent v Cole* M & M, 257 and cases cited in Taylor Ev § 402, n (1)

(2) *Kedar Nath v Shurfoonnissa Bibee*, 24 W R 425 (1875), *R v Holy Trinity, Hull*, 7 B & C 611 1 M & R, 444, s c, *Doe v Hartey*, 8 Bing, 239, 242, 1 M & Sc 274 s c, *Spiers v Wilham*, 4 Cranch 398 *Dennet v Cracker*, 8 Greenl., 239 244 See however, the observations of Best C J, on the case of *R v Holy Trinity in Strother v Barr*, 5 Bing, 158, 159, see also *Twynnam v Knowles*, 13 Com B 222, Taylor, Ev § 405, *Varada Pillai v Jeevarainammal*, 24 C W N, 346

(3) Taylor, Ev, § 405, *Hey v Moor-*

house, 66 Bing N C, 652, s c, 8 Scott, 156

(4) *Maung Kyi v Ma Ma Gale* 54 I C, 84 F B, s c 12 Bur L T, 137

(5) *Alderson v Clay*, 1 Stark R 405 *per Lord Ellenborough*

(6) *Chhotal Aditram v Bai Mahakore*, 41 B 466 (1917)

(7) *Whitefield v Bland*, 16 M & W, 282 See *Explanation* (3), *post*

(8) *Venkatasubbiah Chetty v Govindarajulu Naidu* (1908), 31 M, 45 Ref to in *Ebrahimbhoy v Mamooji*, 45 B, 1242 (1921), s c 23 Bom L R, 767

(9) *Amir Ali v Askup Ali*, 19 C L J, 423 (1913) *Jenkins, C. J.*, and *Mukherjee, J* following *Banku Behary Christian v. Raj Chandra Pal*, 14 C W N, 141 (1909).

Act, oral evidence was inadmissible to prove the terms of the contract but was admissible to show that the contract had been reduced to writing (1)

Parol evidence will be admissible when the writing only amounted either to mere unaccepted proposals or to minutes capable of conveying no definite information to the Court, and *could not by any sensible rule of interpretation, be construed as memoranda, which the parties themselves intended to operate as fit evidence of their several agreements* (2) Section 91 refers to cases where the contract has, by the intention of the parties, been reduced to writing (3)

So where at the time of letting some premises to the defendant, the plaintiff had read the terms, from pencil minutes, and the defendant had acquiesced in these terms, but had not signed the minutes (4) and where, upon a like occasion a memorandum of agreement was drawn up by the landlord's bailiff, the terms of which were read over, and assented to, by the tenant, who agreed to bring surety and sign the agreement on a future day, but omitted to do so (5), and where in order to avoid mistakes the terms upon which a house was let, were at the time of letting reduced to writing by the lessor's agent, and signed by the wife of the lessee, in order to bind him, but the lessee himself was not present, and did not appear to have constituted the wife as his agent, or to have recognized her act further than by entering upon and occupying the premises (6) and where lands were let by auction, and a written paper was delivered to the bidder by the auctioneer concerning the terms of the letting, but this paper was never signed either by the auctioneer or by the parties (7), and where, on the occasion of hiring a servant the master and servant went to the chief constable's clerk, who, in their presence and by their direction, took down in writing the terms of the hiring but neither party signed the paper, nor did it appear to have been read to them (8), and where the document in question was not a promissory note or bond or acknowledgment of debt but appeared to be nothing more than a mere memorandum or note drawn up between the parties as to a transaction which had just been settled between them (9), in all these instances the Court held that parol evidence was admissible upon the grounds above mentioned. And it has been held that since the consideration of the terms of such contract, in proof of which evidence can be given, this section does not operate as a bar to the consideration, and that a landlord may prove the improvements in consideration of which an enhanced rent was agreed on (10)

On the same principle it has frequently been held that, where the action is not directly upon the agreement or non performance of its terms, but is in tort for its conversion or detention or negligent loss, the plaintiff may give parol evidence descriptive of its identity, without giving notice to the defendant to

(1) *Ram Bahadur v. Dursuri Ram* 17 C L J 399 (1913)

(2) *Taylor Ev* § 406

(3) *Balbhadr Prosad v. Maharajah of Betia* 9 A 351, 356 (1887) *Jamna Das v. Srinath Roy*, 17 C 177 See cases cited in note to s 92 post

(4) *Taylor Ev* § 406, *Trewhitt v. Lambert* 10 A & E 407 s c 3 F D 676, See *Drant v. Brown*, 3 B & C 665, s c, 5 D & R, 582 and *Bethell v. Blencowe*, 3 M & Gr, 119, where the Court held that written proposals made pending a negotiation for a tenancy might be admitted without a stamp as proving one step in the evidence of the contract

(5) *Ib Doe v. Cartwright* 3 B & C 326 see *Hacking v. Warre* 3 B & C, 490 s c 5 D & R 512

(6) *Ib R. v. St Martin, Leicester*, 2 A & E 210 s c 4 N & M 202

(7) *Taylor Ev* § 406 *Ramsbottom v. Tunbridge* M & Sel 434 See *Ramsbottom v. Morley* 2 M & Sel 445, cited *Taylor Ev* 402

(8) *R v. Bramble* 2 A & E, 514 See for other instances *Ingram v. Lea* 2 Camp 521, *Dalson v. Stark* 4 Esp. 163 *Wilson v. Bowie* 1 C. & P., 8

(9) *Udib Upadhyay v. Bhavandini* 1 All L J, 483 (1904)

(10) *Probat Chandra Gangapadhyay v. Chirag Ali* (1906), 33 C, 607 (& *Probat Chandra v. Chirag Ali* 11 C W N, 62), distinguished in *Idityam Iyer v. Ram Krishna Iyer*, 38 M 514 (1915) (evidence to vary consideration in sale deed inadmissible)

produce the document itself(1); and even though the defendant be willing to produce it without notice, the plaintiff is not bound to put it in, but may leave his adversary to do so, if he think fit, as part of his case (2) For, as has been observed for the purpose of identification, no distinction can be drawn between written instruments and other articles, between trover for a promissory note and trover for a wagon and horses (3)

The same rule prevails in criminal cases, and, therefore, if a person be indicted for stealing a bill or other written instrument, its identity may be proved by parol evidence, though notice to produce it has been served on the prisoner or his agent (4) If, however, the indictment be for forgery, and the forged instrument be in the hands of the prisoner, the prosecutor must serve him or his solicitor with a notice to produce it, before he can offer secondary evidence of its contents (5)

The next class of cases in which oral evidence cannot be substituted for the writing are those in which there exists any *instrument which the law requires to be in writing* The law having required that the evidence of the transaction should be in writing, no other proof can be substituted for that so long as the writing, which is the best evidence, exists (6) The words in this section "*in all cases in which any matter is required by law to be reduced to the form of a document*" indicate this class, some of the chief instances of which in India are(7) —In judicial proceedings the judgments and decrees in civil cases(8), judgments and final orders in criminal Courts(9), the depositions of witnesses in civil cases(10), and in criminal trials, depositions,(11) confessions(12) and examinations of accused persons (13) The case of an informal *deposition* has not been specially provided for (14) The Code of Criminal Procedure, however, has expressly provided for the taking of oral evidence of statements made by *accused persons* when the writing is informal It provides that, if any Court before which a confession or other statement of an accused person recorded, or purporting to be recorded under section 164 or section 361 of the Criminal Procedure Code, is tendered in evidence or has been received in evidence, finds that any of the provisions of either of such sections have not been complied with by the Magistrate recording the statement, it shall take evidence that such person duly made the statement recorded, and notwithstanding anything contained in section 91 of the Evidence Act, such statement shall be admitted, if the error has not injured the accused as to his defence on the merits (15) These provisions apply to Courts of Appeal, Reference and Revision Section 533 of the Criminal Procedure Code modifies, therefore, as regards confessions, section 91 of this Act It does not however, apply when no attempt at all has been made to conform to the provisions of sections

Matters required by law to be reduced to the form of a document

(1) *Scott v Jones* 4 Taunt 865 *Hov v Hall* 4 East 274 *Bucher v Jarrat*, 3 B & P 143 *Red v Gamble* 10 A & Ev, 597, *Ross v Bruce*, 1 Day, 100 *The People v Holbrook*, 13 Johns 90, *M Lean v Hertog* 6 Serg & R 154 These cases overrule *Crown v Abrahams* 1 Esp, 50

(2) *Whitehead v Scott*, 1 M & Rob 2 per Lord Tenterden

(3) *Jolly v Taylor* 1 Camp 143 per Sir J Mansfield

(4) *R v Aukles* 1 Lea 294 297 n a 300 n a

(5) *R v Hawthorth*, 4 C & P 254, per Parke J *R v Fitzsimons* 1 R, 4 C L

1 See Taylor, Ev § 408

(6) Taylor, Ev, § 399

(7) See Field Ev, 6th Ed, 262 263

(8) Civ Pr Code (2nd Ed) O XX

rr 4—6 pp 854—855, O XLI, r 31, p 1311

(9) Cr Pr Code ss 367, 424 411, See *Yasin v R* 5 C. W N, 670 (1901), post s c, 28 C, 689

(10) Woodroffe & Amir Ali's Civ Pr Code O XVIII rr 5—14, 2nd Ed., pp 844—847

(11) Cr Pr Code, ss 354—362

(12) *Ib* s 364 See *Legal Remembrancer v Lahi Mohan Singh Roy* 49 C, 167 (1922)

(13) *Ib*, s 364

(14) Field, Ev 6th Ed, 263, see Taylor, Ev § 400

(15) Act V of 1898 Cr Pr Code, s 533 See first paragraph of notes to ss 24, 33, ante cf *R v Reed* 1 M & M, 403, *R v Christopher*, 2 C & L 994

164 and 364 of the Code(1), and though it was doubtful whether, under the Code of 1882, it contemplated or provided for cases in which there had been not merely an omission to comply with the law, but an infraction of it, yet under the present section, as amended by the Code of 1898, it seems that omission to comply with any of the provisions of section 164 or section 364 would be remediable (2) If a document framed under section 164 of the Criminal Procedure Code is inadmissible owing to a non compliance with the provisions of the law, the Court must proceed under section 533, if the defects are curable by the provisions of that section. If they are not so cured the document recording the confession is inadmissible and no other proof of the confession can be given (3) When a confession is inadmissible under the provisions of the Criminal Procedure Code, oral evidence to prove that such a confession was made or what the terms of that confession were, is also inadmissible by virtue of the terms of this section (4) No similar provision is contained in the Codes of Criminal or Civil Procedure for the rectification of informally recorded depositions of witnesses. It is clear that when depositions are required by law to be recorded in writing no evidence may be given of the statements of the witnesses other than their recorded depositions or secondary evidence of the contents of depositions where secondary evidence is admissible. It is further submitted that if depositions are informally recorded they are not admissible in evidence if excluded by the terms of this section. But it has been held in the Madras High Court that if a deposition irregularly taken has been admitted by the witness to be correct and signed by him it may be used against him, though he will not be estopped from proving that the record was in fact incorrect (5) A failure to comply with the provisions of sections 182, 183 of Act X of 1877 (Civil Procedure)(6), in a judicial proceeding has been held to be an informality which rendered the deposition of an accused inadmissible in evidence on a charge of giving false evidence based on such deposition and under the present section no other evidence of such deposition was admissible (7) But where the law either does not require the statements of witnesses to be reduced to writing(8), or merely requires the substance of the evidence of witnesses(9), or of witnesses and parties called as witnesses to be recorded, in the first of these cases oral evidence of such statements would be clearly admissible as also upon principle in the second case, of such statements as had not been recorded, such evidence not being in either case excluded by the terms of the present section (10) Section 161 of the Code of Criminal Procedure does not make it obligatory upon a police officer to reduce to writing any statements made to him during an investigation. Neither that section nor section 91 of this Act renders oral evidence of such statements inadmissible (11) It has been held in a recent case in the Madras High Court that while under section

(1) *R v Liram* 9 M 224 (1886)
R v Raghu 23 B 221 228 (1898)

(2) *Jai Narayan v R* 17 C 862 871 (1890), doubted in *Lalchand v R* 18 C 549 (1891), dissented from in *R v Visram Babaji* 21 B 495 (1896) *R v Ragou* 23 B 221 225 (1898) in which it was said there was no ground for a nice distinction between omissions to comply with the law and infractions of it

(3) *Jai Narayan v R* 17 C 868

(4) *R v Rai Ratan* 10 Bom H C R 166 (1873) *R v Shivya* 1 B 219 (1876) *R v Vram* 9 M 224 (1886)

(5) *Bogra v R* (1910) 34 M 141

(6) Now Order XVIII rr 5 and 6

(7) *R v Mayadeb Gossami* 6 C 762 (1881) and see *R v Mungul Das* 23 W

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(8) Cr Pr Code s 263

(9) *Ib* ss 264 355

(10) See ante first para of notes to s 33 and see cases cited in Taylor Ev § 416

(11) *R v Utamchand Kapurchand* 11 Bom H C R 120 (1874)

162 of the Criminal Procedure Code the written record of a statement made to a police officer in the course of an investigation is inadmissible, the section does not exclude oral evidence of such statement, whether the statement had

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terms (2) And the question of the admissibility of search lists has been discussed in several recent cases, and it has been held that search lists being merely declarations not on oath recording facts which must be proved in Court are not affected by this section (3) Also it has been held that even if the narrative of an extrinsic fact must by law be reduced to writing it may still be proved by oral evidence (4) Previous conviction should having regard to the provisions of section 91 of the Evidence Act and section 511 of the Code of Criminal Procedure be proved by copies of judgments or extracts from judgments or by any other documentary evidence of the fact of such previous convictions (5) Where there is a document it may be inadmissible for want of registration notwithstanding that its execution has been admitted (6)

Acknowledgments extending the period of limitation must be made in writing signed by the party against whom the property or right is claimed or by some person through whom he derives title or liability (7) When the

evidence is made out (9) It has been held by the Privy Council that an acknowledgment of liability only extends the period of limitation and does not confer title and is not a 'thing done' within the meaning of section 6 of the General Clauses Consolidation Act with reference to section 2 of the Limitation Act of 1877 (10) In this case it was also held that the Limitation Act applicable to an acknowledgment is the act in force when the suit is instituted The Allahabad High Court has held that section 31 of the present Limitation Act (IX of 1908) is not to be construed as reviving rights already barred under the Limitation Act of 1871 and refers only to Act XV of 1877 (11) An acknowledgment may be to another person not a creditor, under section

(1) *Mullukumaraswami Pillai v King Emperor* 35 M 397 (1912) reversing *R v Nilkanta* 35 M 247 (1912) See *Famindra Nath Banerjee v R* 36 C 281 (1908) *Emperor v Hanwaradda* 39 B 58 (1915)

(2) *Gouridas Namasudra v R* A C (1909) 36 C 665

(3) *Solas Nath v R* F B (1910) 34 M 349 *Public Prosecutor v Sarabu Channaya* (1909) 33 M 413 *Elamathan v R* (1910) 33 M 416

(4) *Solas Nath v R* (supra)

(5) *Yasn v R* 5 C W N 670 (1901) s c 28 C, 689

(6) *Bissessar Lal v Must Bhura* 1 Lahore 436

(7) On the subject of such acknowledgment see *Santishtuar Mahanta v Lakshikanta Mahanta* (1908) 35 C 813 (when a debtor can write an endorsement merely signed by him is not enough) *Doms Lal Sahu v Roslan Dubey* 13 C. W N 107

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(8) Act IX of 1908 s 19 (Limitation)

(9) *Shambu Nath v Ram Chandra* 12 C 267 (1885) *Wajibun v Kad r Buksh* 13 C 292 (1886) *Chathu v Virarajan* 15 M 491 (1892) contra *Zulmusa Sahab v Mohi Ratender* 12 B 268 (1887)

(10) *Soni Ram v Kanhaiya Lal* P C, 35 A 227 (1913) 17 C. L. J., 488

(11) *Jai Singh Prasad v Surja Singh* 35 A 167 (1913) *Tasudera Mudalar v Srinivasa Pillai* P C. 30 M 426 (1907)

164 and 364 of the Code(1), and though it was doubtful whether, under the Code of 1882, it contemplated or provided for cases in which there had been not merely an omission to comply with the law, but an infraction of it yet under the present section, as amended by the Code of 1898, it seems that omission to comply with any of the provisions of section 164 or section 364 would be remediable (2) If a document framed under section 164 of the Criminal Procedure Code is inadmissible owing to a non compliance with the provisions of the law, the Court must proceed under section 533, if the defects are curable by the provisions of that section. If they are not so cured the document recording the confession is inadmissible and no other proof of the confession can be given (3) When a confession is inadmissible under the provisions of the Criminal Procedure Code, oral evidence to prove that such a confession was made or what the terms of that confession were is also inadmissible by virtue of the terms of this section (4) No similar provision is contained in the Codes of Criminal or Civil Procedure for the rectification of informally recorded depositions of witnesses. It is clear that when depositions are required by law to be recorded in writing no evidence may be given of the statements of the witnesses other than their recorded depositions or secondary evidence of the contents of depositions where secondary evidence is admissible. It is further submitted that if depositions are informally recorded they are not admissible in evidence if excluded by the terms of this section. But it has been held in the Madras High Court that if a deposition irregularly taken has been admitted by the witness to be correct and signed by him it may be used against him though he will not be estopped from proving that the record was in fact incorrect (5) A failure to comply with the provisions of sections 182, 183 of Act X of 1877 (Civil Procedure)(6), in a judicial proceeding has been held to be an informality which rendered the deposition of an accused inadmissible in evidence on a charge of giving false evidence based on such deposition and under the present section no other evidence of such deposition was admissible (7) But where the law either does not require the statements of witnesses to be reduced to writing(8), or merely requires the substance of the evidence of witnesses(9) or of witnesses and parties called as witnesses to be recorded, in the first of these cases oral evidence of such statements would be clearly admissible as also upon principle in the second case, of such statements as had not been recorded, such evidence not being in either case excluded by the terms of the present section (10) Section 161 of the Code of Criminal Procedure does not make it obligatory upon a police officer to reduce to writing any statements made to him during an investigation. Neither that section nor section 91 of this Act renders oral evidence of such statements inadmissible (11) It has been held in a recent case in the Madras High Court that while under section

(1) *R v Liram* 9 M 224 (1886)
R v Raghu 23 B 221 223 (1898)

(2) *Jai Narayan v R* 17 C 862 871 (1890) doubted in *Lalchand v R* 18 C 549 (1891) dissented from in *R v Visram Babaji* 21 B 495 (1896) *R v Raghu* 23 B 221 225 (1898) in which it was said there was no ground for a nice distinction between omissions to comply with the law and infractions of it.

(3) *Jai Narayan v R* 17 C 868

(4) *R v Ras Ratan* 10 Bom H C R 166 (1873) *R v Shivya* 1 B 219 (1876) *R v Vram* 9 M 224 (1886)

(5) *Bogra v R* (1910) 34 M 141

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19 of the present Limitation Act, as for instance in a deposition in Court(1) and 'interest' in section 20 of that Act means the whole or part of the interest due (2)

Agreements made without consideration(3), contracts for reference to arbitration(4) mortgages when the principal money secured is Rs 100 or upwards(5), leases of immovable property from year to year or for any term exceeding one year or reserving a yearly rent must be in writing(6) The Statute of Frauds (29 Car II C 3) was introduced into India under the Charter of 1726 but was formerly only in force in the Presidency Towns though it applied perhaps also to British born subjects in the Mofussil(7), and it seems that within those towns it applied to European British subjects only(8) But sections 1—14 17 of that Statute necessitating writing in certain cases have now been repealed by the Indian Contract Act Gifts of immovable property(9) wills(10) and trusts of immovable and (except in cases where the ownership of the property is transferred to the trustee) of movable property, must also be in writing (11)

Exception
(1)

First Exception is in accordance with the English rule on this point Due appointment may fairly be presumed from acting in an official capacity it being very unlikely that any one would intrude himself into a public situation which he was not authorized to fill, or that if he wished he would be allowed to do so See p 555 ante

Exception
(2)

Wills admitted to probate in British India may be proved by the probate Upon proof of the will a copy thereof under the seal of the Court is issued and the original will is retained This copy which is called the probate is secondary evidence but is made admissible by the terms of this section The words in *italics* were substituted for under the Indian Succession Act by the amending Act XVIII of 1872 It was held prior to this Act and subsequent to the passing of Act XXI of 1870 (Hindu Wills) that the effect of the Hindu Wills Act which makes (among others) sections 180 and 212 of the Succession Act (A of 1860) applicable to Hindus is to make the probate of the will of a Hindu evidence of the contents of the will against all persons interested thereunder(12) The decision last cited turned upon the interpretation of the Acts abovementioned and was contrary to the rule previously followed according to which probate of the will of a Hindu was evidence only so far as a decree of the Court granting it would be namely between the parties and those privy to the suit in which the decree is made(13) In the case of probates granted otherwise than under the above A

the alteration made by the Wills not admitted to probate

admitted to probate in England or Ireland, may be proved by the probate under the provisions of section 82 ante or by any other means available in England and Ireland and in this country by the terms of that section Probate

(1) *Megh Raj v Mathura Das* 35 A 437 (1913)

(2) *Abd I Alad v Madhab B b* 35 A 378 (1913)

(3) Act IX of 1872 (Contract) s 25

(4) *ib* s 28 Exception (2)

(5) Act IV of 1882 (Transfer of Property) s 59

(6) *ib* s 107 *Sarat Chandra D it v Jadab Chandra Goswami* 44 C 214 (1917)

(7) *M it a P illa v Western* 1 Mad H C R 27 (1867)

(8) *Borrodale v Chansook Buxyam* 1 Ind Jur O S 71 (1862)

(9) Act IV of 1882 s 123

(10) Act X of 1865 (Indian Succession) s 50 extended to Hindus &c by Act XXI of 1870 An exception exists in the case of privileged wills see s 53 b As to charitable bequests v *ib* s 105

(11) Act II of 1887 (Trusts) s 5

(12) *Brajanath Dey v Anandamaj Das* 8 B L R. 208 214 215 219 220 (1871)

(13) *Sharo Bhee v Baldeo Das* 1 B L R O C 24 (1867) and see *Srinats Ja kali v Sh bnat Chatterjee* 2 B L R O C J 1 (1866)

(14) *Feld Ev* 6th Ed 265

or letters may, amongst other modes, be proved in England by production of the document itself when the seal will be judicially noticed, or by a certified or examined copy of the Act, Book or Register (1) The original will can under no circumstances be admitted in England to prove title to personal estate (2), though *aliter* when required merely to prove a declaration by the testator or to construe the will Probate is not only conclusive proof against all persons of the contents of the will, but also of its validity and of the legal character conferred upon the executor (3)

Further in the undermentioned case it has been held that the general rule in this section is subject to the exceptions laid down in sections 95 and 96, *post* (4)

See *Illustrations (a) and (b)* A contract or grant or other disposition of property may as well be executed by several as by one document, as in the familiar instance of a contract the terms of which are to be gathered from a series of letters passing between the parties (5) This section necessitates the production and proof of all the originals, except when secondary evidence is admissible, in which case secondary evidence of all the originals must be given

A broker is often spoken of as a middleman or negotiator between two parties. He frequently enters into the contract of sale for one party and for the other. He is not a broker, but a broker bought and sold notes is as it

in which he concerns himself Thus in being faithful to all the parties in entrusts him with But primarily he is deemed merely the agent of the party by whom he is originally employed Thus to make the other side liable to pay him brokerage, it must be shown that he has been employed by such party to act for him, or that in the contract such party has agreed to pay the brokerage (6) When the contract is not in writing it is to be inferred from the course of dealing between the parties (7) A broker, when he closes a negotiation as the common agent of both parties, usually enters it in his business book and gives to each party a copy of the entry or a note or memorandum of the transaction The note which he gives to the seller is called the *sold note*, and that which he gives to the buyer is called the *bought note* (8)

It has generally been held that bought and sold notes, though not necessarily constituting the contract, do, as a general rule, constitute it (9) But as

(1) See Taylor Ev. §§ 1588, 1590, Roscoe, N P Ev. 117, 118, Phipson, Ev. 5th Ed. 528, 529, 411—412, 14 & 15 Vic C 99, s 14, by 20 & 21 Vic 77 all probates letters of administration orders and other instruments and exemplifications and copies thereof respectively purporting to be sealed with any seal of the Court of Probate, shall in all parts of the United Kingdom be received in evidence without further proof thereof

(2) *Pinney v Pinney*, 8 B & C, 335, *Pinney v Hunt*, 6 Ch D, 243

(3) S 41, *ante*, *Whicker v. Hume*, 7 H L C, 120, 124, *Concha v Concha*, L R, 11 App Cas 541, *De Mora v Concha*, L R, 29 Ch D, 268 see Taylor, Ev. §§ 1759—1761, Phipson, Ev. 5th Ed. 411—413, Roscoe N P Ev. 201, 202, Coote's Probate 10th Ed. 352—356, Williams on Executors, 369, 556—577,

1902—1903 As to Probate of Wills lost or destroyed, see Act X of 1865, ss 208, 209, the remarks on these sections in Field, Ev. 421, *ib*, 6th Ed. 265, and *Ishur Chunder v Dayamoy Debee*, 8 C, 864 (1882), s c, 11 C L R, 135

(4) *Karappa Goundan v Thoppala Goundan* (1907), 30 M, 397, and *Santaya v Sabitri*, 4 Bom L R 871

(5) See *Allen v Bennett*, 3 Taunt, 169, and cases cited in Taylor, Ev. § 1026

(6) *Municipal Corporation of Bombay v Cutchjee Hirji*, 20 B, 124, 129, 130 (1895)

(7) *Sushil Chandra Das v. Gauri Shanhar*, 39 A, 81 (1917)

(8) See Benjamin on Sales, § 276, where the varieties of these notes are described, Wharton Ev. § 75

(9) See an article in which the subject is discussed in 8 C W N, ccxxx, ccxxxviii

has been stated by the Calcutta High Court to be that when parties who are merchants enter into a contract which is evidenced by bought and sold notes, the presumption is that they intend to be bound by the contract as expressed in the bought and sold notes, and by that only. This, however, is a presumption which may be rebutted by clear evidence (1). The Privy Council, however, in disposing of the appeal in the last mentioned case, held that bought and sold notes do not constitute a contract of sale, but are mere evidence which may be looked to for the purpose of ascertaining whether there was a contract and what the terms of the contract were. The rights of the parties do not depend either for constitution, or for evidence, on the bought and sold notes. The High Court upon the original trial had found that through fraud the notes did not express fully and correctly the arrangement actually made. In this finding of fact the Privy Council agreed. On the assumption, therefore, that the notes constituted the contract, it would have been open to them to have held that oral evidence was admissible under s. 92, by reason of the fraud which had been proved. The Judicial Committee, however, in conformity with the opinion expressed that the notes do not constitute, but are evidence merely of, the contract, held that the case was not touched by section 92 of this Act (2). Oral evidence being admissible as to the terms of the contract and the notes being regarded merely as a piece of evidence like any other, the only question is as to their value. This must depend upon the circumstances of each case. In some instances the notes may be of little value. In other cases, particularly where they have been accepted and signed by the parties, they may be of great weight.

If the notes agree, are delivered and accepted without objection, such acceptance without objection is evidence of mutual assent to the terms of the notes, but the acceptance is to be inferred from the acceptance of the notes without objection, not from the signature to the writing, which would be proof if they constituted the contract in writing (3).

In the undermentioned case (4) in which it was held that the contract was not concluded until bought and sold notes had been signed, and that these notes were the only evidence of the contract, the buyer added some terms in Chinese as to quality, which the seller either did not understand or notice, and the Privy Council held that the terms in Chinese were not to be disregarded. If the seller did not notice the addition made by the buyer, it only showed that the buyer and seller were not *ad idem* as to the quality, and the contract failed. If the seller did notice or understand the addition and offered a different quality, the contract was voidable.

A contract intended to have been entered into between the plaintiff and the defendant, was entered, by a mistake on the part of the broker, in the sold
he defendant. In a
was given to show
and the defendant.
The Judge of the Small Cause Court found that the mistake did not mislead the defendant, and gave judgment in favour of the plaintiff, contingent on the

(1) *Durga Prosad v Bhajan Lal* 8 C W N 492 493 per Sale J.

(2) *Durga Prosad v Bhajan Lal* 8 C W N 499 (1904). The earlier Privy Council decision *Cowie v Remfry*, 3 Moo I A 448 (1846) the correctness of which was questioned in *Heyworth v Knight*, 33 L J C P, 298 (1864) ignored in *Clarion v Shaw* 9 B L R 245 (1872), *Ah Thain v Moothia Chetty* 4 C W N, 453 (in which the facts were somewhat

similar to those in *Cowie v Remfry*) and in the latest Privy Council decision though expressly referred to by the High Court, may be said to be no longer law. See Article referred to in 8 C W N cccxxx, cccxxxi.

(3) *Sietevright v Archibald*, per Erle, L J, 20 Q B, 529.

(4) *Ah Thain v Moothia Chetty*, 4 C W N, 453 (1899).

ke in the sold note was a bar
It was held that there was a
the plaintiff could sue for

damages (1)

Telegrams

In the case of telegrams, ordinarily the original message is the primary evidence, and only on proof excusing its production can its contents be shown *alunde* but on proof of its destruction or non producibility (as where it is out of the jurisdiction) it can be proved that the message as written and therefore without any of is evident that the rule cannot have a general application, as there are instances in which the message received must be thereto may be stated as follows the must be produced, and in all cases with agent of the and the persons proved can a contract and so may a telegraphic answer, duly proved, to a written proposal In such case the contract rests on the telegram as received by the sender and his answer as delivered to the company It is scarcely necessary to add that when the original message is produced against a party it must be duly proved The message must be shown to have been sent by the party from whom it purports to come, either by proof that it was in his handwriting or that it was sent by his direction or authority (2)

Explanation (2)

See *Illustration (c)*, and the first and second *Explanations* to section 62 *ante* Instances of the case dealt with by this *Explanation* are bills of exchange of which three are usually executed called the first, second, and third of exchange and bills of lading which are usually in duplicate, and often in triplicate When a document is executed in several parts, each part is primary evidence of the document

Explanation (3)

When the writing does not fall within either of the three classes already described no reason exists why it should exclude oral evidence (3) "When the contents of any document are in question, either as a fact in issue or a subalter nate principal fact, the document is the proper evidence of its own contents, and all derivative proof is rejected until its absence is accounted for But when a written instrument or document of any description is not the fact in issue, and is merely used as evidence to prove some fact, independent proof *alunde* is receivable Thus, although a receipt has been given for the payment of money, proof of the fact of payment may be made by any person who witnessed it (4) So, although when the contents of a marriage register are in issue, verbal evidence of these contents is not receivable yet the fact of the marriage (5) may be proved

(1) *Mahomed Bhoj v Chutterput Singh* 20 C. 854 857 (1903)

(2) *Wharton Ev* § 76, *Wood's Practice Ev* pp 2 3 *Gray on Communication by Telegraph* see *Index*

(3) *Taylor Ev* § 415

(4) See s 91 *Illustr (c)* *Lambert v Cohen* 4 Esp. 213 *Jacob v Lindsay* 1 East 460 *Taylor Ev* § 415 *Benarsi Das v Biskari Das* 3 A. 717, 721 (1882) [It is a fact stated in a document but it is not evidence of the terms of written contract] *Kedar Nath v Shurfoomussa Bibee* 24 W R 425 (1875) *Jitandas Keshavji v Framji Nanabhai*, 7 Bom H C R. 45

63 (1870) *Dahp Singh v Durga Prasad* 1 A 442 (1877) *Waman Ramchandra v Dhandiba Krishnaji*, 4 B 126 137 (1879) *Soorjoo Coomar v Bhugwan Chunder* 24 W R 328 (1875), *Venkajyar v Venkata Subbayar* 3 M 53 56 (1881), the receipt itself is nothing more than a collateral or subsequent memorial of that fact affording a convenient and satisfactory mode of proof

(5) So also in the case of birth death burial *Taylor Ev* § 416 and cases there cited and see *Jitandas Keshavji v Framji Nanabhai* 7 Bom H C R. 63 (1870)

by the independent evidence of a person who was present at it (1) For though when a contract has been reduced into writing by the parties the writing is the best evidence of it and must be produced yet it is not in every case necessary when the matter to be proved has been committed to writing that the writing should be produced If for instance the narrative of an extrinsic fact such as a payment has been committed to writing as in a receipt it may yet be proved by parol evidence So a verbal demand of goods is admissible in trover though

And as already observed the
it may be proved by parol testi-
f these events may have been
be kept for the existence or

contents of these registers form no part of the fact to be proved and the entry is no more than a collateral subsequent memorial of the fact which may furnish a satisfactory and convenient mode of proof but cannot exclude other evidence though its non production may afford grounds for scrutinising such evidence with more than ordinary care (2) So also the fact of partnership may be proved by parol evidence of the acts of the parties without producing the deed (3) and the fact of partition though the partition deed embodying the terms is inadmissible because unregistered. (4) So in accordance with these principles and their application in English cases the third *Explanation* to this section enacts that *The statement in a document whatever of a fact other than the facts referred to in this section shall not preclude the admission of oral evidence as to the same fact* In connection with this *Explanation* should be read *Illustrations* (d) and (e) In the first of these cases the incidental mention of what was done on another occasion had no reference to the terms of the contract embodied in writing In the second case the writing was merely a memorandum of the fact of the payment and oral evidence of the payment was therefore admissible (5) The facts referred to in this section are the terms (a) of a contract (b) of a grant (c) of a disposition of property If therefore a document relates exclusively to some thing other than any of these facts as for instance if it be a simple receipt or if though it be a written contract grant or disposition it relates to some other independent fact as for instance the payment of the consideration money the fact of payment may be proved orally as well as by the writing It is a fact independent of the contract (6) Written receipts for payments are important but by no means necessary as proof nor are they of the nature of primary evidence the loss of which must be shown in order to let in second

section 49 of the said Act It was however held in the case undermentioned that under *Illustration* (e) of this section such payments might nevertheless be proved by parol evidence which was not excluded owing to the inadmissibility of the documentary evidence (8) When the contents of a pottah (lease)

(1) Best E. 2nd Ed. p. 282 cited in *Balbladur Prasad v. Maharajah of Betal* 9 A. 351 356 357 (1887)

(2) *Jandas Keshav v. Framji Naoba* 7 Bom. H. C. R. 45 62 63 (1870) citing Taylor Ev. §§ 415 416 as to nature of evidence required in India in proof of date of birth see *Shah Ara Begam v. Nanhi Begam* P. C. (1906) 29 A. 29 34 I. A. 1

(3) *Alderson v. Clay* 1 Star R. 405 *Venkatasubba Chetty v. Govindarajulu Naidu* (1908) 31 M. 35 Ref. to in *Ebrallmbhoy v. Mamooj* 45 B. 1242 (1921) s. c. 23 Bom. L. R. 767

(4) *Chhotal Adiram v. Ba Malakore* 41 B. 466 (1917) see Taylor on Evidence 10th Ed. on p. 405

(5) Field E. 6th Ed. 268

(6) Norton Ev. 269

(7) *Raneswar Koer v. Bharat Pershad* 4 C. W. N. 18 (1899)

(8) *Dalip Singh v. Durga Prasad* 1 A. 442 (1877) and see *Haman Ramchandrar v. Dhondba Krishna* 4 B. 126 137 (1879) *Soorjee Coomar v. Bhugwan Chunder* 24 W. R. 328 (1875) *Venkayyar v. Venkatasubbayyar* 3 M. 53 56 (1881) *Appama Nayumulu v. Ramanna* 23 M. 92 (1899) as to the proof of receipt see

are in any way in question it is necessary to prove them by the production of the document, where this is not the case but the fact of occupation and possession of land be in issue without respect to the terms of the tenancy this fact may be proved by parol evidence and notwithstanding such occupation has been under a *pottah* such *pottah* need not be produced (1) The document called a *Sodi Razinama* (whereby a party relinquishes his right of occupancy of

clude the Courts from basing their findings upon other evidence should any such exist (2) When a *labuliyat* was executed but not registered and never came into operation it was held that oral evidence to prove the rent agreed by the parties was admissible (3) Where a plaintiff sued on a renewed set of *hundis* and they were found to be inadmissible as insufficiently stamped it was held that he could fall back on the previous set and give secondary evidence of their contents after proving that they had been returned to the defendant (4)

92 When the terms of any such contract, grant, or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms (5)

Proviso 1—Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto, such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law (6)

Sirja Kant v Banesar Slahi 24 C 251 (1896) as to tenant's receipt as evidence of value see *Girish Chunder v Soshi Siktreshwar* 4 C W N 631 (1900)

(1) *Kedar Nath v Surfooni* 24 W R 425 (1875)

(2) *Venkatesa v Sengoda* 2 M 117 (1879)

(3) *Ameer Ali v Yakub Ali Khan* 41 C 347 (1914)

(4) *Jagan Prasad v Indar Mal* 36 A 259 (1914)

(5) See Illustrations (a) (b) (c) As to strangers to the instrument see s 99 post In England the rule also only applies to cases in which some civil right or liability is dependent upon the terms of a document in question Steph Dig Art 92 The act makes no allusion to this as to contradiction see *Lano v Neale* 2 Stark 105 *Abbott v Hendricks* 1 M & G 794 *Higgins v Senior* 8 M & W 854 foll in *Ebrahimbhoy v Mamooji* 45 B 1242 (1921) s c 23 Bom. L R. 767

As to variation see *Mease v Mease* Cowper 47 *Rawson v Walker*, 1 Starkie,

361 *Hoare v Grafton* 3 Camp 57 *Morley v Harford* 10 B & C 729

As to addition see *Miller v Travers* 8 Bing 254 *Preston v Merceau* 2 Wm Bl 1249 *Maybank v Brooks* 1 Brown Ch Ca. 84 *Meres v Anelle* 3 Wills 275 *Kietridas Aguruallah v Skib Narayan* 9 C W N 178 187 (1904) *Krishnamara v Manaju* 28 M 495 (1905)

As to subtraction see *Kaines v Angilly* Skinner 54 *Western v Emes* 1 Taunt 115 *Norton v Goode* 273 274 *Goode v 362 364* no absolute classification of the cases under these headings is however possible as the evidence tendered frequently has the effect of offending in several or all of these points

(6) See Illustrations (d) (e) Illustration (i) has been cited under this proviso (*Field Ev* 434 4th Ed 279) but it is not clear to what if any portion of the section it refers The receipt is not a dispositive document at all [see s 91 III (e)] and it is only to such that the section applies

Exclusion
of evidence
of oral
agreement

Proviso 2—The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document (1)

Proviso 3—The existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved (2)

Proviso 4—The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property, is by law required to be in writing, or has been registered (3) according to the law in force for the time being as to the registration of documents

Proviso 5—Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved.

Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract

Proviso 6—Any fact may be proved which shows in what manner the language of a document is related to existing facts.

Illustrations

(a) A policy of insurance is effected on goods in ships from Calcutta to London. The goods are shipped in a particular ship which is lost. The fact that the particular ship was orally excepted from the policy cannot be proved. (4)

(b) A agrees absolutely in writing to pay B Rs 1,000 on the first March, 1873. The fact that at the same time an oral agreement was made that the money should not be paid till the thirty first March cannot be proved. (5)

(c) An estate called the Rumpur tea estate is sold by a deed which contains a map of the property sold. The fact that land not included in the map had always been regarded as part of the estate and was meant to pass by the deed cannot be proved (5)

(d) A enters into a written contract with B to work certain mines, the property of B, upon certain terms. A was induced to do so by a misrepresentation of B's as to their value. This fact may be proved (6)

(e) A institutes a suit against B for the specific performance of a contract, and also prays that the contract may be reformed as to one of its provisions, as that provision was

(1) See Illustrations (f) (g) (h)

(2) See Illustration (j) which should run 'A & B make contract in writing and orally agree that it shall take effect etc.', v note to Ills (j) post

(3) So where a deed has been executed and registered it can only be amended by a subsequent registered transfer. *Entisham Ali v Jamna Prasad* 24 Bom L. R. 675

(1922)

(4) Illustrates the section. See *Ramjiban Serougy v Oghur Nath*, 2 C. W. N. 188 (1897). *Vishnu Ramchandra v Ganesh Sathe* 23 Bom L. R. 488 (1921)

(5) Illustrates the section. See *Ramjiban Serougy v Oghur Nath*, 2 C. W. N. 188 (1897)

(6) See Prov (1)

inserted in it by a mistake *A* may prove that such a mistake was made as would by law entitle him to have the contract reformed. (1)

(f) *A* orders goods of *B* by a letter in which nothing is said as to the time of payment, and accepts the goods on delivery *B* sues *A* for the price. *A* may show that the goods were supplied on credit for a term still unexpired (2)

(g) *A* sells *B* a horse and verbally warrants him sound. *A* gives *B* a paper in these words 'Bought of *A* a horse for Rs. 500' *B* may prove the verbal warranty (2)

(h) *A* hires lodgings of *B* and gives *B* a card on which is written—"Rooms Rs. 200 a month." *A* may prove a verbal agreement that these terms were to include partial board.

A hires lodgings of *B* for a year and a regularly stamped agreement drawn up by an attorney is made between them. It is silent on the subject of board. *A* may not prove that board was included in the term verbally (2)

(i) *A* applies to *B* for a debt due to *A* by sending a receipt for the money. *B* keeps the receipt and does not send the money. In a suit for the amount *A* may prove this. (3)

(j) *A* and *B* make a contract in writing to take effect upon the happening of a certain contingency. The writing is left with *B* who sues *A* upon it. *A* may show the circumstances under which it was delivered (4)

Principle—When parties have deliberately put their mutual engagements into writing, it is only reasonable to presume that they have introduced into the written instrument every material term and circumstance. Consequently other and extrinsic evidence will be rejected, because such evidence, while deserving far less credit than the writing itself, would invariably tend in many instances to substitute a new and different contract for the one really agreed upon. (5) See Note upon the principle of last section, as also the introduction, *ante*, and Notes, *post*. Unless the rule enacted by this section were observed, people would never know when a question was settled, as they would be able to play fast and loose with their writings. Therefore if a document purports to be a final settlement of a previous negotiation, as in the case of a written contract, it must be treated as final and not varied by word of mouth (6). And where the law expressly requires that a matter should be reduced to the form of a document the admission of extrinsic evidence would plainly render such requirement nugatory. So also where the law requires registration and stamp and for lack of them a document is not admissible in evidence, oral evidence is inadmissible (7)

s. 3 ("Document")

s. 91 (Evidence inadmissible to supersede document)

s. 3 ("Fact")

s. 3 ("Court")

s. 13 (Facts relevant to prove custom.)

s. 3 ("Evidence")

s. 99 (Who may give evidence in variance of a document.)

s. 100 (Saving of provisions of Succession Act.)

Steph. Dig., Art. 90, Taylor, Ev., §§ 1132—1158, Starkie, Ev., 665—678, Wharton, Ev., §§ 920—1071, Best, Ev., §§ 226—228, Wood's Practice, Ev., § 14—52, Greenleaf v. Ch. N.V., Roscoe, N. P. Ev., 16—27

(1) Illustrates *Proviso* (1)

(2) Illustrates *Proviso* (2)

(3) See p. 608 note (6) *ante*

(4) Illustrates *Proviso* (3) see p. 607, note (8), *ante* Ramjiban Serougy v. Oghur Nath, 2 C. W. N. 188 (1897), Vishnu Ramchandra v. Ganesh Sathe, 23 Bom. L. R., 488 (1921)

(5) Taylor, Ev. §§ 1132, 1158, Green-

leaf Ev. § 275, Best, Ev. § 226, Banaja v. Sundardas Jagjivandas, 1 B., 333 338 (1876) [The apparent object of the section is the discouragement of perjury]. Starkie Ev. 655

(6) Steph. Introd. 172

(7) Jas. Ram Das v. Raj Narain, 20 All. L. J., 777.

COMMENTARY.

The law with regard to the admissibility of oral evidence to vary the terms of a written document is not governed by the English law of evidence but by this Act, and therefore oral evidence to be admissible must come under one or other of the provisions of this section (1)

Extrinsic evidence is inadmissible to control the document, that is, to contradict, vary, add to, or subtract from its terms. Illustrations (a), (b) and (c) exemplify this proposition. It has been observed that this section which formulates the rule is not quite free from ambiguity. The words 'no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument, &c.' correspond with and have clear reference to the words 'contract, grant or other disposition of property' in the beginning of the section but their application to 'any matter required by law to be reduced to the form of a document' is not so evident (2). It does not seem however, that there is really any such ambiguity as is suggested in the above quoted passage. The words "contract, grant or other disposition of the property" in this section refer to the similar words in section 91, viz., "when the terms of a contract or of a grant or of any other disposition of property have been reduced to the form of a document," that is cases where such reduction is the act of the parties. The words "or any matter required by law to be reduced to the form of a document" in this section refer to the case where the matter required to be reduced may be either a fact, such as which is neither a contract, section, in this respect unlike the last, deals only with those matters which the law requires to be reduced to the form of a document, and which are contracts, grants or other dispositions of property. This is indicated by the words "as between the parties to any such instrument or their representatives in interest, which are only applicable in the case of documents which are of a dispositive character. The subject-matters of this section, therefore, are contracts, grants and other dispositions of property, whether embodied in documents by consent of parties or by requirements of law, and therefore the words "no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest, or any matter required by law, &c." which follow them. The section deals with a different set of facts from those contained in section 91, and proceeds upon a different principle from that section. The reasons which preclude extrinsic evidence in substitution of the document are not the same as those which prohibit evidence varying the document when produced. Thus if the matter required by law to be reduced to writing be a disposition oral evidence is admissible for the purpose of contradicting the writing (3). The presumption raised by section 80, ante, is not an irrebuttable one. Those reasons which preclude a person from giving evidence to vary a contract into which he has himself entered do not operate to prohibit evidence in variance of a document made by others as a record of his evidence.

Not only is the section limited in its operation to dispositive documents but also to the parties thereto or their representatives in interest. Oral evidence to contradict, vary, add to, or subtract, from the terms of the writings is excluded only as between the parties to the instrument or their representatives in interest (4). The section is confined to proceedings between the parties to

(1) *Harok Chand v Bishun Chandra* 8

C W N 101 (1903)

(2) *Field Ev* 6th Ed, 271

(3) *Ibid*

(4) *Megha Ram v Mahan Lal* (1912),

47 P R No 67 p 258 *Tara Chand v*

Baldeo (1890) 117 P R., *Parma Nand*

v Aarepat Ram (1889), 20 P R., *Ganu*

the deed or their representatives in interest, and has no application to claims by or against third persons. Other persons may give evidence of any facts tending to show a contemporaneous agreement varying the terms of the document (section 99, *post*). A doubt has been expressed⁽¹⁾ whether the word "varying" in contradistinction to the terms of the document is any such distinction which is certainly unknown to English law, ^{as} was intended. The word "varying" was without doubt employed as embracing (as in fact it does) both contradictions, additions and subtractions (2).

Any person *other than a party* to a document or his representative may, notwithstanding the existence of any document, prove any fact which he is otherwise entitled to prove⁽³⁾ and any *party* to any document or any representative in interest of any such party may prove any such fact for any purpose other than that of varying or altering any right or liability depending upon the terms of the document⁽⁴⁾. The section prohibits variance of the *terms* of the document. The rule is, therefore, not infringed by the introduction of parol evidence contradicting or explaining the instrument in some of its *recitals of facts*. So it may be shown that lands described in a deed as being in one parish were in fact situated in another. So also evidence is admissible to contradict the recital of the date of a deed⁽⁵⁾.

It is to be observed that the rule does not restrict the Court to the perusal of a single instrument or paper, for while the controversy is between the original parties or their representatives, all contemporaneous writings, relating to the same subject-matter are admissible in evidence⁽⁶⁾. Nor does this section affect the proof of an independent agreement collateral to some other agreement reduced into writing. So in the undermentioned case⁽⁷⁾ an agreement to pay Rs 500 a month to a lessor in consideration of receiving from him a permanent lease of portions of his zemindari, which agreement was come to before, but

v *Bhau* 42 B 512 s c 20 Bom L R 684 *Bishinath Singh v Baldeo Singh* 21 O C 165 s c 47 I C 194

(1) Field Ev 6th Ed 271

(2) Cunningham Ev 280. The view here taken has been approved in *Pathan nal v Kalai Ravutlar* 27 M 329 331 (1903) in which it was held that oral evidence was admissible the question not arising as between the parties to an instrument or their privies so as to bring it within the purview of s 92. In *Hara Kumar Saha v Ram Chandra Pal* 47 I C 943 there was held to be a variation [subsequent oral undertaking to waive right]

(3) *Bagesiri Dajal v Pancho A W N* (1906) 28 A 473. Persons who are not parties to a document may adduce oral evidence to show that the rights of parties to it are at variance with the rights ostensibly created and declared by the instrument. *Krishnarwami Aiyar v Mangala Thammal* 53 I C, 243

(4) Steph Dig Art 92 as to the restriction of the rule in England to civil cases v *b R v Adamson* 2 Moody 286

(5) Greenleaf Ev § 285 and cases there cited *Sah Lal Chand v Indrajit* 4 C W N 485 (1900) s c 22 A 370, *Achutaramaraju v Subbaraju* 25 M 7,

11 14 (1901) *R v Scammonden* 3 T R 474 *Doe v Ford* 3 A & E 649, *Gale v Wilkinson* 8 M & W 407 *R v Wickham* 2 A & E 517, *Hall v Gaze* nove 4 East 477, and see Greenleaf Ev § 305. In the application of the rule it is necessary to bear in mind rather the principle in which it originated than its formal character and this principle is simply to make the instruments the record of the transaction conclusive of its obligations. Accordingly the rule does not exclude contradictory evidence of mere formal matter such as dates recitals and so forth not being of the essence of the transaction since while it is presumable that they have not been stated with formal precision their correction would not trench on the obligatory portion of the instrument. Goodeve Ev Evidence of matters not forming a term of obligation is not excluded *ib*

(6) Greenleaf Ev § 283, and cases there cited, *Leeds v Lancashire*, 2 Campb, 205 *Hariley v Wilkinson* 4 Campb 127, *Stone v Metcalfe* 1 Stark R 53 *Botcherbank v Moncrio* 4 Taunt. 846 *per Gibbs J Hunt v Livermore* 5 Pick 395

(7) *Subramanian Chettiar v Arunachalan Chettiar* 25 M 603 (1902) s c. 4 Bom L R 839

To the general rule are annexed certain provisos. This rule is however not infringed by the admission of evidence in the cases dealt with by the provisos. These cases do not form exceptions to the general rule enacted by the section but are merely instances to which attention is drawn as not coming within the purview of the rule at all.

This section was framed in accordance with the current of English decisions upon the question of how far parol evidence can be admitted to affect a written contract and care must be taken in placing a construction upon it not to create a precedent that would open a door to indiscriminate parol proof of transactions where documents have recorded what has passed between the parties (1). Where however an agreement is admitted by both plaintiff and defendant and it is therefore not necessary to prove it the section has no application (2).

Therefore evidence may be given—*firstly*, to show that there was *really* *never any disposition at all* and *secondly* to show that the document produced is not the *whole* disposition. The rule operates only when there has been in fact a disposition the whole of which was meant by the intention of the parties to be embodied in the form of a document.

The rule applies only where a disposition in its entirety has been reduced to the form of a document.

Firstly—Though evidence to vary the terms of an agreement in writing is not admissible yet evidence to show that *there is not an agreement at all* is admissible. Notwithstanding a paper writing which purports to be a contract may be produced it is still competent to the Court to find upon sufficient evi-

the risk of groundless defence
caution in acting on it (3)

with interest there was an agreement touching the transaction of loan although the rate of interest was still unsettled and under discussion. Before any final agreement and while the transaction was still incomplete a promissory note was given not as a writing which expressed or was meant to express the final contract but rather as a voucher or a temporary and provisional security for the money pending at if the note was a contract between the parties the true contract.

The Court said in *Ca. Bell* (4) who was on the face of it an agent and if that had been so it would have been wrong. But I am of opinion that the evidence shewed that in fact there was never any agreement at all. The production of

begins one step earlier the parties met and expressly stated to each other that

(1) *Colen v Bank of Bengal* 2 A 60² (1880) per Straught J.

(2) *Satyesh Chunder v Dhunp Singh* 24 C 20 (1896). See also *Burjorj v Muncerj* 5 B 143 cited in notes to s 58 ante.

(3) *Guddal v Rutina v Kunnattur*

Arunaga 7 Mad H C R 189 (1872) following *Pym* *Ca. Bell* 6 E & B 350 *Harris v Rickett* 28 L J Exch 197.

(4) 6 E & B 370 followed in *Guddalu R. hna Kunnatur Arunaga* 7 Mad H C R 189 196 197 (1872).

the deed or their representatives in interest, and has no application to claims by or against third persons. Other persons may give evidence of any facts tending to show a contemporaneous agreement varying the terms of the document (section 99, *post*). A doubt has been expressed⁽¹⁾ whether the word *varying* must not be understood as restricted to "varying," in contradistinction to "contradicting, adding to or subtracting from," the terms of the document. There is, however, no reason to suppose that any such distinction which is certainly unknown to English law was intended. The word "varying" was without doubt employed as embracing (as in fact it does) both contradictions, additions and subtractions (2).

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It is to be observed that the rule does not restrict the Court to the perusal of a single instrument or paper, for while the controversy is between the original parties or their representatives all contemporaneous writings relating to the same subject matter are admissible in evidence⁽⁶⁾. Nor does this section affect the proof of an independent agreement collateral to some other agreement reduced into writing. So in the undermentioned case⁽⁷⁾ an agreement to pay Rs 500 a month to a lessor in consideration of receiving from him a permanent lease of portions of his zemindari, which agreement was come to before but

v. Bhau 42 B 512 s c 20 Bom L R 684
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(1) Field Ev 6th Ed 271

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(3) *Bageswari Dajal v Pancha A W N* (1906) 28 A 473. Persons who are not parties to a document may adduce oral evidence to show that the rights of parties to it are at variance with the rights ostensibly created and declared by the instrument. *Krishnaswami Aiyar v Mangala Thammal* 53 I C, 243

(4) Steph Dig Art 92 as to the restriction on the rule in England to civil cases v *ib R v Adamson* 2 Moody 286

(5) Greenleaf Ev § 285 and cases there cited. *Sah Lal Chand v Indrajit* 4 C W N 485 (1900) s c 22 A 370.
Achutaramaraju v Subbaraju 25 M 7,

11 14 (1901) *R v Sca* : *orden* 3 T R 474
Doe v Ford 3 A & E 649
Gale v Williamson 8 M & W 407
R v Wickham 2 A & E 517
Hall v Ga : *note* 4 Erst 477 and see Greenleaf Ev § 305. In the application of the rule it is necessary to bear in mind rather the principle in which it originated than its formal character and this principle is simply to make the instruments the record of the transaction conclusive of its obligations. Accordingly the rule does not exclude contradictory evidence of mere formal matter such as dates, recitals and so forth not being of the essence of the transaction since while it is presumable that they have not been stated with formal precision their correction would not trench on the obligatory portion of the instrument. Goodev Ev. Evidence of matters not forming a term of obligation is not excluded *ib*.

(6) Greenleaf Ev § 283 and cases there cited. *Leeds v Lancashire* 2 Campb. 205
Hartley v Wilkinson 4 Campb 127,
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J Hunt v Livermore 5 Pick 395
(7) *Subra anan Chettiar v Arunachalan Chettiar* 25 M 603 (1902) s c 4 Bom. L R 839

reduced to writing after, the execution of the lease was held to be not affected

To the general rule are annexed certain provisos. This rule is, however, not infringed by the admission of evidence in the cases dealt with by the provisos. These cases do not form exceptions to the general rule enacted by the section but are merely instances to which attention is drawn as not coming within the purview of the rule at all.

This section was framed in accordance with the current of English decisions upon the question of how far parol evidence can be admitted to affect a written contract, and care must be taken in placing a construction upon it, not to create a precedent that would open a door to indiscriminate parol proof of transactions where documents have recorded what has passed between the parties (1). Where, however, an agreement is admitted by both plaintiff and defendant, and it is therefore not necessary to prove it the section has no application (2).

Therefore evidence may be given—*firstly* to show that there was *really never any disposition at all*, and *secondly* to show that the document produced is not the *whole* disposition. The rule operates only when there has been in fact a disposition, the whole of which was meant by the intention of the parties to be embodied in the form of a document.

The rule applies only where a disposition in its entirety has been reduced to the form of a document

Firstly—Though evidence to vary the terms of an agreement in writing is not admissible yet evidence to show that *there is not an agreement at all* is admissible. Notwithstanding a paper writing which purports to be a contract may be produced it is still competent to the Court to find upon sufficient evidence that *this writing is not real*, does not affect the rule itself.

In the case last cited which agreement touching the transaction of loan although the rate of interest was still unsettled and under discussion. Before any final agreement and while the transaction was still incomplete a promissory note was given not as a writing which expressed or was meant to express the final contract, but rather as a voucher, or a temporary and provisional security for the money pending interest. It was held that if the note was be regarded as the contract between the following other evidence of the true contract.

The Court cited the observations of Erle, J., in *Pym v Campbell* (4) who said 'the point made is that this is a written agreement absolute on the face of it and that evidence was admitted to show it was conditional and if that had been so it would have been wrong. But I am of opinion that the evidence shewed that in fact there was never any agreement at all. The production of a paper purporting to be an agreement by a party with his signature attached, affords a strong presumption that it is his written agreement, and if in fact he did sign the paper *animo contrahendi*, the terms contained in it are conclusive and cannot be varied by parol evidence but in the present case the defence begins one step earlier the parties met and expressly stated to each other that

(1) *Cohen v Bank of Bengal* 2 A 602 (1880) per Straight J.

(2) *Satyesh Chunder v Dhunput Singh* 24 C 20 (1896). See also *Burjorji v Muncierji* 5 B 143 cited in notes to s 58 ante.

(3) *Guddalur Ruthna v Kunnattur*

Arumuga 7 Mad H C R 189 (1872), following *Pym v Campbell* 6 E & B 350 *Harris v Rickett* 28 L J Exch 197.

(4) 6 E & B 370 followed in *Guddalur Ruthna v Kunnattur Arumuga* 7 Mad H C R 189 106 107 (1872).

Oral evidence is also admissible to show the moment of time at which a document becomes a contract and to show, not that which was agreed to but what was the condition of the paper when the parties agreed that it should be an agreement between them (1) Where there is an oral agreement to grant a lease this section does not stand in the way of proof that there has been an agreement by implication or inferrible from the circumstances as to the time of commencement of the lease The Statute of Frauds has no application to this country (2) There is nothing in this section to exclude evidence of an oral agreement which contradicts, varies, adds to or subtracts from not the terms of the contract but some recitals on the contract itself (3)

Evidence of
conduct

The section says 'no evidence of any oral agreement or statement shall be admitted' There has been very considerable discussion on the question whether its terms, therefore do or do not exclude evidence of conduct where such conduct is relevant It does not, it has been held, necessarily follow from this section that subsequent conduct and surrounding circumstances may not be given in evidence for the purpose of showing in certain circumstances the real nature of the transaction Thus when a woman had through her attorneys conveyed a property to her daughter apparently as and by way of a sale it was held by the Privy Council that, though the daughter took under ad puid the purchase

So too there have been cases where the admissibility of such evidence has come in question with reference to the question whether evidence can be given to show that what purports to be an out and out conveyance was in reality a mortgage only But it is not only in cases of mortgage that the Courts have drawn a distinction between parol evidence of a transaction and evidence of conduct indicating such a transaction, and while compelled by law to reject the one has not felt itself precluded from admitting and acting upon, the other, though (5) as already observed, the illustration of this distinction is chiefly to the case cited where the defendant repaid to the plaintiff it was said that everyone is now agreed that what took place after the execution of the document can have no bearing on its construction (7)

The matter was at an early date, the subject of consideration of a Full Bench in the case of *Kasheerath Chatterjee v Chundry Churn* (8) In that case Peacock C J (in whose opinion the majority of the Full Bench concurred) said — "I am of opinion that verbal evidence is not admissible to vary or alter the terms of a written contract in cases in which there is no fraud or mistake and in which the parties intend to express in writing what their words import If a man writes that he sells absolutely, intending the writing which he executes

Essabhoj v Mulji Haridas P C 39 B 399 (1915, Discussed in *Badal Ram v Jhalu* 19 A L J 816 (1921))

(1) *Stewart v Eddowes* L R 9 C P 311

(2) *Kalash Chandra Bloinick v Bejoy Kanta Lahiri* 23 C W N 190 s c. 50 I C 177

(3) *Mukhi Singh v Kishan Singh* 51 I C 320

(4) *Isaiah Mussajee v Hafiz Bood* 10 C W N 570 s c. *Hanif un Nissa v Faun Nissa* P C (1911) 33 A 340 post See *Bisunath Singh v Baldeo Singh* 21 O C 165 s c. 47 I C, 194

(5) *Kasli Nath v Hirsilur Mookerjee* 9 C 898 900 *Baksu Lakshman v Govinda Kanji* 4 B 594 601 per Melvill J (1880) and see *Chango v Kalaran* 4 Bom H C R 120 (1866)

(6) See *The Law of Mortgage in India* by Rash Behary Ghose 3rd Ed p 271 *Shya a Claran v Herus Mollah* 26 C. 160 (1898) which was the case of a lease

(7) *Lissanji Sons & Co v Shapoorji Burjorji Bharoocha* P C 36 B 387 (1912)

(8) 5 W R 68 (1866)

to express and convey the meaning that he intends to sell absolutely, he cannot by mere verbal evidence show that at the time of the agreement both parties intended that their contract should not be such as their written words express, but that which they express by their words to be an absolute sale should be a mortgage. It is said that there is no Statute of Frauds, and therefore, parties may enter into verbal contracts for the sale of lands in the Mofussil without writing. But admitting that the law allows sales of land or other con-

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said 'intending to write 'one thousand' might prove that by a verbal agreement the words 'one thousand' were not intended to mean 'one thousand' but only 'one hundred'. Nor is the admission of such evidence further admissible, the whole effect of the new I

The plaintiff in the present case alleged that he took possession in 1266, and that in 1270 the defendant forcibly dispossessed him. The defendant says that the plaintiff never took possession and that he was never forcibly ousted. If possession did not accompany or follow the absolute bill of sale, it would be a strong fact to show that the transaction was a mortgage and not a sale, and it, therefore, becomes material to try whether the plaintiff was ever in possession and forcibly dispossessed as alleged by him, and whether, having reference to the amount of the alleged purchase money, and to the value of the interest alleged to be sold and the *acts and conduct of the parties*, they intended to act upon the deed as an absolute sale or to treat the transaction as a mortgage only. For I am of opinion that *parol evidence is admissible to explain the acts of the parties*, as for example to show why the plaintiff did not take possession in pursuance of the bill of sale, if it be found that the defendant retained possession and that the plaintiff never had possession as alleged by him, and was never forcibly dispossessed' (1). And Campbell J, said that 'When these *actings* of the parties are at variance with the written instrument and especially when possession of the property has not been transferred nor full value paid, then parol evidence to explain these facts may be admitted. I would hold that although parol evidence may not be admitted purely and simply to contradict the terms of a formal and public written instrument duly acted on it may, as between the original parties themselves be admitted in support of substantial *acts and facts* which negative or detract from the effect of the instrument' (2). The case was accordingly remanded to the first Court to try the issue whether, *having regard to the acts and conduct of the parties*, and having reference to the amount of the alleged purchase money and the real value of the interest alleged to be sold the parties intended the deed to operate as an absolute sale and treated the transaction as an absolute sale or as a mortgage only.

This decision does not appear to have been always entirely acquiesced in nor did some of the subsequent cases follow the principles which had been laid down by it (3). In one case it appears to have been considered that this decision

(1) *Kashee Nath v Chund, Churn* 5 W R 68 (1866)

(2) *Ib*

(3) *Madhub Clunder v Gungadur Samunt* 11 W R 470 (1869) s c 3 B L R 86 (I confess that I have some difficulty in comprehending the distinction between the admissibility of evidence of a verbal contract to vary a written instru-

ment and the admissibility of evidence showing the acts of the parties which after all are only indications of such an expressed unwritten agreement between the parties.) Per Jackson J commented upon in *Baksu Lakshman v Goinda Kanji* 4 B 594 600 (1880) *Ram Doolal v Radha Nath* 23 W R 167 (1875) *Dianooddee Pak v Kam Taridar* 5 C

was overridden by section 92 of this Act (1). It has, however, been subsequently held that the law on this point under the Act and in England is the same the rule contained in this section being that of the Common Law modified by equitable considerations (2), and that the present section made no change in the law as laid down in *Kasheenath Chatterjee v Chandy Churn* (3) the principles of which case have been approved and followed, and applied in numerous subsequent cases (4).

A Full Bench of the Calcutta High Court has also held that oral evidence of the acts and conduct of the parties such as oral evidence that possession remained with the vendor notwithstanding the execution of a deed of out and out sale is admissible to prove that the deed was intended to operate only as a mortgage (5). In *case of lease* the lease inoperative (6). It is however a question whether the facts are not affected by the decision of the Privy Council.

— Council decision, be inadmissible. The Full Bench case but rather supports it, there being a distinction between mere oral evidence of intention and evidence as to the acts and conduct of the parties (9). This Court has however recently held that where the terms of a contract are unambiguous no evidence can be given of the conduct of the parties in contravention of such terms (10).

300 (1879) s c 4 C L R. 419 *Ram Dyal v Heera Lal* 3 C L R. 386 (1878) [following *Banaja v Sundardas Jagjivan das* 1 B 333 (1876)] dissented from in *Hem Chunder v Kally Churn* 9 C 528 (1883)

(1) *Diamooddee Paik v Kaim Taridar* 5 C 300 302 (1872) See as to this case *Khetridas Agarwalla v Shib Narayan* 9 C W N 178 at p 183 (1904) The question was later raised again in *Datoo v Ranelandra Totaram* 7 B L R. 669 (1905)

(2) *Baksu Lakshman v Govinda Kanji* 4 B 594 606 607 (1880)

(3) See *Hem Chunder v Kally Churn* 9 C 528 (1883) s 92 of the Evidence Act lays down in terms the same rule as Sir Barnes Peacock then stated to be law following the case in last note and dissenting from *Diamooddee Paik v Kaim Taridar* supra and followed in *Kashi Nath v Hurrihur Mookerjee* 9 C 898 (1883)

(4) *Pheloo Monee v Greesh Chunder* 8 W R 515 (1887) *Sheikh Parabdi v Sheikh Mohammed* 1 B L R A C 87 (1868) *Nindo Lal v Prasanno Mojee* 19 W R 333 (1873) *Hasla Khand v Jesha Pre naji* 4 B 609n (1878) s c 7 B 73 *Baksu Lakshman v Govinda Kanji* 4 B 594 (1880) *Hem Chunder v Kally Churn* 9 C 528 (1883) s c 12 C L R 287 *Kashi Nath v Hurrihur Mookerjee* 9 C. 898 (1883) *Belary Lal v Tej Narayan* 10 C 764 (1884) *Venkatratna v Reddish* 13 M

494 (1890) *Rakken v Alagappudayas* 16 M 80 (1892) *Kader v Nepean* 21 C P C 882 (1894) s c 21 I A 96 [See also *Holmes v Matheas* 9 Moo P C 413 (1855) *Mutty v Annindo* 5 Moo I A 72 (1849)] See *Barton v Bank of New South Wales* L R 15 App Cas 379 *Balkishen Das v Legge* 19 A 434 (189)

(5) *Pronath Shaha v Madhu Suddan* 25 C 603 (1898) foll in *Khankar v Ali* 28 C 256 (1900) *Mahomed v Nawar* 29 C 289 (1901) *Ran Sarup v Allah Rakhs* 107 P L R (1905) ref to *Narendra v Bhola* 27 C W N 336 (1920)

(6) *Shyana Charan v Heras Moolah* 26 C 160 (1898) but see *Mayand Cheti v Oliver* 2 M 261 (1898)

(7) 22 A 149 (1899) d st. *Narend v Bhola* 27 C W N 336 (1920)

(8) 27 I A 58 (1899) s c 27 A. 149

(9) *Khankar Abdur v Ali Hafe* 28 C. 256 (1900) (evidence admissible of repayment of money return of deed and acts of possession by vendors) s c 5 C W N 351 *Malomed Ali v Nawar Ali* 28 C 289 (1901) evidence admissible of promise by vendee to restore the property on repayment in two or three years s c 5 C W N 326 Second Appeal Calcutta High Court 696 of 1899

(10) *Secretary of State v Kumar Narendranath Mitter* 32 C. L. J. 402 *Bhupendra Chandra Singla v Harshkar Chakraborty* 24 C W N 874 *Aronskashi*

A different view from that expressed in the cases in the last note but one has been expressed by the Bombay High Court(1) where it was said in answer to a contention that the circumstances required the Court to draw an inference that the document was not what it appeared to be —“ We can only understand that as meaning that the document was accompanied by a contemporaneous oral agreement or statement of intention, which must be inferred from these several circumstances ” This, it was held, was opposed to the Privy Council decision in cases in which a party was not entitled to rely on any of the provisos to the section And in another case in the same Court when the plaintiff desired to set aside a deed of sale by proving that a misrepresentation, agreement or promise, was made to him at the time of execution that the deed would not be enforced as a deed of sale, it was held that such evidence would be inadmissible, since its effect would not be to prove fraud, but to prove the existence of a different contract without proof of fraud to invalidate it (2)

was overridden by section 92 of this Act (1). It has, however, been subsequently held that the law on this point under the Act and in England is the same the rule contained in this section being that of the Common Law modified by equitable considerations (2), and that the present section made no change in the law as laid down in *Kasheenath Chatterjee v Chandy Churn* (3) the principles of which case have been approved and followed, and applied in numerous subsequent cases (4).

A Full Bench of the Calcutta High Court has also held that oral evidence of the acts and conduct of the parties such as oral evidence that possession remained with the vendor notwithstanding the execution of a deed of out and out sale, is admissible to prove that the deed was intended to operate only as a mortgage (5). The principle of this decision was applied to a lease in a subsequent case in which it was held that evidence of conduct as for instance return of the lease, was admissible to prove that such return was due to an intention to make the lease inoperative (6). It is, however, a question whether these decisions are not affected by the decision of the Privy Council in *Balkishen v Legge* (7).

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case but rather supports it, there being a distinction between mere oral evidence of intention and evidence as to the acts and conduct of the parties (9). This Court has however recently held that where the terms of a contract are unambiguous no evidence can be given of the conduct of the parties in contravention of such terms (10).

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(3) See *Hem Chunder v Kally Churn* 9 C 528 (1883) s 92 of the Evidence Act lays down in terms the same rule as *Sr Barnes Peacock* then stated to be law following the case in last note and dissenting from *Diamooddee Patk v Kaim Taridar* supra and followed in *Kashi Nath v Hurrihur Mookerjee* 9 C 898 (1883)

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494 (1890), *Rakken v Alagappadayan* 16 M 80 (1892) *Kader v Nepean* 21 C P C 882 (1894) s c 21 I A 96 [See also *Holmes v Matthews* 9 Moo P C 413 (1855) *Mutty v An undo* 5 Moo I A 72 (1849)] See *Barton v Bank of New South Wales* L R 15 App Cas 379 *Balkishen Das v Legge* 19 A 434 (1897)

(5) *Preonath Shaha v Madhu Suddan* 25 C 603 (1898) foll in *Khankar v* 41 28 C 256 (1900) *Mahomed v Nasir* 28 C 289 (1901) *Ram Sarup v Allah Rakha* 107 P L R (1905) ref to *Narendra v Bhola* 27 C W N 336 (1920)

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(7) 22 A 149 (1899) dist *Narendra v Bhola* 27 C W N 336 (1920)

(8) 27 I A 58 (1899) s c 22 A, 149

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(10) *Secretary of State v Kumar Narendranath Mitter* 32 C. L. J 402 *Blupendra Chandra Singha v Harhar Chakraborty* 24 C. W N 874, *Kuronshahi*

A different view from that expressed in the cases in the last note but one has been expressed by the Bombay High Court⁽¹⁾ where it was said in answer to a contention that the circumstances required the Court to draw an inference that the document was not what it appeared to be —“We can only understand that as meaning that the document was accompanied by a contemporaneous oral agreement or statement of intention, which must be inferred from these several circumstances” This, it was held, was opposed to the Privy Council decision in cases in which a party was not entitled to rely on any of the provisos to the section And in another case in the same Court when the plaintiff desired to set aside a deed of sale by proving that a misrepresentation, agreement or promise, was made to him at the time of execution that the deed would not be enforced as a deed of sale, it was held that such evidence would be inadmissible, since its effect would not be to prove fraud, but to prove the existence of a different contract without proof of fraud to invalidate it (2)

The different view of the decision, the parties is excluded thereby, relevant only by reason of the there was a contemporaneous oral agreement or statement between the parties that a deed was to operate in different manner than it purports to operate, and that no exception is made in any of the provisos to this section or elsewhere in the Act in favour of evidence which consists of the acts and conduct of the parties from which an inference might be drawn that there was an oral agreement to vary the terms of the contract or grant (3)

The principle upon which evidence of conduct has been admitted is explained by Melvill, J, in his judgment in the case of *Bakshu Lakshman v Gobinda Kanji*⁽⁴⁾, in which he held that “A party whether plaintiff or defendant, who sets up a contemporaneous oral agreement as showing that an apparent sale was really a mortgage should not be permitted to start⁽⁵⁾ his case by offering direct parol evidence of such oral agreement, but if it appears clearly and unmistakably from the conduct of the parties that the transaction has been treated by them as a mortgage, the Court will give effect to it as a mortgage and not as a sale and therefore, if it be necessary to ascertain what were

Debi v Ananda Chandra 37 C L J 15
Raja Nirod Chandra v Harihar Chakravarty 32 C L J 19

(1) *Dattoo v Ramchandra Totaram* 7 Bom L R 669 (1905)

(2) *Dagdu Valad Sahu v Nanu Valad Sahu* 35 B 93 and *v Saiana Basappa v Gadigaia Koriya* (1910) 35 B 231

(3) *Aclutaraniaraju v Subbaraju* 25 M 7 (1901)

(4) 4 B 795 (1880) referring to this case Garth C J said In the latter case there will be found an excellent judgment of Mr Justice Melvill in which he very clearly explains this principle of Equity and the mode and the circumstances under which it may be applied *Hem Chunder v Kally Churn* 9 C at p 533 (1888) and see *Behary Lall v Tej Narayan* 10 C 764 (1884) at pp 767, 768 If we may say so we entirely concur in these decisions (*Bakshu Lakshman v Gobinda Kanji* supra *Hem Chunder Soor v Kally Churn* supra) indeed the luminous and able judgment of

Melvill J in the Bombay case cannot but commend itself to the mind of every lawyer per Tottenham and Norris JJ *Bakshu Lakshman v Gobinda Kanji* has been followed in *Hem Chunder v Kally Churn* supra *Behary Lall v Tej Narayan* supra, *Kashi Nath v Hurriur Moolerjee* 9 C 898 (1883) *Venkataratna v Reddiah* 13 M 494 (1890) For more recent decisions in the Bombay High Court on this point (sales or mortgages by conditional sale) see *Tukara v Ramlal* F B 26 B 252 (1901) *Madhorao Keshavrao v Sahebrao* 39 B 119 (1914) *Kasturchand Lalinaji v Jakhna Pada Patel* 40 B 74 (1916) following *Meruti v Balaji* 2 Bom L R 1058 (1900) *Narayan Ram Krishna v Vigneshwar* 40 B 378 (1916) *Rakken v Alagappudayan* 16 M 80 (1892)

(5) This rule prohibiting parol evidence in the first instance was applied in *Behary Lall v Tej Narayan* 10 C 64 768 (1884) but dissented from in *Rakken v Alagappudayan* 16 M 80 83 (1892) v post

the terms of the mortgage, the Court will for that purpose allow parol evidence to be given of the original oral agreement" (1)

"Although parol evidence will not be admitted to prove directly that simultaneously with the execution of a bill of sale there was an oral agreement by way of defeasance, yet the Court will look to the subsequent conduct of the parties, and, if it clearly appears from such conduct that the apparent vendee treated the transaction as one of mortgage, the Court will allow parol evidence to be given of the original oral agreement" (2)

of the agreement out of which it arose, but it may be very much more. In many cases it may amount to an estoppel. In such a case it is clear that evidence of conduct would be strictly admissible under section 115 of this Act. And even when conduct falls short of a legal estoppel, there is nothing in the Evidence Act which prevents it from being proved, or, when proved from being taken into consideration. Courts of Equity in England will always allow a party (whether plaintiff or defendant) to show that an assignment of an estate, which is, on the face of it, an absolute conveyance, was intended to be nothing more than a security for debt, and they will not only look to the conduct of the parties, but will admit mere parol evidence to show or explain the real intention and purpose of the parties at the time. The exercise of this remedial jurisdiction is justified on two grounds, viz *part performance* and *fraud*.

'The Courts in India are not precluded by the Indian Evidence Act from exercising a similar jurisdiction. The rule of estoppel, as laid down in section 115 covers the whole ground covered by the theory of part performance. That section does not say, that in order to constitute an estoppel the acts which a person has been induced to do, must have been acts prejudicial to his own interest. Its terms are sufficiently wide to meet the case of a grantor who has simply been allowed to remain in possession on the understanding and belief that the transaction was one of mortgage, and thus every instance of what the English Courts call 'part performance' would be brought within the Indian rule of estoppel. But the ground upon which this jurisdiction of the Courts in India may most safely be rested is the obligation which lies upon them to prevent fraud (2). The Courts will not allow a rule or even a Statute which was passed to suppress fraud, to be the most effectual encouragement to it, and, accordingly, in England the Courts, for the purpose of preventing fraud have in some cases set aside the Common Law rules of evidence and the Statute of Frauds. The Courts in India have the same justification in dealing similarly with the obstacle interposed by the Indian Evidence Act. In thus modifying the rules laid down by sections 91 and 92 of that Act, the Courts will not be acting in opposition to the intention of the Legislature, which, by enacting the provisions of section 26, clause (c) of the Specific Relief Act (I of 1877), has shown an intention to relax the rules of the Indian Evidence Act, so as to bring them into conformity with the practice of the English Courts of Chancery."

(1) As was observed by Wigram V C. in *Dale v Hamilton* (5 Hare 381), and also by Jessel M R. in *Ungley v Ungley* (L R, 5 Ch D 1837), the conduct of the parties shows that some contract reconcilable with such conduct must have taken place between the litigant parties and the Court is consequently compelled to admit evidence of the terms

of the contract in order that justice may be done between the parties (v. post.)

(2) See *Bholanath Khetri v Kal prasad Aguriallah* 8 B L R. 89 (1871) *Hem Chunder v Kally Churn* 9 C 528 533 (1853), *Kashi Nath v Harrihur Mookerjee* 9 C, 893 (1883) *Rakhen v Alagapudayan* 16 M 80 81 83 (1892) See *Field Ev.* 429 4b 6th Ed 273

Melvill, J, further intimated that in his opinion the *First Proviso* to this section was large enough to let in evidence of such subsequent conduct as in the view of the Court of Equity would amount to fraud, and would entitle a grantor to a decree restraining the grantee from proceeding upon his document. If the admission of this evidence can be justified on the grounds that it is within the purview of the *First Proviso* of the section, there can clearly be no ground for the contention that it in any sense contravenes its terms. As already observed, this was the opinion of Melvill, J, in the case cited who said (1) "Or they may think, and this is a view which is certainly capable of being supported by argument, that the case may be made to fall within the *First Proviso* to section 92, which admits parol evidence of fraud to invalidate a document. It is true that it was held in *Banapa v Sundardas* (2) that the fraud mentioned in the section must be fraud contemporaneous with and not subsequent to, the making of the document, and the Court refused to entertain the argument, which is suggested by Mr Dart in his work on Vendors and Purchasers (p 954, 4th Ed), that the refusal to fulfil a promise may be taken to show that the promise was originally fraudulent. But, admitting that such an argument can hardly be maintained, I must still say that the words of the first proviso to section 92 are very wide, and declare that any act of fraud may be proved which would entitle any person to any decree relating to a document, and it is not quite clear to me that these words are not large enough to let in evidence of such subsequent conduct as, in the view of a Court of Equity, would amount to fraud, and would entitle a grantor to a decree restraining the grantee from proceeding upon this document" (3).

Similarly in the later case of *Rakken v Alagappudayan* (4) Muttusami Ayyar, J, said "I desire, however to rest my decision on the ground stated by Lord Justice Turner in *Lincoln v Wright* (5). His Lordship said in that case 'without reference to the question of part performance on which I do not think it necessary to give any opinion. I think the parol evidence is admissible and is decisive upon the case. The principle of this Court is that the Statute of Frauds was not made to cover fraud. If the real agreement in this case was that as between the plaintiff and W, the transaction should be a mortgage, it is in the eye of this Court a fraud to insist on the conveyance as being absolute and parol evidence must be admissible to prove the fraud. Assuming the agreement proved the principle of the old cases as to mortgages seems to me to be directly applicable. Here is an absolute conveyance when it was agreed that there should be a mortgage and the conveyance is insisted on in fraud of the agreement. The question then as I view it, is whether there was such an agreement as this bill alleges, and upon the evidence I am perfectly satisfied that there was. Besides the agreement for the mortgage was only part of the entire transaction, and the appellant cannot as I conceive adopt one part of the transaction and repudiate the other. Thus the *ratio decidendi* was that the conveyance formed only part of the real agreement, and that the oral agreement which gave a claim to equitable relief formed another part of the same transaction. Again the ground for departing from the ordinary rule of evidence, was subsequent unconscionable conduct in taking advantage of that rule, and thereby endeavouring to mislead the Court into the belief that what was only an apparent sale but a real mortgage was a real sale and not a mortgage. The fraud referred to by the Lord Justice

(1) At p 608

(2) 1 B 333 (1876). See also *Cuttis v Brown* 6 C 328 338 (1880). *The Law of Mortgage in India* by Rash Behary Ghose 3rd Ed p 221

(3) For subsequent conduct see *Vesanti*

Sons & Co v Shapurji Burjorji Bharrowala P C 36 B 387 (1912)

(4) 16 M 80 82 83 (1892)

(5) 4 DeG & J 16 also referred to in *Balkushen Das v Legge*, 19 A 443 (1897)

the terms of the mortgage, the Court will *for that purpose allow parol evidence to be given of the original oral agreement*"(1)

"Although parol evidence will not be admitted to prove directly that simultaneously with the execution of a bill of sale there was an oral agreement by way of defeasance, yet the Court will look to the subsequent conduct of the parties, and, if it clearly appears from such conduct that the apparent vendee treated the transaction as one of mortgage, the Court will give effect to it as a mortgage and nothing more. It is a mistake to reject evidence of the conduct of parties to a written contract on the ground that it is only an indication of an unexpressed unwritten contract between them. Conduct is, no doubt, evidence of the agreement out of which it arose, but it may be very much more. In many cases it may amount to an estoppel. In such a case it is clear that evidence of conduct would be strictly admissible under section 115 of this Act. And even when conduct falls short of a legal estoppel, there is nothing in the Evidence Act which prevents it from being proved, or, when proved, from being taken into consideration. Courts of Equity in England will always allow a party (whether plaintiff or defendant) to show that an assignment of an estate, which is, on the face of it, an absolute conveyance, was intended to be nothing more than a security for debt, and they will not only look to the conduct of the parties, but will admit mere parol evidence to show or explain the real intention and purpose of the parties at the time. The exercise of this remedial jurisdiction is justified on two grounds, viz., *part performance* and *fraud*."

"The Courts in India are not precluded by the Indian Evidence Act from exercising a similar jurisdiction. The rule of estoppel, as laid down in section 115, covers the whole ground covered by the theory of part-performance. That section does not say, that in order to constitute an estoppel, the acts which a person has been induced to do, must have been acts prejudicial to his own interest. Its terms are sufficiently wide to meet the case of a grantor who has simply been allowed to remain in possession on the understanding and belief that the transaction was one of mortgage, and thus every instance of what the English Courts call 'part performance' would be brought within the Indian rule of estoppel. But the ground upon which this jurisdiction of the Courts in India may most safely be rested is the obligation which lies upon them to prevent fraud (2). The Courts will not allow a rule or even a Statute which was passed to suppress fraud, to be the most effectual encouragement to it, and, accordingly, in England the Courts, for the purpose of preventing fraud, have in some cases set aside the Common Law rules of evidence and the Statute of Frauds. The Courts in India have the same justification in dealing similarly with the obstacle interposed by the Indian Evidence Act. In thus modifying the rules laid down by sections 91 and 92 of that Act, the Courts will not be acting in opposition to the intention of the Legislature, which, by enacting the provisions of section 26, clause (c) of the Specific Relief Act (I of 1877), has shown an intention to relax the rules of the Indian Evidence Act, so as to bring them into conformity with the practice of the English Courts of Chancery."

(1) As was observed by Wigram V C in *Dole v Hamilton* (5 Hare 381), and also by Jessel M R, in *Ungley v Ungley* (L R, 5 Ch D 1887), the conduct of the parties shows that some contract reconcilable with such conduct must have taken place between the litigant parties and the Court is consequently compelled to admit evidence of the terms

of the contract in order that justice may be done between the parties (*vide post*).

(2) See *Bholanath Khatri v Kal Prasad Agurwallah*, 8 B L R. 89 (1871). *Hem Chunder v Kally Churn* 9 C 522 533 (1883). *Kashi Nath v Harikur Shooterjee* 9 C., 898 (1883), *Rakken v Alagapudayan* 16 M 80 81, 83 (1892). See *Field Ev.*, 429, 1b 6th Ed., 273.

Melvill, J., further intimated that in his opinion the *First Proviso* to this section was large enough to let in evidence of such subsequent conduct as in the view of the Court of Equity would amount to fraud, and would entitle a grantor to a decree restraining the grantee from proceeding upon his document. If the admission of this evidence can be justified on the grounds that it is within the purview of the *First Proviso* of the section, there can clearly be no ground for the contention that it in any sense contravenes its terms. As already observed, this was the opinion of Melvill, J., in the case cited who said (1) "Or they may think, and this is a view which is certainly capable of being supported by argument, that the case may be made to fall within the *First Proviso* to section 92, which admits parol evidence of fraud to invalidate a document. It is true that it was held in *Banapa v Sundardas* (2) that the fraud mentioned in the section must be fraud contemporaneous with, and not subsequent to, the making of the document, and the Court refused to entertain the argument, which is suggested by Mr Dart in his work on Vendors and Purchasers (p 954, 4th Ed.), that the refusal to fulfil a promise may be taken to show that the promise was originally fraudulent. But, admitting that such an argument can hardly be maintained, I must still say that the words of the first proviso to section 92 are very wide, and declare that any act of fraud may be proved which would entitle any person to any decree relating to a document, and it is not quite clear to me that these words are not large enough to let in evidence of such subsequent conduct as, in the view of a Court of Equity, would amount to fraud, and would entitle a grantor to a decree restraining the grantee from proceeding upon this document" (3).

Similarly in the later case of *Rakken v Alagappudayan* (4) Muttusami Ayyar, J., said "I desire, however, to rest my decision on the ground stated by Lord Justice Turner in *Lincoln v Wright* (5). His Lordship said in that case "without reference to the question of part performance on which I do not think it necessary to give any opinion, I think the parol evidence is admissible and is decisive upon the case. The principle of this Court is that the Statute of Frauds was not made to cover fraud. If the real agreement in this case was that as between the plaintiff and W, the transaction should be a mortgage, it is in the eye of this Court a fraud to insist on the conveyance as being absolute and parol evidence must be admissible to prove the fraud. Assuming the agreement proved, the principle of the old cases as to mortgages seems to me to be directly applicable. Here is an absolute conveyance when it was agreed that there should be a mortgage and the conveyance is insisted on in fraud of the agreement. The question then, as I view it, is whether there was such an agreement as this bill alleges, and, upon the evidence I am perfectly satisfied that there was. Besides, the agreement for the mortgage was only part of the entire transaction, and the appellant cannot, as I conceive adopt one part of the transaction and repudiate the other. Thus the *ratio decidendi* was that the conveyance formed only part of the real agreement, and that the oral agreement which gave a claim to equitable relief formed another part of the same transaction. Again, the ground for departing from the ordinary rule of evidence, was subsequent unconscionable conduct in taking advantage of that rule, and thereby endeavouring to mislead the Court into the belief that what was only an apparent sale but a real mortgage was a real sale and not a mortgage. The fraud referred to by the Lord Justice

(1) At p 608

(2) 1 B 333 (1876). See also *Cutts v Brown*, 6 C., 328, 338 (1880). *The Law of Mortgage in India* by Rash Behary Ghose 3rd Ed p 221

(3) For subsequent conduct see *Vesanti*

Sons & Co v Shapurji Burjorji Bharoocha P C 36 B 387 (1912)

(4) 16 M 80 82 83 (1892)

(5) 4 DeG & J 16 also referred to in *Balkishen Das v Legge*, 19 A., 443 (1897)

And in the undermentioned case it was held that a registered instrument of mortgage takes effect against any oral agreement relating to the hypothecated property and no parol agreement which purports to modify the terms of the contract of mortgage can be proved (1)

As this rule turns on the fraud which is involved in the conduct of the person who is really a mortgagee, and who sets himself up as an absolute mortgagee, the purpose of defeating this fraud is the notice of the existence of fraud who was in possession of the property (2)

In the decision of the Privy Council, already referred to (3), the Judicial Committee with reference to the admission by the High Court and Subordinate Courts for the purpose of their being admissible for the purpose of construing the deeds or ascertaining the intention of the parties

By section 92 of the Indian Evidence Act, no evidence of any oral agreement or statement can be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting varying or adding to or subtracting from its terms, subject to the exceptions contained in the several provisos. It was conceded that this case could not be brought within any of the exceptions referred to by their Lordships

the Indian Legislature the contents of the documents themselves with such extrinsic evidence of surrounding circumstances as may be required to show in what manner the existing facts (5) In a later case in the while under this section and section 93 as to what was intended by the parties, for such intention must be gathered from the language of the instrument, evidence of previous transaction between them may be admissible for a limited purpose as, for instance, in anticipation of an obvious defence (6) And in a recent case in the Privy Council where it was a question whether the amount of land, named in a *labuliyat* was more than was contained by the specified boundaries, it was held that the *labuliyat* could not be varied by extrinsic evidence on this point or as to the negotiation before it was completed (7)

In a later case where the respondents claimed possession of lands under deeds purporting to be absolute conveyances, and the appellants, contending that those were intended to be mortgages and had always been so treated by all the parties, offered evidence of conduct in support of that view, and this was tried under this section, the Privy Council disclosed a charge of fraud antecedent to the deed, and gave any opinion on the application of this

(1) *Maharaj Singh v Raja Bulwant Singh* (1906), 28 A 508

(2) *Kashi Nath v Hurrihur Mookerjee*, 9 C, 1898 (1883), *Rakken v Alagappudasan* 16 M 80, 81, 82 (1892)

(3) *Balkishen Das v Legge* 22 A., 149, 158 159 (1899), s c, 4 C. W. N., 153 The decision of the High Court is upheld in 19 A 434 (1897)

(4) *Alderson v White*, DeG & J., 105, *Lincoln v Wright*, 4 DeG & J., 16 were referred to by the High Court. See as to this class of cases *Rockefoucauld v*

Boustead L. R., 1897, 1 Ch., 196

(5) *Balkrishen Das v Legge*, 22 A., 158 159 (1899), *Jhanda Singh v Wahid-ud din* P C., 38 A 370 (1916) but see *Hanifun nissa v Faisun nissa*, P C., 33 A 340 (1911)

(6) *Protap Chandra Saha v Mohammad Ali Sarkar*, 19 C L. J., 64 (p 70) (1914), per Mookerjee J

(7) *Durga Prasad Singh v Rajendra Nara n Bagchi* P C., 41 C., 493 (1913); 18 C W N., 66

was not fraud practised at the time when the document was executed but the advancement of a claim in fraud of the true intention or the real agreement of the parties. It seems to me that section 92 of the Evidence Act, as observed in *Venkatratnam v Reddiah*(1) does not render evidence of the oral agreement inadmissible for, if the real agreement were proved, it would invalidate the document as a deed of absolute sale within the meaning of the first *Proviso* to section 92 of the Evidence Act, and constitute a ground for a Court of Equity and good conscience giving effect to it only as a mortgage." It has, however been also held that the fraud referred to in this *Proviso* must be contemporaneous and not subsequent fraud, i-

this *Proviso* so far as it makes proviso

be applicable(2) (v post). The same

whether or not a party should or sh

proof of a contemporaneous oral agreement expressed his dissent from the rule laid down in that respect in *Baksu Lakshman v Govinda Kany*, saying(3)

Nor do I see my way to adopting the rule that a party should not first start his case with proof of a contemporaneous oral agreement, and then confirm it by evidence of subsequent acts and conduct of the parties, but that he should prove the latter first and then proceed to prove the former. The subsequent acts and conduct are only indications of the contemporaneous oral agreement and it is such agreement that is the real ground of Equitable relief. Such rule involves in it the anomaly that, while indirect evidence of the true agreement is admissible notwithstanding section 92, direct evidence of the same is not admissible. I do not, however, desire to be understood as saying that it would be safe to rely on the uncorroborated oral evidence of the contemporaneous oral agreement at variance with the terms of a document, but I think the absence of corroborative evidence in the shape of subsequent possession and conduct and other circumstances, is an objection that ought to go to the credit due to the parol evidence and not to its admissibility. In the case before us, there was such corroborative evidence, though the weight due to it was a matter for the Judge to determine."

But in the absence of fraud or of conduct indicating fraud parol evidence

if a party do or refrain from doing any particular thing, a certain sum shall be paid by him, then the sum stated may be treated as liquidated damages. A bond for Rs 20,000, which, provided for payment of interest at the rate of Re 1 4 per cent per month, contained the following clause "We hereby promise and give in writing that we shall pay year by year a sum of Rs 3 000 on account of the interest. And in the case of our failing to pay year by year the said sum of Rs 3 000, the same shall be considered as principal and thereon interest shall run also at the rate of Re 1 4 per cent per month. In a suit on such bond the defendant sought to adduce evidence to show that after the execution of the bond the plaintiff stated that the clause was intended to operate as a penal clause, and that the conditions therein would not be enforced but it was held that the clause was not penal, but in the nature of an agreement to pay liquidated damages, and that the plaintiff was entitled to a decree for the amount due on the bond with interest as agreed upon, and approving and distinguishing the cases of *Baksu Lakshman v Govinda Kany*(4), and *Chunder Soor v Kaly Churn Das*(5), that the evidence tendered was not admissible.(6)

(1) 13 M 495

(2) *Banafa v Sundardas Jagjivandas* 1 B 333 (1876), *Cutts v Brown* 6 C. 328 338 (1880) and see *The Law of Mortgage in India* by Rash Behary Ghose 3rd Ed., p. 221

(3) 16 M at p 83

(4) 4 B, 594

(5) 9 C. 528.

(6) *Bihary Lal v Tej Narain* 10 C. 764 (1884)

reserved to the vendor a right to repurchase within a specified time, and these had been separately stamped and registered, and the right to repurchase had not been exercised, it was held that the transaction was a sale (1). In this case it was said that the intention of the parties was to be gathered from the document viewed in the light of the surrounding circumstances. In several cases the Bombay High Court has decided the question whether a transaction was a mortgage by conditional sale by deducing the real intention of the parties from the circumstances of each case (2).

As already stated the position adopted by the High Courts following the decision of the Privy Council is this —

The English Chancery cases are inapplicable. The question must be determined by the provisions of this section which precludes evidence of any oral agreement or statement. Admittedly direct evidence of any statement of intention is excluded. But evidence of conduct is only relevant as leading to the inference of a contemporaneous oral agreement (3). Subsequent acts and conduct are only indications of the contemporaneous oral agreement which agreement is the ground for relief. The admission of evidence of conduct involves the anomaly that, while indirect evidence of the true agreement is admissible notwithstanding this section, direct evidence of the same is not admissible (4). If evidence of conduct does not establish an agreement other than that appearing on the face of the document, it is irrelevant. If it does, then it is excluded by this section, which prohibits evidence whether direct or

It has been more recently held that

(5) the rights of the parties may be determined by the conduct of the parties, but in any case where the terms are unambiguous no evidence can be given of the conduct of the parties in contravention of the terms of the contract (6).

The true rule would therefore appear to be that any evidence whether of conduct or otherwise, tendered for the purpose of contradicting, varying, adding to, etc., a document is excluded by the terms of this section unless it can be shown to be admissible under the Provisos (7), as on the ground of fraud (8). If a case comes within the Provisos, then any evidence of conduct or otherwise may be given. In short, the same principles apply to the admission of evidence of conduct as indirect evidence of the existence of a contemporaneous oral agreement as to the admission of direct evidence. Neither is admissible

(1) *Jianda Singh v Wahid ud din* P C 38 A 570 (1916) see *Bhagwan Sahas v Bhagwan Din* P C 12 A 387 (1890).

(2) *Kasturchand Lakhmaji v Jakhia Padia* 40 B, 74 (1916) *Narayan Ram Krishna v Vigneshwar*, 40 B 378 (1916) *Madhav Rao Keshavrao v Sahebrao* 39 B, 119 (1914), *Tukaram v Ramchand* F B, 26 B 252 (1901).

(3) *Acularamaram v Subbaraju* 25 M 7 (1901) *Dattoo v Ramchandra* 7 Bom L R 669 (1905) *Radha Raman v Bhouani Prasad* 5 C W N 666 (1901).

(4) *Rakken v Alagappudayan* 16 M, 80 at p 83 (1892).

(5) See *Secretary of State v Kumar Narendranath Mitter*, 32 C L J 402.

(6) *Ib. v Bhupendra Chandra Singha v Harihar Chakravarti*, 24 C W N, 874. *Kironkashi Debi v Ananda Chandra* 32 C L J, 15, *Raja Nirod Chandra v*

Harihar Chakravarti 32 C L J 19.

(7) *Dattoo v Ramchandra* 7 Bom L R 669 670 (1905). 'This of course does not preclude a person from relying on the proviso of the section but there is no case made here which would enable us to say that any of these provisions are applicable to the circumstances of the case. And in *Balkishen v Legge*, 22 A, 149 (1899) the Privy Council said it was conceded that the case could not be brought within any of the provisions.

(8) *Rahman v Elahi Baksh* 28 C. 10 (1900), *Maung Bin v Ma Hlaing* (F. B.) 3 L B R 100, *Abdaji Annaji v Luxman Tukaram* 8 Bom. L R 553, *Sangra Malappa v Ramappa* (1909), 34 B 59. In *Haridas Ranchoredas v Mercantile Bank* 44 B 474 it was held that there was nothing in this section which prevented an implied agreement by acquiescence being proved.

section, ordered that the rejected evidence should be heard subject to any objection which the respondents might take (1)

As already stated, it has been held by some decisions of the Calcutta High Court, that the decision in *Ballishen Das v Jegye* does not in any case exclude evidence of conduct. It does not, it is said lay down any rule of exclusion of evidence over and above that contained in this section which excludes any oral agreement or statement, but not evidence of the acts and conduct of the parties not being in the nature of an oral agreement or statement. The evidence which the Privy Council held inadmissible consisted of the statements of one of the parties to the transaction and of a pleader which went to show that at the time when the negotiations were going on which led to the execution of the deeds under consideration, one of the parties said that he would not execute the deeds unless it was a mortgage and the other answered, and that answer was supported by the pleader that the two deeds which they were going to have would together amount to a mortgage only. That was adduced as evidence of the intention of the parties, and that evidence was considered inadmissible.

That evidence consisted only of a statement of the parties and therefore came directly within the scope of the section. It was held by the Privy Council (2). Such evidence of intention is obviously inadmissible. So evidence of a contemporaneous oral agreement at the time of sale of immovable property that the property was to be reconveyed on payment of the consideration money has been held inadmissible (3). There are, however, decisions both earlier and later than that of the Privy Council in which the Courts have in order to judge of the nature of a transaction, had recourse to the acts and conduct of the parties and to the circumstances, as for example, where it was sought to show that an apparent sale was really a mortgage to the circumstance that the property which was worth Rs 250 was apparently sold for Rs 35 (4). Whilst, however, these cases decide that evidence of conduct is admissible they leave untouched the question whether, when evidence of conduct has been admitted to show that a transaction is not what on its face it appears to be, oral evidence may then be given to show what were the terms of the real transaction. It has been held that such evidence may be given (5). There are, however, decisions of the Calcutta High Court which adopt or approximate to the views of the Madras and Bombay High Courts (6).

In a case in the Calcutta High Court it was held that in determining whether a transaction is a mortgage or a sale with option to repurchase a Judge should take the transaction as expressed in the documents and may also consider facts which may be legitimately proved with a view to showing the relation of the language of the document to existing facts and is justified in referring to a difference between the value and the consideration (7). And in a later case in the Privy Council, where a deed purporting to be one of absolute sale had been followed a month later, by one in which the purchaser

(1) *Ma ng Kyin v Ma She La P C* 38 C 892 (1911)

(2) *Klankar Abdur v Ali Hafiz* 2 C 256 258 259 (1900) *Molamed Ali v Nazar Ali* 28 C 289 (1901) 2nd Appeal Cal H C 696 of 1899 (4th June 1901) *Contra* see *Achutaramaraju v Subbaraju* 25 M 7 (1901)

(3) S A 32 of 1904 Mad H C 6th Sept, 1905 15 Mad L J s n 9

(4) Second Appeal Cal H C 696 of 1899 (11th June 1901) *cor* *Ameer Ali and Pratt JJ*

(5) *v ante* p 620 *Baksu Lakshman v*

Govinda Kanji 4 B 594 (1880) *In Rakken v Alagappidayan* 16 M 80 82 83 (1892) the Court disagreed with the limitation imposed in the former case preventing a party from starting his case by direct parol evidence of the alleged oral agreement

(6) *Radha Raman v Bhowani Prasad* 5 C W N cccxvi (1901) *Rahman v Elahi Buksh* 28 C 70 (1900) *v post* and see *ante* p 618

(7) *Abdul Gaffur v Sheikh Jamal* 18 C L J 228 (1913) *per* *Jenkins C J*

section would not apply to questions like that of the present case, raised by the parties on one side *inter se* and not affecting the other party to the contract, touching their relations to each other in the transaction. The evidence in this respect would be offered not to vary, contradict, add to or subtract from, the terms of the vendees' joint liability under the contract of purchase and sale from their vendor, but only to show as between themselves, the two vendees, to wit, which was the real purchaser, or rather whether M was not the trustee only of his brother G P. Analogously, in the case of the promisors of a joint note, it is competent to one of them, who has had to pay the entire debt to show in variation of the terms of the note, as against a co promisor, that the payer was a surety only, and proving this to get a decree for indemnification against his co promisor (1).

See Illustrations (a) (b), (c). The following cases may also be taken together with those cited *ante* and *post*, in the Note to the second *Proviso* as illustrations of the meaning of these words. In a suit for ejectment in which the defendant pleaded that there was an oral agreement between him and his lessors that he should be entitled to a renewal of the lease for three years it was held that evidence of this oral agreement was inadmissible as it was inconsistent with the terms of the second clause of his lease, which provided for the defendant giving up possession of the premises on receiving a month's notice to quit, and which was as follows: 'If you mean me to vacate at the completion of the term you must give one month's notice. In accordance therewith I will vacate and give up possession to you' (2). Where, again, in a suit on a promissory note the defendants pleaded that the note was passed to the plaintiff only as a security to him against an apprehended loss in certain transactions going on between the parties and sought to prove an agreement between them that accounts would be settled at a later date and money would be paid or received in accordance with such later settlement held that such a defence could not be allowed to be raised and that the evidence sought to be adduced was inadmissible under this section (3).

For the purpose of contradicting varying adding to or subtracting from its terms

In the case next cited *R N*, prior to his death, was a partner with defendants in the firm of *N C and Co*. He died on the 8th November 1884. On the 9th November 1885 his executors passed a release to the defendants, which recited that *R*'s share in the firm and future business had ceased on his death, that the surviving partners had requested the executors to settle the account of their testator with the firm, and that after examining the books and taking accounts etc. a balance of Rs 8395 11 0 was found due, on payment whereof the executors released the defendants from all claims in respect of the share and interest of *R*, &c. On the 7th April 1887, the executors assigned over to the plaintiff a one anna share in the said firm, and the plaintiff, as assignee, was entitled to the share and for an account of the examination of the books at the time of the testator's death, due to the testator's estate by the firm had not been ascertained, and that it had been agreed on by the partners at the time of the release, that, in addition to the sum therein mentioned, the plaintiff should receive a one anna share of the profits of the firm, and the right of the plaintiff, and consequently the partnership ceased at his death. They relied on the release, and denied any agreement to give the executors a share, and contended that, under section 92 of the Evidence Act

(1) *Mulchand v Madho Ram* supra at pp 423 424

(2) *Ebrahim Pir v Cursetji Sorabjee* 11 B, 644 (1887). See as to terms in contravention and defeasance of those of the instrument *Moran v Mutu Ribex*, 2

C 58 (1876) *Cohen v Bank of Bengal*, 2 A 598 602 (1880), *Jadu Rai v Bhubolaran Nundy* 17 C, 173, 186 (1889)

(3) *Sree Ram v Firm Sobha Ram Gopal Rai*, 20 All L J, 315

unless the case can be shown to come within the Provisos to the section. The Dekhan Agriculturists Relief Act (XVII of 1879) section 10A creates an exception to the rule by admitting oral evidence to enable a Court to ascertain the real nature of a transaction (1) but it only applies in the case of one who was an agriculturist at the time of the transaction (2).

"As between the parties to any such instrument or their representatives in interest"

Persons who are not parties to a document or their representatives in interest may give evidence of any facts tending to show a contemporaneous agreement varying the terms of the document (3). Though under this section oral evidence is not admissible for the purpose of ascertaining the intention of the parties to a written document as between the parties to such written instrument or their representatives in interest where evidence is tendered as to a transaction with a third party, the ordinary rules of equity and good conscience come into play unhampered by the statutory restrictions of the section (4). A party to what is on the face of it a sale deed cannot in a suit with a person who is no party to the deed produce evidence to show that the deed was really a deed of gift (5). Further, the words in this section 'between the parties to any such instrument,' refer to the persons who on the one side and the other came together to make the contract or disposition of property and would not apply to questions raised between parties on the one side only of a deed regarding their relations to each other under the contract. The words do not preclude one of two persons in whose favour a deed of sale purported to be executed from proving by oral evidence in a suit by the one against the other, that the defendant was not a real but a nominal party only to the purchase and that the plaintiff was solely entitled to the property to which it related. Thus *M* conveyed certain houses and premises to plaintiff and defendant jointly by a sale deed. Plaintiff sued defendant for ejectment from the premises alleging that he alone was the real purchaser, and that defendant was only nominally associated with him in the deed. Held that section 92 of the Evidence Act did not preclude plaintiff from showing by oral evidence that he alone was the real purchaser, notwithstanding the defendant was described in the sale deed as one of the two purchasers (6). The Court in this case said "In the case before us, the 'parties' in this sense would be the vendor on the one part and the two vendees on the other part. 'As between the vendor and themselves neither of the vendees would be heard to plead or would be allowed to offer oral evidence to show that both were not parties to the buying of the house. Neither vendees could resist the vendor's claim for the price or for any other relief properly arising to him out of the contract on a plea intended to show that one of the two was a nominal party only to the contract. Similarly one of the several obligors of a bond or bill of exchange would not be allowed in answer to the obligee's action on the joint instrument to maintain a plea that he was a surety only, except of course in a case where a money lender made advances on the security of a joint and separate note being well aware at the time that one of its makers was a surety only. In such case, notwithstanding the form of the note, the surety has been allowed to plead, as an equitable defence, and prove that he was known by the lender to be surety when the note was made, and that without his consent, the principal had time given to him by the lender. Such a case as this would fall probably under the first Proviso to section 92. But, on the other hand, we think that this

(1) *Gopal Gela v. Rajaram Amtha* 36 B 305 (1912)

(2) *Savantrana v. Girappa Fakirappa* 38 B 18 (1914)

(3) S 99 *post* see note to that section. See *Pathammal v. Syed Kola* 27 M 329 331 (1903) dissenting in this respect from *Rahiman v. Elahi Baksh* 28 C 70 (1900) and *v. Mehgar Ram v. Alakhan*

Lal (1912) 47 P R No 67 p 258

(4) *Maung Aun v. Ma Shue Sa* 43 C 320 s c 22 C W N 257 P C. See *Sukunari Debi v. Kalipada Mukerjee* 45 I C 13

(5) *Ashfaq Husan v. Syed Naw Husan* 22 O C 222 s c 53 I C 961

(6) *Mulchand v. Madho Ram* 10 A. 421 (1883)

section would not apply to questions like that of the present case, raised by the parties on one side, *inter se* and not affecting the other party to the contract, touching their relations to each other in the transaction. The evidence in this respect would be offered not to vary, contradict add to or subtract from the terms of the vendees joint liability under the contract of purchase and sale from their vendor, but only to show as between themselves the two vendees to wit, which was the real purchaser, or rather whether *M* was not the trustee only of his brother *G P*. Analogously, in the case of the promisors of a joint note, it is competent to one of them who has had to pay the entire debt, to show in variation of the terms of the note as against a co promisor, that the payer was a surety only, and proving this to get a decree for indemnification against his co promisor (1).

See Illustrations (a) (b) (c) The following cases may also be taken together with those cited *ante* and *post*, in the *Note* to the *second Proviso* as illustrations of the meaning of these words. In a suit for ejectment in which the defendant pleaded that there was an oral agreement between him and his lessors that he should be entitled to a renewal of the lease for three years it was held that evidence of this oral agreement was inadmissible as it was inconsistent with the terms of the second clause of his lease which provided for the defendant giving up possession of the premises on receiving a month's notice to quit, and which was as follows: If you mean me to vacate at the completion of the term you must give one month's notice. In accordance therewith I will vacate and give up possession to you. (2) Where again, in a suit on a promissory note the defendants pleaded that the note was passed to the plaintiff only as a security to him against an apprehended loss in certain transactions going on between the parties and sought to prove an agreement between them that accounts would be settled at a later date and money would be paid or received in accordance with such later settlement held that such a defence could not be allowed to be raised and that the evidence sought to be adduced was inadmissible under this section (3).

In the case next cited *R N* prior to his death was a partner with defendants in the firm of *N C and Co*. He died on the 8th November 1884. On the 9th November 1885 his executors passed a release to the defendants, which recited that *R*'s share in the firm and future business had ceased on his death, that the surviving partners had requested the executors to settle the account of their testator with the firm and that after examining the books and taking accounts etc. a balance of Rs 8395 11 0 was found due on payment whereof the executors released the defendants from all claims in respect of the share and interest of *R & Co*. On the 7th April 1887, the executors assigned over to the plaintiff a one anna share in the said firm, and the plaintiff, as assignee brought this suit for a declaration of his right to the share and for an account. He alleged that there had been no accurate examination of the books at the time of the release, that the amount really due to the testator's estate by the firm had not been ascertained, and that it had been agreed on by the partners at the time of the release, that in addition to the sum therein mentioned, the executors as representing the testator's estate, should receive a one anna share in the partnership. The defendants denied the right of the plaintiff, and contended that the interest of *R* and his estate in the partnership ceased at his death. They relied on the release, and denied any agreement to give the executors a share and contended that under section 92 of the Evidence Act

For the purpose of contradicting varying adding to or subtracting from its terms

(1) *Mulcland v Madho Ram* supra at pp 423 424

(2) *Ebrahim Pir v Cursetji Sorabjee* 11 B, 644 (1887). See as to terms in contravention and defeasance of those of the instrument *Moran v Mittu Bidee*, 2

C 58 (1876) *Cohen v Bank of Bengal*, 2 A 598 602 (1880) *Jadu Rai v Bhubotaran Nundy* 17 C. 173, 186 (1889)

(3) *Sree Ram v Firm Sobha Ram Gopal Rai* 20 All L J, 315

no evidence could be given of the alleged agreement. For the plaintiff, it was contended that the agreement as to the one anna share was quite independent of the release. It was held, that evidence of the agreement that the executors should continue to have a one anna share in the partnership was inadmissible as being inconsistent with the written release. By the release the executors of *R* released the partners from all claims whatever in respect of *R*'s share and the consideration for that release was stated in the document to be a lump sum, on payment of which under the writing all claims arising out of the old partnership ceased and determined. The oral agreement added another term to the consideration for the release in respect of the past accounts viz, the continuance of a one anna share in the partnership. Such an agreement was not a purely collateral or additional agreement. It was an addition to the terms of a contract that had been reduced to writing and was inconsistent with those terms (1).

And where in a suit on a promissory note payable on demand, the defendant admitted execution and consideration, but pleaded that it was agreed between the plaintiff and the defendant at the execution of the note that the plaintiff until a certain date, it was in this section and the suit was accordingly decreed against the defendant (2). Had this evidence been admitted it would have had the effect of contradicting the terms of the document. As the *third Proviso* under which the evidence was tendered, the oral rule proviso of the

instrument, and, therefore, if effect be given to this condition it cannot affect the terms of the document itself. In a case in the Privy Council where a mortgagor had contended that the real intention of the parties should be ascertained from negotiations and conversations alleged to have taken place before the mortgage was executed, it was held that where there is an express and unambiguous stipulation in a mortgage deed that the profits of the property shall belong to the mortgagee in lieu of interest this cannot be contradicted or varied by reference to preliminary negotiations, and it was said that this is no more permissible in India than in England and that this Act is clear on that point (3). And in another case in the Privy Council where it was a question whether the area stated as demised in a *kabuliyat* exceeded the quantity of land contained by the specified boundaries it was held that the construction of the *kabuliyat* could not be contradicted or varied by extrinsic evidence to this effect or by evidence of the preliminary negotiations which led to the contract (4).

by instalment was orally agreed between the parties as part of the hypothecated property, until the amount due on the bond should have been liquidated from the rents, that, in accordance with this agreement the plaintiff obtained possession of the land, and that he had thus realized the whole of the amount due. It was held that the oral agreement was not one

(1) *Cottasji Ruttonji v Burjorji Ruttonji* 21 B 335 (1888) followed in *Adityaji Iyer v Rama Krishna Iyer* 38 M 514 (1915).

(2) *Kaishan Serotjee v Oghur Nath* 1 C W N 2 C W N 183 (1897).
Ishnu Ramchandra Joshi v Ganesh

Krishna Sathe 23 Bom L R. 448 (1911).
(3) *Sayid Abdullah Khan v Sayid Beshereet Ilushin* 40 I A 31 (1912) 17 C L J 312.

(4) *Durga Prasad Singh v Rajendra Naran Bagchi* P C. 41 C. 493 (1912), 18 C W N. 66 s c 19 C. L. J 93.

which detracted from, added to, or varied the original contract, but only provided for the means by which the instalments were to be paid, and that it was, therefore, admissible in evidence (1) Where there was a registered partition-deed allotting the several joint properties among the different sharers, and the partition deed whilst it made special provisions for giving access to other portions was silent as to the right of access of a particular house fallen to the share of a particular sharer, the latter, it was held, could not set up an oral agreement to give him the right as the same was not admissible under this section (2) In the undermentioned case (3) it was held that an alleged agreement to pay interest was either a part of the agreement embodied in the *khata* or it was a separate agreement If the former, then under this section evidence of it was inadmissible If it was a separate agreement, then it would not vitiate the agreement embodied in the *khata* which apart from this supposed oral agreement, would not have been open to objection under section 257A of the last Civil Procedure Code, now omitted

In the absence of a contract to that effect an agent cannot personally enforce or be bound by contracts (4) The agent is liable if, by the terms of the contract he makes himself the contracting party Evidence is not admissible to show that a person who appears on the face of a written contract to be personally a contracting party is not really a contracting party, and, therefore, not liable as such upon the contract (5) When it appears upon a written contract that the agent is liable, he is not unless he can show that there was a mistake and that the writing did not properly express the intention of the parties (6) entitled to discharge himself by reason of his agency, for the effect of the written instrument cannot be varied by oral evidence (7) In a suit on a contract signed by the defendant personally, the latter attempted to lead oral evidence to show that he was contracting as agent and that the name of his principal was disclosed at the time of the contract On objection it was held that such evidence was not admissible for the purpose of exonerating a contracting party from liability, for that would be substituting a different agreement from that evidenced by the writing (8) The Contract Act, moreover, provides that such a contract by the agent personally shall be presumed to exist in three specified cases, unless the contrary appears, one of which cases is where the agent does not disclose the name of his principal This probably means in the case of a written contract where the name of the principal is not disclosed on the face of the contract The Contract Act should be read subject to the provisions of this section and if on the face of a written contract an agent appears to be personally liable, he cannot probably escape liability by the evidence of any disclosure of his principal's name apart from the document (9) On the other hand, it has been held that there is nothing to prevent the production of evidence to show that the person who is not liable upon the face of the contract is in fact chargeable under it (10)

(1) *Ra i Baksh v Durjan* 9 A 392 (1887) See *Badal Ra i Jhulai* 44 A 53 19 A L J 826 (1921)

(2) *Aristna i Raju v Marra'u* 15 Mad L J 255 (1905)

(3) *Raici and Mot claid v Naran Bh kha* 28 B 310 (1904)

(4) Contract Act (N of 1872) s 230 in which the converse rule to that which obtains in England is laid down see s C, 77 as to Negotiable Instruments see s 28 Act XVI of 1881 as to evidence of usage v post In Calcutta where a vendor of goods deals with the banian of an European firm qua banian he can only

look to the latter for the price *Sheik Fa-ulla v Ra kamal Mitter* 2 B L R., O C J 7 8 9 (1866)

(5) *Bepu behari v Ramchand* 5 B L R 234 242 243 (1870)

(6) *Hake v Harrop* 6 H & N 768.

(7) See Cunningham and Shephard, Contract Act note to s 230 Taylor, Ev., § 1153

(8) *Ebrahimbhoy v Mamooji*, 45 B., 1242 (1921)

(9) *Sopromonian Setty v Heilgers*, C 71 79 (1879)

(10) Taylor Ev §§ 1135, 1174, *Behari v Ram Chundra* 5 B L R.,

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instrument, and, therefore, if effect be given to this condition it cannot affect the terms of the document itself. In a case in the Privy Council where a mortgagor had contended that the real intention of the parties should be ascertained from negotiations and conversations alleged to have taken place

or varied by reference to the instrument, it is no more pertinent to the question at that point (3).

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In the absence of a contract to that effect an agent cannot personally enforce or be bound by contract, he makes himself to show that a person who personally a contracting party is not really a contracting party, and, therefore, not liable as such upon the contract (5) When it appears upon a written instrument unless he can show that there was a properly express the intention of the principal by reason of his agency, for the effect of the written instrument cannot be varied by oral evidence (7) In a suit on a contract signed by the defendant personally, the latter attempted to lead oral evidence to show that he was contracting as agent and that the name of his principal was disclosed at the time of the contract On objection it was held that such evidence was not admissible for the contracting party from liability, for that would be a fraud on that evidenced by the writing (8) The fact that such a contract by the agent personally shall be presumed to exist in three specified cases, unless the contrary appears one of which cases is where the agent does not disclose the name of his principal This probably means in the case of a written contract where the name of the principal is not disclosed on the face of the contract The Contract Act should be read subject to the provisions of this section and if on the face of a written contract an agent appears to be personally liable, he cannot probably escape liability by the evidence of any disclosure of his principal's name apart from the document (9) On the other hand, to prevent the production of evidence to the face of the contract liable upon

(1) *Ram Baksh v Durjan* 9 A 392 (1887) See *Badal Rai v Jhulsi* 44 A 53 19 A L J 826 (1921)

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(9) *Soopramaniam Setty v Helgers* 5 C 71 79 (1879)

(10) Taylor Ev §§ 1135 1174 *Bepin Behari v Ranchorandra* 5 B L R. 443

In the undermentioned case(1) Jackson, J, speaking of *benami* transactions observed "In this very large class of cases it seems to me that the rule in regard to the admission of parol evidence to vary written contracts will not
 who enters
 evidence
 re us (2)
 o persons

primarily liable is not affected by a private arrangement between them as to suretyship (3) Oral evidence is not admissible to show that one of the executors of a note of hand signed it only as surety and that his liability was only to the extent of standing as a surety for one month (4)

In the undermentioned case the plaintiff sued to recover money which he had been compelled to pay in virtue of a mortgage executed by his two half sisters and himself His claim was based on the plea that, though appearing in the bond as a co obligor, he was in reality merely a surety Held that evidence was admissible to show that the plaintiff executed the mortgage bond as a surety only (5)

Where the contention was as to whether evidence could be given to show that a will was really intended for the benefit of a person, other than the one mentioned therein, the Court, stating that there was no authority in India upon the subject held that in the absence of any such authority, it doubted whether it was open to adduce such evidence unless the Courts here acted upon the principle which in cases of this class, is acted upon in the English Courts namely, that a party setting up a secret trust must adduce evidence to prove that it was communicated by the testator to the universal legatee, and that the legatee agreed to accept the property bequeathed in the terms of trust (6) In a later case it was held that where the testator at the time of the disposition or after it, informs a legatee of a secret trust, which the latter accepts expressly or by implication, the legatee becomes a trustee as in English law and the trust may be proved by oral evidence (7) In this case it was said that the English rule was made applicable by section 5 of the Indian Trusts Act This decision has been followed in a later case where a testator made bequests in favour of a person not named in the will, stating that he would give private instructions on this point to a trustee who would disclose the name of the beneficiary (8) There may be a new and independent contract Thus in the case cited (9) the parties to a decree pending execution compromised their disputes and adjustment of the decree was certified to the Court The execution case was struck off as the decree was satisfied Held that the order of the Court was binding on the parties and there was no longer an operative decree in existence The fact that the liabilities under the decree formed the consideration for the compromise, did not prevent that compromise from being a new and independent contract which might form the basis of a suit and which

(1870) [It is quite another matter whether evidence may be admitted to charge another person as the principal]

(1) *Bepin Belari v Ram Chandra* 5 B L R 234 248 249 s c 14 W R. 12 (1870)

(2) And see *Donzelle v Kedarnath Chuckerbutty* 7 B L R 720 727 (1871) the *benamidar* is not an agent for either party but a stranger to the whole business whose name only is used

(3) S 132 of Contract Act and see *Pogose v Bank of Bengal* 3 C 174 (1877) distinguished in *Harek Chand v Bishnu Chandra* 8 C. W N 101 (1903),

Taylor Ev § 1153

(4) *Harek Chand v Bishnu Chandra* 8 C W N 101 (1903)

(5) *Shanishul Jahan Begum v Ahmad Wali* 25 A 337 (1903)

(6) *Kali Churn v Ram Chandra*, 30 C 783 (1903)

(7) *Manuel Louis Kunha v Juana Coelho* (1907) 31 M 187

(8) *Bajabas Sakalkar v Haridas Ram chhorda* 40 B 1 (1916) and see post Commentary in section 93 ambiguity in Wills p 616

(9) *Ratan Lal v Anwar Khan* 53 I C. 527

might be proved by oral evidence and such evidence would not amount to contradicting and so forth the terms of the decree.

The rule of evidence embodied in the first paragraph of this section presupposes the validity of the transactions evidenced by the documents to which that rule is to be applied. If, therefore, that validity is impeached, it is no defence to point to the apparent rectitude of the document and to claim protection from enquiry under a rule which exists against the contradiction and variance of the terms only of those instruments the validity of which is not in question. In such case the Court is not bound by the mere "paper expressions" of the parties and is not precluded from enquiry into the real nature of the transaction between them. Hence the declaration in this Proviso (1) In order that an agreement may constitute a perfect contract it must have been made by the free consent of parties (1), without coercion, undue influence, fraud, misrepresentation or mistake, competent to contract, for a lawful consideration and with a lawful object and it must not be one which is expressly declared by the Contract Act to be void (2). And in order to dispose of property by will a person must be of sound mind and not a minor (3). And a will or any part of a will, the making of which has been caused by fraud or coercion or by such importunity as takes away the free agency of the testator, is void (4). Such being the conditions imposed by law as necessary to the existence of a perfect contract, grant, or other disposition of property, the want of such conditions as invalidate the document or entitle any person to any decree or order relating thereto may clearly be proved without infringing the general rule enacted by the section. The rule enacted by this section is simply a canon of evidence. The instrument must be a valid one, and the rule addresses itself accordingly only to the contradiction and so forth, of an instrument, the validity itself of which is not in question. Oral evidence is admissible under this proviso to prove any fact which would invalidate a document. Thus agreements by way of wager are void (5). So, though

provisions as that provision was inserted in it by mistake. A may prove that such a mistake was made as would by law entitle him to have the contract reformed (7). Where neither party is in error as to the matters in respect of which

(1) *Bens Madhab v Sadasook Kotary* 9 C W N 305 308 (1905) s c 1 C L J 155 32 C 437, per Woodroffe J

(2) Act IX of 1872 (Contract) s 10 as to competency to transfer property see Act IV of 1882 (Transfer of Property) s 7 the Chapters and sections of which Act relating to contracts are to be taken as part of the Indian Contract Act

(3) *Krishna Nachariar v Krishnamachariar* 38 M 166 (1915)

(4) Act V of 1865 (Indian Succession), ss 46 48 extended to the wills of Hindus etc. by Act XXI of 1870 s 2

(5) Act IX of 1872 (Contract) s 30 See *Balgobind v Bhagwan Val* 35 A 558 (1913) (part of consideration for gambling debts)

(6) *Eshoor Doss v Venkatasubba Rao*

17 M 480 (1894) *Anupchand Heirchand v Charasji Ugarel* and 12 B 785 (1888), both cases dissenting from *Juggernath Sow v Rani Dyal* 9 C 791 (1883) which last decision is incorrect and has since been overruled [*Bens Madhab v Sadasook Kotary* 9 C W N 305 F B (1905)] s c 1 C L J 155 32 C 437 and in which as was pointed out in the subsequent cases above cited the effect of Proviso (1) to s 92 does not appear to have been considered. See also as to contracts for lidden by statute or common law *Kasheerath Chatterjee v Clundy Churn* 5 W R 68 71 (1866)

(7) S 92 Illustr (e) Field Ev 432, *Mahendra Nath v Jogendra Nath* 2 C W N 260 (1897) cited post

ror in the reduction of the contract purpose of reforming the contract not exhaustive, that is merely con appears from the use of the words "such as" there are set out by way of illustration only Any fact may be proved which would invalidate any document (2)

(a) Fraud

A party will be allowed to give parol evidence when the execution of such document was obtained from him by fraud (3) Thus in a suit by a purda lady to set aside a bill of sale, execution of which by her had been obtained by collusion and fraud, the Court admitted parol evidence to show that the bill of sale was intended by her to operate only as a mortgage (4) So a plaintiff sued to recover rent under a *labuliyat* The defendant admitted execution of the *labuliyat*, but asserted that he executed it in order to enable the plaintiff to sell the land at a high price, the plaintiff agreeing to make over to him Rs 282 out of the purchase money and to obtain for him from the purchaser a *mourasi pottah* of the land, it never having been intended that any rent should be payable under the *labuliyat* It was held that under this proviso evidence of the oral agreement was admissible for the purpose of proving the fraudulent character of the transaction between the parties (5)

There is a conflict of opinion on the point whether the fraud referred to in this Proviso is (6), or is not (7), contemporaneous fraud In the first of the cases cited, it was held that the fraud referred to in this proviso must be contempo

if it were otherwise case it has been held such fraud as would un(10), Garth, C J, observed with regard to the Proviso as follows — "That proviso seems to me to apply to cases where evidence is admitted to show that a contract is void or voidable, or subject to reformation etc, in its inception and not t perfectly valid and free from any

to make a fraudulent use of it as against the other It will be found that the rule laid down in section 92 of the Evidence Act is taken almost verbatim from Taylor on Evidence (1st Edition), section 813, and the exceptions which follow in the several provisos are discussed in sections 816 to 841 of the same work That being so I think it is quite legitimate to refer to those sections, as one means of ascertaining the true meaning of the provisos The substance of the proviso, and the examples showing the meaning of that proviso, are contained and explained in sections 816 to 819, and it will be found that they all relate to the reception of evidence for the purpose of invalidating contracts

(1) Fry on Specific Performance § 787 For alteration made without fraud to express real intention see *Ananda Mohan Saha v Ananda Chandra Saha* 44 C. 154 (1917) Woodroffe and Mookerjee JJ

(2) *Beni Madhab v Sadasook Kotary* 9 C W N 305 (1905) s c 32 C 437 per Woodroffe J

(3) As to fraud see Act IX of 1872 ss 17 14 19 *Kassim Mundle v Sreenmully Noor Bibee* 1 W R., 76 (1864) *Ganu v Bhau* 42 B 512 per Shah J *Asatulla v Sadatulla* 28 C L J 197

(4) *Manohar Das v Bhagbat Das* 1 B L R O C 28 (1867)

(5) *Kashi Nath v Brindaban Chucker butty* 10 C 649 (1884)

(6) *Baapa v Sundardas Jagjandas* 1 B 333 338 (1876) *Cutts v Brown* 6 C 328 338 s c 7 C L R 11 (1880) per Garth C J *Pronath Slaha v Madiu Sudan* 25 C 606 (1898)

(7) *Bakshi Lakshman v Gorinda Kanji* 4 B 594 608 (1880) *Rakken v Alagapudayan* 16 M 80 83 (1892) *Cutts v Brown* supra at p 335 per Ponfex J

(8) *Baapa v Sundardas Jagjandas* supra and see remarks in *The Law of Mortgage in India* by Rash Behary Ghose 3rd Ed p 271

(9) *Dagdu talad Sahu v Anand talad Sahu* 35 B 93

(10) 6 C 378 (1880) at p 338 and see *Keshavarao Bhanant v Roy Pandu* 8 Bom L R 287

by reason either of fraud illegality, etc., in their inception, or of some subsequent failure of consideration. For this reason as well as from the language of the proviso itself, I think that it is not intended to apply to a case where the contract itself being valid one of the parties wishes to make an improper use of it' (1). On the other hand, it had been observed that the jurisdiction of the Courts to admit parol evidence of conduct of the parties to show that an apparent sale was really a mortgage rested on the basis of fraud, and that the words of the first proviso to section 92 were very wide and declared that any act of fraud might be proved which would entitle any person to any decree relating to a document, and that it was not clear that these words were not large enough to let in evidence of such subsequent conduct as in the view of a Court of Equity would amount to fraud and would entitle a grantor to a decree restraining the grantee from proceeding upon his document.

A person cannot both approbate and reprobate the same transaction. A

proof of fraud for his own
dice his adversary. Their
d v *Srinivasa Singh* (2)

observed upon this principle as follows: "The rules of evidence, and the law of estoppel, forbid any addition to or variation from, deeds or written contracts." The law, however, furnishes exceptions to its own salutary protection, one of which is when one party for the advancement of justice is permitted to remove the blind which hides the real transaction, as for instance in cases of fraud, illegality, and redemption in such cases the maxim applies, that a man cannot both affirm and disaffirm the same transaction, show its true nature for his own relief, and insist on its apparent character to prejudice his adversary. This principle so just and reasonable in itself, and often expressed in the terms, that you cannot both approbate and reprobate the same transaction has been applied by their Lordships in this Committee to the consideration of Indian Appeals, as one applicable also in the Courts of that country, which are to administer justice according to equity and good conscience. The maxim is founded not so much on any positive law, as on the broad and universally applicable principles of justice. The case of *Forbes v Ameeroonissa Begum* (3) furnishes one instance of this doctrine having been so applied, where it is said in the judgment of their Lordships "The respondent cannot both repudiate the obligations of the lease and claim the benefit of it."

coercion (and similarly by undue (b) Intimidation
at the option of the party whose
'Undue influence' are defined

by sections 15 and 16 of the Indian Contract Act. A will or any part of a will, the making of which has been caused by fraud or coercion or by such importunity as takes away the free agency of the testator is void (5). Parol evidence may be given to prove such coercion or undue influence as for instance that the writing sued upon was obtained by improper means such as duress (6).

The consideration or object of an agreement is unlawful if it is forbidden (c) Illegal
by law, or is of such a nature that if permitted it would defeat the provision of any law, or is fraudulent, or involves or implies injury to the person or property of another, or the Court regards it as immoral or opposed to public policy. Every agreement of which the object or consideration is unlawful is

(1) *Bakshi Lakshman v Govind Kanji*
4 B 594 608 (1880) and see to same
effect *Rakken v Alagappudayan* 16 M
80 83 (1892) *Cutts v Brown* 6 C,
328 335 (1880) per *Pontifex J*.
(2) 2 B L R P C 44 48 49 (1869)
the rule was followed and applied in *Lala*

Himmat v Llewellyn 11 C. 486 490
(1885) v *post*
(3) 10 Moo I A 356
(4) Act IX of 1872 (Contract) s 19
(5) Act X of 1865 (Indian Succession)
s 43
(6) *Taylor Ev* § 1137

void (1) So also a bequest upon a condition the fulfilment of which would be contrary to law or to morality is void (2) Under this *Proviso* parol evidence may be given of illegality, namely, the unlawful character of the object or consideration of the agreement or condition in question, as for example to show that a contract not disclosing these, was really made for objects forbidden either by Statute or by common law (3)

(d) Want of due execution or capacity

Due execution of a document being necessary to make operative the disposition therein contained, want of such execution may be proved for the purpose of invalidating the document. In some cases as in the matter of wills (4) the law has enacted that their execution shall be governed by certain rules. It may be shown that those rules have not been followed and that thus the disposition has thereby become defective (5) So also it may be shown that the party was incapable of contracting, by reason of some legal impediment such as minority, idiocy, insanity or intoxication (6) An agreement is not a contract, if made by a party who is not competent to contract (7) Contractual competency is defined by the 11th and 12th sections of the Indian Contract Act

(e) Want or failure of consideration

An agreement made without consideration is void, unless it is made on account of natural love and affection in writing and registered, or is a promise to

this section prevents the admission of oral evidence for the purpose of contra

described the consideration to be Rs 100 in ready cash received but the evidence showed that the consideration was an old bond for Rs 63 12 0 and Rs 36 1-0 in cash it was held that there was no real variance between the statement in the deed and the evidence as to consideration, having regard to the fact that it is a

as bonus to the plaintiff by the defendant the mode of payment being stated

(1) Act IX of 1872 (Contract) s 23 as to consideration and object unlawful in part see ss 24 55 58 ib Cf definition of illegal in Penal Code s 43

(2) Act X of 1865 s 114

(3) See *Collins v Blantern* 2 Wills 347 s c 1 Smith L C *Benyon v Nettlefold* 3 Mac and G 94 Taylor Ev § 1137 1 Smith L C (Note to *Collins v Blantern*) and cases there cited *Hill v Clarke* 1 All L J 632 (1904) s c 27 A 266 [the Court will take notice of illegality even though not pleaded]

(4) Act X of 1865 (Indian Succession) Part VIII extended to Hindus by Act XXI of 1870 s 2 Part IX

(5) See Taylor Ev § 1135

(6) See ib § 1137

(7) Act IX of 1872 s 10

(8) Act IX of 1872 (Contract) s 25

(9) *Choudhry Deby v Chowdhry*

Doulat 3 Moo I A 347 (1844) and see *Shakh Walee v Shakh Kumar* 7 W R 428 (1867) *Dookla Tlakoor v Ra* 5 W R 408 (1865) the case of *Musam* *ut Rande v Shib Dayal* 7 W R 334 (1867) and *Mussamut Ram v Bhen* *Dyal* 8 W R 339 (1867) are no longer law See s 115 post

(10) *Hukun Cland v Hiralal* 3 B 179 (1876) distinguished in *Adityam Iyer v Rama Krishna Iyer* 38 M 514 (1915) (as referring to difference in kind of consideration with difference in amount) see also *Vasudeta Blais v Narasanna* 5 M 6 8 (1882) [the provisions of s 92 do not prohibit the disproof of a recital in a contract as to the consideration that has passed by showing that the actual consideration was something different to that alleged] *Kumara v Srimtasa* 11 M 233 215 (1887)

alleged that, at the time of the transaction it was agreed that the sum of Rs 1 000 was to be retained by him on account of a debt due by one of the plaintiff's relations to him. The plaintiff objected that the evidence of the agreement set up by the defendant was inadmissible. But it was held that inasmuch as it was open to the plaintiff under the first proviso of section 92 of the Evidence Act to prove by oral evidence that the whole of the consideration money had not been paid it was equally competent to the defendant in answer to such case to adduce evidence to prove the true nature of the contract, and that the consideration was different from that stated in the contract. It was held, also that the plea

and that on this ground the oral evidence tendered was admissible under the

had any consideration for it and that he accepted it for the accommodation of the drawer or some other party (2) Section 92 will not debar a party to a contract in writing from showing notwithstanding the recitals in the deed that the consideration specified in the deed was not in fact paid as therein recited but was agreed to be paid in a different manner (3) The Privy Council have held that it is a settled law that notwithstanding an admission in sale deed that the consideration has been received it is open to the vendor to prove that no consideration has been actually paid. The Evidence Act does not say that no statement of fact in a written instrument may be contradicted but the terms of the contract may not be varied etc. So where the contract was to sell for Rs 30 000, which was stated in the deed to have been received it was held competent for the vendor, without infringing any provision of the Act to prove a collateral agreement that the purchase money should remain in the hands of the vendee for the purposes and subject to the conditions alleged by him (4) Where one of the parties to a deed is under any of the provisions of this section permitted to go into oral evidence, it is open to the other party also to rebut that evidence by oral evidence. So where a deed recited the payment of a certain consideration and the plaintiff denied the passing of any consideration and adduced evidence in support of his contention it was held open to the defendant to go into oral evidence to show that there was some consideration for the deed though not the same as recited in the deed (5) And it has been held that the "want or failure of consideration" contemplated by this proviso is a complete want or failure of consideration. If the document could or cannot be proved, it has been held that a registered sale deed is inadmissible (7) In another case in that High Court it

(1) *Lala Himmat v Llehellen* 11 C 486

(2) *Pogose v Bank of Bengal* 3 C. 174 184 (1877)

(3) *Inderjit v Lal Chand* 18 A 186 (1895)

(4) *Shah Lalchand v Indrajit* 4 C W N 485 (1900) s c 27 A 370 in which it was held that evidence was admissible to show that consideration had not been received notwithstanding the recital of that fact in the deed followed in *Fazlunissa v Hafunissa* 2 All L J 360 364 (1905)

(5) *Kalash Chandra v Harish Chun*

der 5 C W N 158 (1900)

(6) *Keslavarao Bhalant v Ray Pandu* 8 Bom L R 287

(7) *Adityam Iyer v Rana Krishna Iyer* 38 M 514 (1915) following *Couassji Ruttonji v Burjorji Rustomji* 12 B 335 (1886) *Inderjit v Lal Chand* 18 A 168 (1896) *Salamba Goundan v Palana Goundan* M W N 620 (1913) and *Probhat Chandra Gangapadhya v Chivraj Al* 33 C 607 (1906) distinguishing *Gopal Singh v Laloo Lal* 10 C L J 27 (1909) and *Kistara v Srivasa* 11 M 213 (1882)

void (1) So also a bequest upon a condition the fulfilment of which would be contrary to law or to morality is void (2) Under this *Proviso* oral evidence may be given of illegality, namely, the unlawful character of the object or consideration of the agreement or condition in question, as for example to show that a contract not disclosing these, was really made for objects forbidden either by Statute or by common law (3)

(d) Want of due execution or capacity

Due execution of a document being necessary to make operative the disposition therein contained, want of such execution may be proved for the purpose of invalidating the document. In some cases as in the matter of wills (4) the law has enacted that their execution shall be governed by certain rules. It may be shown that those rules have not been followed and that thus the disposition has thereby become defective (5). So also it may be shown that the party was incapable of contracting by reason of some legal impediment such as minority, idiocy, insanity or intoxication (6). An agreement is not a contract if made by a party who is not competent to contract (7). Contractual competency is defined by the 11th and 12th sections of the Indian Contract Act

(e) Want of failure of consideration

An agreement made without consideration is void, unless it is made on account of natural love and affection in writing and registered or is a promise to do something in a document. It may be proved by oral evidence of such payment and may be rebutted by evidence of non payment (9). So also this section prevents the admission of oral evidence for the purpose of contracting with a party to a contract, a deed of sale, or a deed of gift, consideration

described the consideration to be Rs 100 in ready cash received, but the evidence showed that the consideration was an old bond for Rs 63 12-0 and Rs 36-10 in cash, it was held that there was no real variance between the statement in the deed and the evidence as to consideration, having regard to the fact that it is usual to receive an old bond for cash (10)

as bonus to the plaintiff by the defendant the mode of payment being stated to be in cash in one lump sum. The plaintiff sued to recover the sum of Rs 1800 alleging that only Rs 150 had been paid and not Rs 2000 as recited in the *putawa*. The defendant admitted that Rs 850 was due, and as to the remaining Rs 1000

(1) Act IX of 1872 (Contract) s 23 as to consideration and object unlawful in part see ss 24 55 58 ib Cf definition of illegal in Penal Code s 43

(2) Act X of 1865 s 114

(3) See *Collins v Blantern* 2 Wills 347 s c 1 Smith L C *Benson v Nettelford* 3 Mac and G 94 Taylor Ev § 1137 1 Smith L C (Note to *Collins v Blantern*) and cases there cited *Hill v Clarke* 1 All L J 632 (1904) s c 27 A 266 [the Court will take notice of illegality even though not pleaded]

(4) Act X of 1865 (Indian Succession) Part VIII extended to Hindus by Act XXI of 1870 s 2 Part IX

(5) See Taylor Ev § 1135

(6) See ib § 1137

(7) Act IX of 1872 s 10

(8) Act IX of 1872 (Contract) s 25

(9) *Choudhry Deby v Choudhry*

Donlat 3 Moo I A 347 (1844) and see *Shaikh Walce v Shaikh Kumar* 7 W R 428 (1867) *Dookla Thakoor v Ran Lal* 5 W R 408 (1865) the case of *Musammut Ramdee v Sh b Dayal* 7 W R 334 (1867) and *Musammut Rai v Faken Dayal* 8 W R 339 (1867) are no longer law See s 115 post

(10) *Hukum Chand v Hirala* 3 B 179 (1876) distinguished in *Idiyam Iyer v Rama Krishna Iyer* 38 M 514 (1915) (as referring to difference in kind of consideration with difference in amount) see also *Vasudeva Bhatlu v Narasimha* 5 M 6 8 (1882) [the provisions of s 92 do not prohibit the disproof of a recital in a contract as to the consideration that has passed by showing that the actual consideration was something different to that alleged] *Kumara v Srinivasa* 1 M 233 215 (1887)

alleged that, at the time of the transaction, it was agreed that the sum of Rs 1 000 was to be retained by him on account of a debt due by one of the plaintiff's relations to him. The plaintiff objected that the evidence of the agreement set up by the defendant was inadmissible. But it was held that inasmuch as it was open to the plaintiff under the first Proviso of section 92 of the Evidence Act to prove by oral evidence that the whole of the consideration money had not been paid it was equally competent to the defendant, in answer to such case, to adduce evidence to prove the true nature of the contract, and that the consideration was different from that stated in the contract. It was held, also, that the plea

and that on this ground the oral evidence tendered was admissible under the

had any consideration for it and that he accepted it for the accommodation of the drawer or some other party (2) Section 92 will not debar a party to a contract in writing from showing notwithstanding the recitals in the deed, that the consideration specified in the deed was not in fact paid as therein recited but was agreed to be paid in a different manner (3) The Privy Council have held that it is a settled law that notwithstanding an admission in sale deed that the consideration has been received, it is open to the vendor to prove that no consideration has been actually paid. The Evidence Act does not say that no statement of fact in a written instrument may be contradicted, but the terms of the contract may not be varied, etc. So where the contract was to sell for Rs 30 000, which was stated in the deed to have been received it was held provision of the Act, to prove should remain in the hands of conditions alleged by him (4)

Where one of the parties to a deed is, under any of the provisions of this section, permitted to go into oral evidence, it is open to the other party also to rebut that evidence by oral evidence. So where a deed recited the payment of a certain consideration, and the plaintiff denied the passing of any consideration and adduced evidence in support of his contention it was held open to the defendant to go into oral evidence to show that there was some consideration for the deed, though not the same as recited in the deed (5). And it has been held that the "want or failure of consideration" contemplated by this proviso

tion may be proved, evidence to vary the amount of the consideration in a registered sale deed is inadmissible (7). In another case in that High Court it

(1) *Lola Hin mat v Lleukhellen* 11 C 486

(2) *Pogose v Bank of Bengal* 3 C 174 184 (1877)

(3) *Inderjit v Lal Chand* 18 A 186 (1895)

(4) *Shah Lalchand v Indrajit* 4 C W N 485 (1900) s c 22 A 370 in which it was held that evidence was admissible to show that consideration had not been received notwithstanding the recital of that fact in the deed followed in *Faiz un nissa v Hanif un nissa* 2 All L J 360 364 (1905)

(5) *Kalash Chandra v Hurish Chun*

der 5 C W N 158 (1900)

(6) *Keslaraoa Blaguant v Ray Pand* 8 Bom L R 287

(7) *Adityam Iyer v Rana Krishna Iyer* 38 M 314 (1915) following *Gouarji Ruttonji v Burjorji Rustomji* 12 B 335 (1886) *Inderjit v Lal Chand* 18 A, 168 (1896) *Salamba Goundan v Palana Goundan* M W N 630 (1913) and *Probhat Chandra Gangapadhyay v Churaj Ali* 33 C 607 (1906) distinguishing *Gopal Singh v Laloo Lal* 10 C L J 27 (1909) and *Kuriara v Srinivasa* 11 M 213 (1832)

void (1) So also a bequest upon a condition the fulfilment of which would be contrary to law or to morality is void (2) Under this *Proviso* parol evidence may be given of illegality, namely, the unlawful character of the object or consideration of the agreement or condition in question, as for example to show that a contract not disclosing these, was really made for objects forbidden either by Statute or by common law (3)

(d) Want of due execution or capacity

Due execution of a document being necessary to make operative the disposition therein contained, want of such execution may be proved for the purpose of invalidating the document. In some cases as in the matter of wills (4) the law has enacted that their execution shall be governed by certain rules. It may be shown that those rules have not been followed and that thus the disposition has thereby become defective (5). So also it may be shown that the party was incapable of contracting, by reason of some legal impediment such as minority, idiocy, insanity or intoxication (6). An agreement is not a contract, if made by a party who is not competent to contract (7). Contractual competency is defined by the 11th and 12th sections of the Indian Contract Act.

(e) Want of failure of consideration

An agreement made without consideration is void, unless it is made on account of natural love and affection in writing and registered, or is a promise to do something in a document. If the consideration is not in a document, oral evidence of such payment and may be rebutted by evidence of non payment (9). So also this section prevents the admission of oral evidence for the purpose of contracting a party to a contract, the consideration of which is not in a document of sale.

described the consideration to showed that the consideration in cash, it was held that there was no real variance between the statement in the deed and the evidence as to consideration, having regard to the fact that it is customary to state the consideration of an agreement in an agreement of sale.

as bonus to the plaintiff by the defendant, the mode of payment being stated in the deed as Rs 1000.

(1) Act IX of 1872 (Contract) s 23 as to consideration and object unlawful in part see ss 24 55 58 ib Cf definition of illegal in Penal Code s 43

(2) Act X of 1865 s 114

(3) See *Collins v Blantern* 2 Wills 347 s c 1 Smith L C. *Benson v Nettelford* 3 Mac and G 94 Taylor Ev § 1137 1 Smith L C (Note to *Collins v Blantern*) and cases there cited *Hill v Clarke* 1 All L J 632 (1904) s c 27 A 266 [the Court will take notice of illegality even though not pleaded]

(4) Act V of 1865 (Indian Succession), Part VIII extended to Hindus by Act VI of 1870 s 2 Part IX

(5) See Taylor Ev § 1135

(6) See ib § 1137

(7) Act IX of 1872 s 10

(8) Act IX of 1872 (Contract) s 25

(9) *Choudhry Debj v Choudhry*

Donlat 3 Moo 1 A 347 (1844) and see *Shaikh Walce v Shaikh Kunar* 7 W R 428 (1867) *Dookla Thakoor v Ram Lal* 5 W R 408 (1865) the case of *Musammut Ran-dee v Shib Dayal* 7 W R 334 (1867) and *Musammut Ran v Bishen Dayal* 8 W R 339 (1867) are no longer law. See s 115 post

(10) *Hukun Cland v Huralal* 3 B 179 (1876) distinguished in *Adityam Iyer v Rama Krishna Iyer* 38 W 514 (1915) (as referring to difference in kind of consideration with difference in amount) see also *Varudeta Bhatlu v Narasamma* 5 M 6 8 (1882) [the provisions of s 92 do not prohibit the proof of a recital in a contract as to the consideration that has passed by showing that the actual consideration was something different to that alleged] *Aumara v Srinivasa* 1 M 233 215 (1887)

alleged that at the time of the transaction it was agreed that the sum of Rs 1 000 was to be retained by him on account of a debt due by one of the plaintiff's relations to him. The plaintiff objected that the evidence of the agreement set up by the defendant was inadmissible. But it was held that inasmuch as it was open to the plaintiff under the first Proviso of section 92 of the Evidence Act to prove by oral evidence that the whole of the consideration money had not been paid it was equally competent to the defendant in answer to such case to adduce evidence to prove the true nature of the contract and that the consideration was different from that stated in the contract. It was held also that the plea of the defendant substantially was that although the consideration was fixed at Rs 2 000 there was a separate oral agreement to the effect that out of that sum the plaintiff was to refund Rs 1 000 on account of the debt due from his relative and that on this ground the oral evidence tendered was admissible under the second Proviso of section 92 of that Act (*vide post*) the stipulation as to the refund of Rs 1 000 not being inconsistent with the recital as to the consideration in the contract (1). Under this proviso it may be shown that an acceptor of a bill never had any consideration for it and that he accepted it for the accommodation of the drawer or some other party (2). Section 92 will not debar a party to a contract in writing from showing notwithstanding the recitals in the deed that the consideration specified in the deed was not in fact paid as therein recited but was agreed to be paid in a different manner (3). The Privy Council have held that it is a settled law that notwithstanding an admission in a sale deed that the consideration has been received it is open to the vendor to prove that no consideration has been actually paid. The Evidence Act does not say that no statement of fact in a written instrument may be contradicted but the terms of the contract may not be varied etc. So where the contract was to sell for Rs 30 000 which was stated in the deed to have been received it was held competent for the vendor without infringing any provision of the Act to prove a collateral agreement that the purchase money should remain in the hands of the vendee for the purposes and subject to the conditions alleged by him (4). Where one of the parties to a deed is under any of the provisions of this section permitted to go into oral evidence it is open to the other party also to rebut that evidence by oral evidence. So where a deed recited the payment of a certain consideration and the plaintiff denied the passing of any consideration and adduced evidence in support of his contention it was held open to the defendant to go into oral evidence to show that there was some consideration for the deed though not the same as recited in the deed (5). And it has been held that the want or failure of consideration contemplated by this proviso is a complete want or failure of consideration since no consequence invalidating the document could otherwise follow (6). In a case in the Madras High Court it has been held that while such want or failure or difference in kind of consideration may be proved, evidence to vary the amount of the consideration in a registered sale deed is inadmissible (7). In another case in that High Court it

(1) *Lala Himmat v Lleschellen* 11 C 486

(2) *Pogose v Bank of Bengal* 3 C 174 184 (1877)

(3) *Inderjit v Lal Chand* 18 A 186 (1895)

(4) *Shah Lalchand v Indrajit* 4 C W N 485 (1900) s c 27 A 370 in which it was held that evidence was admissible to show that consideration had not been received notwithstanding the recital of that fact in the deed followed in *Fazlurissa v Hanifurissa* 2 All L J 360 364 (1905)

(5) *Kalash Chandra v Hurish Chandra*

5 C W N 158 (1900)

(6) *Kesavarao Blaguant v Ray Pandit* 8 Bom L R 237

(7) *Adityam Iyer v Rana Krishna Iyer* 38 M 514 (1915) following *Coutarji Ruttuji v Brijraj Rustomji* 12 B 335 (1886) *Inderjit v Lal Chand* 18 A 163 (1896) *Sala ba Goundan v Palana Goundan* M W N 650 (1913) and *Probhat Chandra Gangapadhyaya v Churaj Al* 33 C 607 (1906) *dstangushing Gopal Singh v Laloo Lal* 10 C L J 27 (1909) and *Kumara v Srivasa* 11 M 213 (1882)

has been held that (assuming evidence is admissible to show that the real consideration was not the one stated but a promise to maintain the grantor) the deed would not be set aside without proof of undue influence misrepresentation or fraud (1). The Allahabad High Court has held that where one party to a deed proves that the whole of the consideration did not pass this proviso enables the other party to prove what the real consideration was (2) and in another that the recital of receipt of consideration in a mortgage deed raises a strong though rebuttable presumption that such consideration was paid (3). In a suit on a promissory note the question whether the defendant executant of the note signed it by way of security for others cannot be tried or determined except so far as it affects the question of consideration (4).

f) Mistake
a fact or
law

Mistake may exist either in the intention or purpose of the parties or be a mistake in rendering their intention into words. As regards the first an agreement is void when both parties are under a mistake as to a matter of fact (5) and for this purpose a mistake as to a law not in force in British India has the same effect as a mistake of fact (6). In such cases there is no contract at all. Further where a contracting party who cannot read has a written contract falsely read over to him and the contract written differs from that pretended to be read the agreement is void (7).
is not voidable merely because of the mistake of one party as to a matter of fact (8) nor because it was caused by a mistake as to any law in force in British India (9). Oral evidence is admissible of such mistake which if established shows that there was no agreement at all.

But the mistake may be one in rendering the intention into words an agreement being not void if the mistake be one for which a remedy may be obtained by the reformation of a document. In such cases there is an agreement but the words in which it is expressed do not rightly represent the meaning of the parties. When through fraud or mutual mistake a contract or other instrument does not truly express the intention of the parties either may institute a suit to have the instrument rectified (10) and oral evidence is again admissible to correct the mistake. What in such case is rectified is not the agreement but the mistaken expression of it (11). Thus in a recent case (12) where upon the renewal of a mortgage one of the mortgaged properties was apparently by clerical error misdescribed in the later deed though correctly described in the former deed and the mortgagor had no such property as was incorrectly described in the later deed held that under this Proviso evidence was admissible to prove the mistake by reference to and comparison of the former deed. In the Madras High Court where a defendant in a suit for possession of property which had been the subject of a sale deed pleaded that the property had been wrongly described in the sale deed by the use of a wrong survey number it was held that the combined effect of this Proviso and of section 31 of the Specific Relief Act (I of 1877) was to enable either party to a contract

(1) *Subbajar v. Monant S. braman Ajjar* 36 M. 8 (1913)

(2) *Chinnai B. b. v. Basanta B. b.* 36 A. 537 (1913)

(3) *Ra. Sarup v. Kera. Hah* 36 A. 464 (1914)

(4) *D. rga. Clara. Bose v. Laksh. Nara. Bera* 47 I. C. 917

(5) Act IX of 1872 (Contract) s. 20

(6) *Ib.* s. 21. See Taylor Ev. 1119 1140

(7) *Dagdu v. Bhana* 28 B. 420 427

(1904)

(8) Act IX of 1872 s. 22

(9) *Ib.* s. 21 & Taylor Ev. sup. a

(10) Act I of 1877 (Specific Relief) s. 31

(11) *Dagdu v. Bhana* 28 B. 40 45 (1904) where the subject of mistake is discussed. Cf. *Abdul Hak m. K'ian v. Pan Gopal* 44 A. 246

(12) *Abdul Hak m. K'ian v. Ram Gopal* 44 A. 246 s. c. 20 All. L. J. 53

to prove a mistake (1). And in another later case the Allahabad High Court held that where one of several villages the subject of a registered mortgage deed was described as being in the wrong *tappa* but the description was otherwise sufficient for identification, the mistake did not vitiate the registration on the mortgage of the village in question (2). But where the misdescription is intentional as where an imaginary property in Cicutta was described in a mortgage-deed apparently for the purpose of securing registration there, this registration was held by the Privy Council to be invalid (3), and in another case it was held by the Allahabad High Court that a sale deed fraudulently registered at Bareilly by a similar trick conveyed no title to property situated elsewhere (4).

If some plain and palpable error has crept into the written instrument, Equity formerly, and the Courts of Common Law now, sanction the admission of evidence to expose the error (5). In such cases, especially where recourse is had to Equity for relief, the extrinsic evidence is not offered to contradict a valid existing agreement, but to show that from accident or negligence the instrument in question has never been constituted the actual depository of the intention and meaning of the parties. Cases of this nature are nearly of kin to those of fraud, it is in point of conscience and equity an actual fraud to claim an undue benefit and advantage from a mere mistake contrary to the real intention of the contracting parties. Such evidence, however, ought not for obvious reasons, to be allowed to prevail unless it amount to the strongest possible proof. The most satisfactory evidence for this purpose consists of the written materials and instructions which were intended by the parties to be the basis and ground plan for the construction of the intended instrument (6). Thus where parties covenanted to convey an estate in trust, to raise £30,000 to pay off debts and encumbrances, with remainder over, parol evidence was admitted to show that it was the concurrent intention of all the parties to raise that sum in addition to the sum of £21,000, with which the estate was encumbered (7). So also in cases of marriage settlements where mistakes have been committed, and in consequence, the deeds have varied from the instructions of the parties, they have been rectified by the Court. The same has also been done in instances of mercantile and other contracts (8). The first *Principle* does not limit the admissibility of oral evidence to a suit to obtain a

plaintiffs brought a suit to recover it was covered by the conveyance and the defence was to the effect that what was intended to be sold and purchased was the revenue paying estate of the defendant, but that the land in suit, which was the homestead

(1) *Rangasami Ayyangar v. Soury Ayyangar* 39 M 792 (1916) following *Mohendra Nath Mookerjee v. Jogendra Nath Roy Choudhry* 2 C W N 260 (1897) and *Maladava Ayyar v. Gopala Ayyar* 34 M 51 (1911).

(2) *Parsota Das v. Patesri Partab Naran Singh* 35 A 250 (1913). But see *Durga Prasad Singh v. Rajendra Naran Bagchi* P C 18 C W N 66 41 C 493 19 C L J 95 (1914).

(3) *Harendra Lal Roy Choudhury v. Hari Das Debi* P C 41 C 972 41 I A 110.

(4) *Mangali Lal v. Abid Yar Khan* 39 A 523 (1917).

(5) *Guardhouse v. Blackburn* L. R. 1 P & D 109 115 citing *Hake v. Harrop* 6 H & N 763 *Ram Sarup v.*

Allah Rakha 107 P L R (1905).

(6) *Starkie Ev.* 675—677 and cases there cited. See as to the rectification of instruments on the grounds of mistake *Act I of 1877 Ch III Nelson's Specific Relief Act* pp 51—62 223 278 *Story Eq Jur Ch V Taylor Ev* §§ 1139 1140 *Pollocks Law of Fraud in British India* 123 *Kassim Mundle v. Noor Bibee*, 1 W R 76 (1864) *Babu Dimpul v. Sheikh Jussalur* 8 W R 152 (1867) *Dagdu v. Bhana* 28 B 420 (1904).

(7) *Shelbourne v. Inchiquin* 1 Bro C C 338.

(8) *Starkie Ev.* 676 and cases there cited. In *Durga Prasad v. Bhajan Lal* 31 C 614 626 (1904) the P C held that no rectification was needed and that the case was not touched by this section.

of the defendant though found included in the estate was not expressly excepted because both the parties were under the mistaken impression that it was not so included, but was *lakhray* and it was contended that it was not open to the defendant to raise such a defence in this suit, it was held that it was open to the Court to allow oral evidence to prove the mutual mistake and that where there is a mutual mistake of fact in a case, as here, a Court administering Equity will interfere to have the deed rectified so that the real intention of both parties may be carried into effect and will not drive the defendant to a separate suit to rectify the instrument (1) Where a deed of mortgage under which the possession of the mortgaged property was handed over to the mortgagee provided that there was to be no accounting between the parties at the time of redemption and it appeared that a portion of the mortgage consideration was set down in the deed as being due to the mortgagee from the mortgagor merely by guess without any account having been really taken at the time Held that the mortgagor could show that there was a mistake in the statement of consideration and that the mortgagor was entitled to have an account taken (2)

Proviso (2) The rule excluding parol evidence to vary or contradict a written document is not infringed by proof of any *collateral* parol agreement which does not interfere with the terms of the written contract though it may relate to the same subject matter (3) it does not prevent parties to a written contract from proving that either contemporaneously or as a preliminary measure they entered into a distinct oral agreement on some collateral matter (1) See *Illustrations (f) (j) (l)* In considering however whether or not such proof may be given the Court shall have regard to the degree of formality (2) of the document The evidence moreover will in no case be admissible if the oral agreement is inconsistent (6) with the terms of the written instrument If however the document is silent on the matter and the agreement is consistent (4) with its terms it may be proved

So when a promissory note is silent as to interest a verbal agreement made subsequent to the execution of the note to pay interest may be proved under this clause (8) And in a suit upon a *hathchitta* the Court having regard to the informal nature of the document sued upon allowed evidence to be given of a verbal agreement to repay the amount acknowledged with interest no mention having been made as to interest in the *hathchitta* itself (9) In a case where a mortgagee inserted the words 'per cent' in a mortgage bond thus changing the rate of interest payable under it, the Calcutta High Court held that the alteration was made in good faith to carry out the intention of the partner and

(1) *Mohendra Nath v Jogendra Nath* 2 C W N 260 (1897) *Rangasa is Ayyan gar v So ri Ayyan gar* 39 M 792 (1916) *Parsola v Das v Patesri Partab Nara n* 35 A 250 (1913)

(2) *Partab Singh v Balwant Singl* 50 L J 670 s c. 48 I C 550

(3) *Kastanath Clatterjee v Clundt Clarn (I B)* 5 W R 68 69 citing Taylor Ey § 1147 See *Badal Ram v Jhulai* 44 A 53 19 Ali L J 816 (1921) *Gur B ksh Singh v Chatta Singh* 50 O L J 471 *Dhan Singh v Gopal Chand* 53 I C 137 *Yado v Behari Lal* 53 I C 242, *Dhan Singh v Gokul Chand* 1 Lahore 83

(4) Taylor Ey § 1135

(5) See *Illustration (b)*, *Mayen v*

Alsto 16 M 238 254 255 (1897) and post

(6) See *Ebrailim Par v Cursetj Sorah* 11 B 544 (1887) *Cocazj Rustomji v Burjorji Rustomji* 12 B 335 (1888) *Cutts v Broan* 6 C. 328 338 (1890) *Sabapattij Mudali v Kupusami Mudali* 15 M L J 225

(7) See *Lala Himmat v Liechellen* 11 C 486 (1885) cited *supra* *Mayen v Alston* 19 M 238 254 255 261 (1892) and cases cited in next two notes

(8) *Soudanonjee Debya v Spalding* 12 C. L. R. 163 (1882) *Yado v Behari Lal* 53 I C 242

(9) *Unesh Chunder v Mohini Mohun* 9 C L. R. 301 (1881)

did not vitiate the instrument (1) See for a further application of this Proviso, *Hunmat Sahai Singh v Lleuhellen* (2)

When an instrument is not formal, it may, as already observed, often be shown that some additional and supplementary agreement was made contemporaneously with the principal one. When an instrument is a formal one, it is often extremely difficult to say what is really "collateral" to it. Obviously, unless some restriction be imposed the general rule may be rendered nugatory. It has been suggested in America that a matter ought not to be considered "collateral" except where it is evident from the writing itself that such writing contains part only and not the whole of the agreement. And so the section makes the degree of formality the condition upon which if the other terms of the section are fulfilled the admissibility of the evidence depends. In a recent case it was held that having regard to the concluding words of this Proviso evidence of an agreement to pay interest on the amount shown due in an entry was admissible, such entry not being of a formal character (3).

The case provided for by this Proviso and that in which evidence is admitted because the document does not and was not intended to contain the whole agreement between the parties (4) agree in this, that in neither case does the document in fact contain the whole agreement between the parties, but differ in that in the latter case the document was not intended to contain the whole agreement, the document being subject to or merely a memorandum of a transaction which was in fact entered into orally, and therefore oral and inconsistent evidence may be given while in the former case the document was intended to and does contain the principal contract, which has, however, been orally supplemented by other terms upon matters on which it is silent. In so far as in the latter case the document does, with the exception of such terms constitute the contract these terms must be consistent with those embodied in the instrument itself. An agreement in writing to refer certain disputes to arbitrators was made outside Court and it was stated therein that whatever award was made by the arbitrators would be binding upon the parties to the reference. The award was made only by a majority of the arbitrators and it was sought to be proved that there was a separate contemporaneous oral agreement between the parties to the effect that the decision of a majority of the arbitrators would be binding upon the parties. Held that the oral agreement was admissible under this Proviso (5).

In a case where in a suit on a promissory note the defendant pleaded that by an oral agreement his liability on the note was to cease a month after its date and the plaintiff replied that this was conditional on further security which had not been produced the Appellate Court held that evidence of the oral agreement was inadmissible under this section, but the Privy Council held that since a mere amendment of the pleadings would have brought this defendant's contention within this Proviso, it was unsatisfactory to decide against him without hearing this evidence, but that it had been incumbent on him to tender substantive proof of the oral agreement (6). In this case it was said that while there are cases in which it is permitted to plead an oral agreement which would have the effect of leaving matters otherwise than they
 agreement
 Evidence
 admissible

(1) *Ananda Mohan Saha v Ananda Chandra Raha* 44 C 154 (1917) per Woodroffe and Mookerjee JJ

(2) 11 C 486 490 (1885)

(3) *Bhan Singh v Gokal Chand*, 1 Lahore 83

(4) See ante para 2 to notes of the

section

(5) *Gur Baksh Singh v Chatta Singh* 5 O L J 471

(6) *Notabhooy Mulla Essabhooy v Mulla Haridas* P C. 39 B 399 (1915), discussed in *Badal Ram v Jhulas* 44 A 53 19 A L J 816 (1921).

under this Proviso (1) In the case cited(2), it was held that where a promissory note made no mention regarding the payment of interest oral evidence was admissible under this Proviso

Proviso (3)

This Proviso, with which should be read Illustration (j), is intended to introduce the well established rule in England(3), that when at the time of a written contract being entered into it is orally(4) agreed between the parties that the written agreement shall not be of any force or validity, until some condition precedent has been performed, parol evidence of such oral agreement is admissible to show that the condition has not been performed and consequently, that the written contract has not become binding. Until the condition is performed there is in fact no written agreement at all(5). For instance it may be shown by parol evidence that an instrument apparently executed as a deed, had really been delivered simply as an escrow(6), that is a writing deposited with a third person(7) to be by him delivered to the person whom it purports to benefit, upon the performance of some condition upon which only the writing is to have effect. Also it may be shown that a document was really meant to be conditional on the happening of an event which had never occurred(8). The admission of such evidence shows that the contract was never to come into operation as a contract at all unless the condition precedent were complied with it neither varies nor contradicts the writing, but suspends the commencement of the obligation(9).

An oral stipulation that an instrument is not to become binding unless and until some stipulation be first fulfilled may always be shown. Thus evidence has been admitted to show that an agreement in writing was not intended to operate as an agreement between the parties, until a third party had approved of it(10) and that a written instrument by way of lease containing no date was to operate only when the date was filled in, and which was not to be filled in until certain repairs had been done(11). So where the plaintiff declared upon an
 help
 mac
 within a reasonable time after the making of the agreement consent and agree
 the defendant
 clared on was
 X should not

(1) *Bhan Singh v Gokal Chand* 53 I C 31

(2) *Jado v Belari Lal* 53 I C 242

(3) See Taylor Ev § 1135

(4) See Illustration (j) which should run A & B make a contract in writing and orally agree that it shall take effect &c

(5) *Jugtanund Misser v Nerghan Singh* 6 C 433 435 (1880) See *Badal Ram v Jhular* 19 A L J 816 (1921)

(6) *Murray v Lord Star* 2 B & C 82

(7) In *Shah Mozum v Balasoo Koer*, Hays Rep 576 (1863) it was held that where a deed of sale of a portion of an estate was delivered to the party in whose favour it had been executed evidence could not be admitted to show that it was intended to operate as an escrow only as might have been the case had it been delivered to a third party. Technically it is true that the document was not in such case an escrow. But in principle it was the same thing. For it was alleged that until the condition was performed no interest was to pass to the transferee (B II

v *Ingestre* 12 Q B 317 319 320) The report of this decision which may perhaps have been justified on other grounds is not full or clear and does not appear to be in accordance with the terms of this proviso or of the cases upon which the latter is founded. See Field Ev 6th Ed 281

(8) Taylor Ev § 1135 and cases there and hereafter cited.

(9) See *Ranjiban Serougy v Oghur Nath* 2 C W N 188 (1897) cited post. Discussed in *Lishnu Ramchandra Joshi v Ganesh Krishna Saitle* 23 Bom L R 488 (1921)

(10) *Pym v Campbell* 6 E F B 370 followed in *Guddalur Ruthna v Annasair Arumuga* 7 Mad H C R 189 196 197 (1872). *Dada Honaji v Babaji Jagdish* 2 Bom H C R 38 41 (1865). *Jugtanund Misser v Nerghan Singh* supra. *Dinanath Law v Metharam* 33 C L J 577 (1921) (subject to confirmation by principals)

(11) *Davis v Jones* 25 L J C P 91, followed in *Jugtanund Misser v Nerghan Singh*, supra.

to the transfer of the farm to the plaintiff, it was held that it was competent to the defendant to prove by extraneous evidence this contemporaneous oral agreement as it operated only as a suspension of the written agreement and not in defiance of it (1). And where a plaintiff attempted to enforce as a contract of loan binding upon the defendant immediately upon its execution an instrument which he verbally agreed at the time should not so operate, and for which the defendant received no consideration, the latter was allowed to give evidence of the verbal agreement (2). It is open to the Court to decide under this Proviso that an *ijara patta* granted by a landlord was intended to be operative only in the event of the lessee being able to obtain possession of the leasehold property and that such possession was a condition precedent to the attaching of any obligation under the lease upon which a suit could be based (3). So also evidence of a contemporaneous oral agreement to suspend the operation of a written contract of sale, until an agreement for a resale was executed, is admissible (4). The same doctrine applies to wills, though it must be used with very great caution. So a duly executed paper, testamentary on the face of it, is not entitled to probate, if it is clearly proved by parol evidence that it was executed by the deceased without any intention that it should affect the disposition of his property after death (5). The first Proviso does not permit the terms of a written contract to be varied by a contemporaneous

proper meaning
written contract
no obligation

at all until the happening of a certain event, may be proved. So the terms of a promissory note purporting to be an absolute engagement to pay on demand cannot be varied by a contemporaneous oral agreement constituting an undertaking on the part of the plaintiff not to enforce the note by a suit till the happening of a certain event, or implying that the legal obligation of payment was to be postponed to, or made conditional upon, the happening of a certain event (6).

document was held that when a document was operation and, according to its tenor or at once, the executant

could not be permitted to set up or prove that the real intention was to vest such property at a future time or after his own death (7). In this case it was said that the English rule permitting evidence that a document was intended to operate in a manner different from its ostensible effect cannot be followed in India under this Act. And in another case in the same High Court it has been held that the question whether a document operates as a present conveyance or as an agreement to create a future right must be decided according to the intention of the parties as expressed in it (8).

(1) *Hallis v Littell* 11 Scot Rep N S 369, followed in *Dada Honaji v Babaji Jagushet* 2 Bom H C R 38 41 (1865) see also *Bell v Ingestre* 12 Q B, 317, *Gudgen v Bissett* 6 E & B 986, *Lindley v Lacey*, 17 Scott Rep, N S 578 Taylor Ev, § 1135

(2) *Annagurubala Chetti v Krishnasami Nayakkan*, 1 Mad H C R 475 (1863) cited and approved in *Jugtanund Musser v Nerghan Singh*, 6 C, 433, 435 (1880) See also *Tiruvengada Ayyangar v Rangasami Nayak* 7 M 19 (1883), *Dada Honaji v Babaji Jagushet*, 2 Bom H C R 38 (1865), in which evidence was also admitted under this proviso and *Cohen v Bank of Bengal*, 2 A, 598 (1880), in which the admissibility of the evidence in question was held to be doubtful

(3) *Kafiluddin Biswas v Sabdar Ali Biswas* 29 C L J 478, s c, 50 I C, 918

(4) *Dada Honaji v Babaji Jagushet*, 2 Bom H C R 38 (1865)

(5) *Lister v Smith* 3 S & T 282

(6) *Ramjiban Serougy v Oghur Nath*, 2 C W N 188 (1897) *Foll in Vishnu Ramchandra v Ganesh Krishna* 45 B, 1155 (1921)

(7) *Motayappan v Palani Goundan* 38 M, 226 (1915), citing *Chella Venkata Reddi v Devabhaktuni*, M W N, 169 (1912), and *Jiban Nisa v Asgar Ali P C*, 17 C, 937 (1890), distinguishing *Chandra Mehdi Hasan v Muhammad Hasan P C* 28 A 439 (1906)

(8) *Mangamma v Rasumma* 37 M, 480 (1914)

A distinction must be drawn between the cases where the matter sought to be introduced by extraneous evidence is a condition precedent or a defeasance. It may be shown that the instrument was not meant to operate, until the happening of a given condition, but it cannot be shown by parol that the agreement was to be defeated on the happening of a given event (1)

Upon the question whether the words "condition precedent to the attaching of any obligation under any such contract" mean a "condition precedent to the contract being of any force or validity," or a "condition precedent to some particular obligation contained in the contract being of force or validity," it has been held that the rule contained in this proviso does not apply to a case where the written agreement had not only become binding, but had actually been performed as to a large portion of its obligations, and that the words 'any obligation' in this proviso mean any obligation whatever under the contract and not some particular obligation which the contract may contain (2). The condition precedent to which this proviso refers is a condition the subject matter of which is *dehors* the contents of the instrument, and, therefore, if effect be given to this condition, it cannot affect the terms of the document itself (3). In a case where the defence was that one of the executants of the note signed it only as surety and that his liability was only to the extent of standing as a surety for one month, it was held that this proviso was inapplicable, as the liability attached from the date of the note of hand and ceased upon the expiry of one month, and the defence was not that no liability attached to the note of hand until some event happened or something was done (4).

Proviso (4)

When a contract is reduced into writing, it is competent to the parties at any time before breach of it, by a new contract not in writing either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to or subtract from, or vary or qualify the terms of it, and thus to make a new contract which is to be proved partly by the written agreement and partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement, but modifies that rule, in that it declares that the new contract cannot be a verbal one in cases in which the old contract (a) is by law required to be in writing or (b) has been registered (6). For the rule is *nihil tam convenientius est naturali æquitate quam unum quodque dissolvere eo ligamine, quo ligatum est* ("Nothing is so agreeable to natural equity as that a thing be unbound in the manner in which it was bound"). It is of course incumbent on the party setting up a substituted agreement to establish it and to show that both parties were proceeding on a new agreement the terms of which they both understood (7). It has been argued that the word "or" should be read as "and" and that oral evidence is admissible when the document, though registered in

(1) See *Hallis v. Littell* 11 Scott Rep N S 369 374

(2) *Jigantund Misser v. Nerghan Singh* 6 C 433 (1880) See *Tiruvengada Ayyangar v. Rangasami Nayak* 7 M 19 22 (1883)

(3) *v. ante* pp 627—629

(4) *Harek Chand v. Bishun Chandra* 8 C W N 401 (1903)

(5) *Goss v. Lord Nugent* 5 B & Ad 58 65 cited and applied in *Cuddalur Ruthna v. Kunnathur Arumuga* 7 Mad H C R 189 197 198 (1872) see *Taylor* Ev §§ 1141—1145 See *Ganu v. Dhan*

42 B 512 *per* Martin J

(6) See *United al Motram v. Davab n Dhordiba* 2 B 547 (1878) where it was held that a conveyance having been registered no oral agreement to rescind could be proved under this proviso and *Darba Nath v. Bhogoban Panda* 7 C L R 577 (1880) *Banku Behari v. Shama Churn* 2 C W N cclxv *Mark d'Crux v. Jendra Nath Chatterji* 46 C, 1079 s. c. 30 C L J, 94

(7) *Dinanath Law v. Metharam* 33 C. L. J 577 (1921)

fact, is not compulsorily registrable. But the contention was overruled (1). In a case in the Calcutta High Court where a receipt for simple interest paid on a mortgage bond, which stipulated for compound interest, was produced as a proof that simple interest was to be charged, this was held admissible as a waiver which had to be in writing but did not require registration (2). Where it is alleged that a new contract which the law requires to be in writing has been substituted for a prior contract, such substituted contract must be complete in itself and embody distinctly the terms of the new contract. If it is not complete, then extraneous evidence is inadmissible to prove the substituted contract, with the result that the first contract is not varied and remains in force (3). One contract is rescinded by another only when the latter is valid and inconsistent with it and makes its performance impossible, and evidence of rescission or waiver must be as clear as the proof of the original contract (4). The exception at the end of this Proviso applies to executory as well as to executed agreements (5). It has been held by the Madras High Court that the word 'oral' is used in this proviso in the sense of being not committed to writing, and that the words 'oral agreement' include all unwritten agreements whether arrived at by word of mouth or otherwise. So where the lessor of certain land

and conduct of the parties, and an unwritten agreement, if so implied, amounts to an oral agreement within the meaning of the Proviso (6). And in a later case it has been held by the same High Court that under the Proviso evidence of an of subsequent conduct of the ted is void, is inadmissible (7). taken a different view, holding cases any oral agreement or statement, evidence of conduct, as for instance, return of a lease, is admissible to prove that such return was due to an intention to make the lease inoperative (8). In, however, a subsequent case in the same Court a different view of the admissibility of evidence of conduct was taken. It was held that acts and conduct of parties could only be proof (a) either of a contemporaneous oral agreement varying the terms of the registered contract, or (b) of a subsequent oral agreement having the same effect. In the former case the evidence was excluded by the section itself and in the latter by this Proviso (9). If a t Act has been given, it is immaterial suance of an alleged oral agreement, was not illegal (10). Evidence will be agreement is not to rescind or modify

(1) *Nolloor Chinder v. Asitosh Mukerjee* 9 C. W. N. cxxiv (1905)

(2) *Kailash Chandra Nath v. Sheikh Chhenu* 42 C. 546 (1915) following *Juan Ali Beg v. Basa Mal* 9 All. 108 (1886)

(3) *Janendra Mohan v. Gopal Das* 8 C. W. N. 923 (1904) [The consent in writing by the landlord to the division of a tenure or holding has the effect of substituting a new contract for the old]

(4) *Mathura Mohan Saha v. Ram Kumar Saha & Chittagong District Board*, 43 C. 790 (1916)

(5) *Goreti Sabburoo v. Parigonda Nara*

Sulan 27 M. 368 (1903) s. c. 14 Mad. L. J. 218

(6) *Mayanti Chetti v. Olier*, 22 M. 261 (1898) followed in *Karampali v. Thekku* 26 M. 195 (1902)

(7) *Srinivasa Suami v. Athmaruma Ajar* (1908), 32 M. 281

(8) *Shyama Charan v. Heras Mollah* 26 C. 160 163 (1898), but v. ante, p. 618

(9) *Padma Raman v. Bhonani Prasad* 5 C. W. N. cxxvi (1901), *Maung Bin v. Wa Hlan* (F. B.) 3 L. B. R. 100 see Notes ante on 'Evidence of Conduct'

(10) *Karampali v. Thekku* 26 M. 195 (1902)

the original transaction, but is an entirely new transaction (1) Oral evidence is of course admissible to prove the discharge and satisfaction of a mortgage bond and is not excluded by this proviso (2) This applies to any transaction which operates validly as a mode of payment, but oral evidence of an invalid oral conveyance of the equity of redemption in a portion of a mortgaged estate is inadmissible (3) Only those agreements come within the section which affect the terms of the previous transaction, not indirectly, as a consequence of an independent and valid contract between some only of the parties, but directly by virtue of the consensus of those who alone are competent to rescind or modify the original contract, viz., all the parties concerned or all their representatives (4) Where a tenant had given a written undertaking to occupy on certain conditions, it was held that this was not a document by which a lease could be made, nor an instrument referred to by section 107 of the Transfer of Property Act, and so was admissible to prove an oral lease (5)

In 1875 certain lands were mortgaged for Rs 675. The mortgage bond provided that the mortgagee was to enjoy the rent and profits in lieu of interest on Rs 475 and that the remaining Rs 200 were to carry interest at 6 per cent per annum. In 1880 a receipt was passed by the mortgagee to the mortgagor, reciting that on taking accounts Rs 525 were due on account of the mortgage, that Rs 100 were paid on the day of the receipt, that a further sum of Rs 100 was to be paid in a month and a half, and the rents and profits of the property were in future to be taken for the interest on the balance of Rs 325 only. In 1896 the mortgagor sued for redemption and relied on the receipt in support of his case. Held that the receipt did not require registration. It purported to be a mere settlement of accounts and was not intended to modify or supersede the original mortgage contract. This clause had therefore no application to the case (6)

In the undermentioned case (7) the plaintiff mortgaged certain property to the first defendant on the 28th December 1895. By the mortgage deed the mortgage debt was made repayable on 28th December 1896. On the 12th May 1897 the first defendant sold it by auction under the power of sale contained in the mortgage deed and the second defendant was the purchaser. The plaintiff now sued to set aside the sale and to be allowed to redeem, alleging that on the day before the sale the first defendant had orally promised and agreed to postpone the sale for four days, and that the second defendant had notice of this fact before he purchased the property. Held that evidence of such oral agreement was admissible. It was not an agreement to modify any
 (1) *Rakhmabai v Tukaram* 11 B 47 (1886)
 (2) *Herembdev Dharnidhardev v Kashinath Bhaskar*, 14 B 472 (1890),
Autu Singh v Ajudhia Saha, 9 A, 249 (1887)
 (3) *Ramlal Chundra v Gobinda Karmakar*, 4 C. W. N. 304 (1900)
Kettika Dapana nima v Kettika Kristanamma (1906) 30 M, 231
 (4) *Aryasathira Padayachi v Muthu kumaraswami Padayachi*, 37 M, 423 (1914)
 (5) *Goreti Subbarow v Varigonda Varsimham* 27 M, 368, s. c. 14 Mad L. J. 218 (1903) [Oral evidence held not to be excluded]
 (6) *Kuki Subhanadri v Mulla Rangayya* (1909), 32 M, 532, and *Tarof Sahib v Esuf Sahib* (1907), 30 M, 322.
 (7) *Lukshman v Damodar*, 24 B 603 (1900)
Trimbak Gangadhar v Bhagwanadas Mullaichand, 23 B, 348 (1893)

(1) *Rakhmabai v Tukaram* 11 B 47 (1886) *Herembdev Dharnidhardev v Kashinath Bhaskar*, 14 B 472 (1890), *Autu Singh v Ajudhia Saha*, 9 A, 249 (1887)

(2) *Ramlal Chundra v Gobinda Karmakar*, 4 C. W. N. 304 (1900) *Kettika Dapana nima v Kettika Kristanamma* (1906) 30 M, 231

(3) *Aryasathira Padayachi v Muthu kumaraswami Padayachi*, 37 M, 423 (1914)

(4) *Goreti Subbarow v Varigonda Varsimham* 27 M, 368, s. c. 14 Mad L. J. 218 (1903) [Oral evidence held not to be excluded]

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(6) *Lukshman v Damodar*, 24 B 603 (1900)

(7) *Trimbak Gangadhar v Bhagwanadas Mullaichand*, 23 B, 348 (1893)

proceeding but also that the other party had the same understanding—that both parties were proceeding on a new agreement, the terms of which they both understood”(1) In a suit by balance due on two registered mortgage deeds that the mortgagee had received Rs 800 the mortgage debt. The Lower Courts allowed oral evidence to show that the mortgages in suit were discharged by the payment of Rs 800. Held that oral evidence was inadmissible to prove discharge of the mortgage debt under this Proviso (2)

In the case of contracts, the evidence is not confined to the explanation under s 98, *post*, of the written terms. Provided they are not repugnant to, or inconsistent with, the express terms of the contract, (3) it is allowed to supply terms of known usage in control of the contract, and which is known by the expression of “*annexing incident*,” This is upon the principle that the contract was itself framed with reference to the usage, and so as to incorporate the usage in, and as part of, itself. Indeed, it is in part also upon this principle, that even as respects the actual terms of the contract, it is by the usage they are expounded (4)

Accordingly, where a ship was to depart with convoy, but without any definition of the spot at which the convoy was to start, evidence was allowed to fix this as from the *place of rendezvous* (5) So a sale of tobacco was allowed to be explained as a sale by *sample*, though the bought and sold notes were silent on the point (6) And in England, prior to the statutory enactment with regard thereto, a bill of exchange was by custom allowed three days' grace for payment beyond the day specified on the face of the bill itself

These incidents are sometimes the creatures of mere usage. But usage may come at length, by judicial recognition, to be received as part of the Law Merchant, and this would be obligatory without special evidence. Consequently, the Law Merchant annexing to a Marine Insurance the condition of seaworthiness at the commencement of the voyage, it would *ipso facto* become annexed to any ordinary contract of such insurance (7)

In the case of that which is strictly usage or custom, the Courts are at liberty to import into the contract incidents not excluded by the terms of such contract even though a party to the contract was not actually cognizant of the usage. But this is not so in the case of a mere particular practice. Thus in order that the practice on a particular estate may be imported as a term of the contract into a contract in respect of land in that estate, it must be shown that the practice was known to the person whom it is sought to bind by it and that

(1) *Earl of Darnley v L. C. and D. Railways*, 2 E & I, App 60

(2) *Jagannath v Sanjar* 44 B 55 Cf *Maung Shue v Chetty* 43 I C, 913

(3) Thus Evidence of Customs in respect of tenancies is inadmissible where the custom alleged is contradictory to the terms of the written instrument (*Mahamud Aze-uddin Khan v Prodgot Kumar Tagore* 48 C 359 (1921), s c 25 C W N 13)

(4) *Goodeve v* 378, *Greenleaf v*, §§ 292 294, *Roscoe v P. Ev* 22—27 As to proof of usage see *Phipson* 3rd Ed, 84, 1b, 5th Ed, p 91 Such proof may be given (1) by direct evidence of witnesses in which case particular instances of its occurrence or non occurrence will be admissible in corroboration or rebuttal, or (2) by a series of particular instances

in which it has been acted upon or (3) by proof of similar customs in the same or analogous trades in other localities etc., 1b In mercantile contracts the intention must be collected from the instrument but resort may be had to mercantile usage in certain cases as a key to its exposition *Braddon v Abbott Taylor*, Rep, 356 *Supreme Court Plea Side* (1848) A condition not expressly made between the parties to a contract may nevertheless be attached to such contract by custom *Koonj Beharce v Shiva Baluk*, Agra Rep, F B 119 (1867) *Protap Chandra Saha v Muhammad Ali Sarkar*, 19 C L J, 66 (1914)

(5) *Lathulans* s case 2 Salk., 443

(6) *Syres v Jones* 2 Exch R 111

(7) *Goodeve v* 378

he assented to its being a term of the contract, and when the person sought to be bound by the practice is an assignee for value of rights under that contract, it must also be shown that he and all prior assignees, if any, for value, knew that the practice was a term of the original contract (1)

In the undermentioned case(2), where there had been a contract for purchase by brokers, not disclosing their principal, and evidence was admitted to show a usage of trade holding the brokers liable, Lord Campbell, C J, laid down the law *in extenso* on this subject as follows —

“Now, neither collateral evidence, nor the evidence of a usage of a trade, is receivable to prove anything which *contradicts* the tenor of a written contract, but subject to this condition both may be received for certain purposes relating to transactions of commerce the purpose of *defining* what would be a peculiar term, or to *explain* what was obscure, or to *ascertain* what was equivocal, or to *annex particular incidents* which, although not mentioned in the contracts, were connected with them. Evidence in such cases is admitted, to the present intention, to seek by the evidence of usage to *contradict* what the tenor of the note primarily imports, namely, that this was a contract with the defendants made as brokers. The evidence is based on this assumption of their having acted as brokers in the contract made with their principal. But now that, according to the usages of the trade, and as those concerned in the trade understand the words used, they find that the broker did not disclose the name of the principal with the broker as principal, he is to be treated as *explaining* the language used or *adding a tacitly implied incident* to the contract beyond those which are expressed is not material. In either point of view it will be admissible unless it labours under the objection of introducing something repugnant to or inconsistent with the tenor of the written instrument, and upon consideration of the sense in which that objection must be understood with reference to this question, we think it does not. In a certain sense every material incident which is added to a written contract varies it, makes it different from what it appeared to be, and so far is inconsistent with it. If by the side of the written contract *without*, you write the same contract *with*, the added incident, the two would seem to import different obligations and be different contracts. Take a familiar instance by way of illustration. On the face of a bill of exchange at three months after date, the acceptor will be taken to bind himself to the payment precisely at the end of the three months, but by the custom he is only bound to do so at the end of the days of grace, which vary according to the country in which the same is made payable, from three up to fifteen. The truth is, that the principle on which the evidence is admissible is, that the parties have not set down on paper the whole of their contract in all its terms but those only which were necessary to be determined in the particular case by specific agreement and which of course might vary infinitely, leaving to implication and tacit understanding, all those general and unvarying incidents which a uniform usage would annex and according to which they must in reason be understood to contract, unless they expressly exclude them. To fall within the exception, therefore,

(1) *Manu Vikrama v. Pama Patter*, 20 M 275 (1897)

(2) *Hurifrey v. Dale W. R.* (Eng) 1856-7, p 467. See also judgment of Parks B. in *Hutton v. Warren* 1 M &

W 474 cited in *Smith v. Ludha Ghelss*, 17 B 143 (1892), and see *Jugomchow Ghose v. Kaisreechund* 9 Moo 1 A 260 261 (1862) [custom as to interest]

of repugnancy, the incident must be such as *if expressed on the written contract*, would make it insensible or inconsistent. Thus to warrant bacon to be prime, adding that is to say slightly tainted as in *Yates v Pym*(1) or to insure all the boats of a ship and add 'that is to as in *Blackett v The Royal Exchange Assurance* of the same sort scattered through the books in which both the two parts could not have full effect given to them if written down. Therefore when one part only is expressed it would be unreasonable to suppose that the parties intended to exclude the other also. Without repeating ourselves, it will be found that the same reasoning applies where the evidence is used to explain a latent ambiguity of language."

Merchants and traders with a multiplicity of transactions pressing on them and moving in a narrow circle and meeting each other daily *desire to write little and leave unwritten what they take for granted in every contract*. In spite of the lamentations of Judges they still continue to do so and in a vast majority of cases of which Courts of Law hear nothing they do so without loss or inconvenience and upon the whole they find this mode of dealing advantageous even at the risk of occasional litigation. It is the business of Courts reasonably so to shape their rules of evidence, as to make them suitable to the habits of mankind and such as are not likely to exclude the actual facts of the dealings between parties when they are to determine on the controversies which grow out of them. It cannot be doubted in the present case that in fact this contract was made *with the usage understood to be a term in it to exclude the usage* considered to be the *suorn interpreters of the mercantile language in which the contract is written*. Indeed the observation applies to all usage evidence (3).

Where there is a usage or custom of trade, the intention of the parties to exclude a contract from its operation must be shown by the contract itself and cannot be proved by other evidence. Thus where there was a sale of rum, no mention being made of warehouse rent, evidence was admitted that, by custom of trade an allowance for warehouse rent was incorporated in such contracts but evidence that the parties had orally agreed to make an allowance different from the customary one, was rejected (4). Usage and custom cannot be restored to control or vary positive stipulations in a written contract, and *a fortiori* not in order to contradict them. An express contract of the parties is always admissible to supersede, or vary, or control a usage or custom, for the latter may always be waived at the will of the parties. But a written and express contract cannot be controlled or varied or contradicted by usage or custom for that would be not only to admit parol evidence to control, vary or contradict written contracts but it would be to allow mere presumptions and implications, properly arising in the absence of any positive expressions of intention to control vary or contradict the most formal and deliberate declarations of the parties (5). Therefore where an usage conflicts with the expressed intention of the document, the latter must be followed. So where in

(1) 6 Taunt 446

(2) 2 C. & J. 244

(3) Goodeve Ev 378—381. See *Birch v Depeyster* Starkie 210. *Boxes v Shand* 2 App Cas 468 cited in *Smith v Ludha Ghella* 17 B 144 (1892)(4) *Fatches v Laib* 31 L J Q B 98(5) Story cited Field Ev 6th Ed 283. *Indur Clunder v Luchin Bib* 7 B L R 682 (1871) [custom cannot affect the express terms of a written contract]*Macfarlane v Carr* 8 B L R 459 (1872) [custom at variance with contract]*Smith v Ludha Ghella* 17 B 129 (1892) [usage repugnant to and inconsistent with contract]. *Hari Mohun v Krishna Mohan* 9 B L R App 1 (1872) evidence was admitted but *quære* however whether the custom was consistent with the terms of the instrument. See also *Morris v Panchnada Pillay* 5 Mad H C R 135 (1870)

he assented to its being a term of the contract, and when the person sought to be bound by the practice is an assignee for value, it must also be shown that he and all prior holders of the practice were aware that the practice was a term of the original contract.

In the undermentioned case(2), where there had been a contract for purchase by brokers, not disclosing their principal, and evidence was admitted to show a usage of trade holding the brokers liable, Lord Campbell, C J, laid down the law in *extenso* on this subject as follows —

"Now, neither collateral evidence, nor the evidence of a usage of a trade, is receivable to prove anything which *contradicts* the tenor of a written contract, but subject to this condition both may be received for certain purposes. To use the language of Mr Phillips, in Vol II, p 415, 10th edition — 'Evidence relating to transactions of commerce is receivable for the purpose of *defining* what would be the meaning of a particular term, or to *explain* what was obscure, or to *ascertain* what was equivocal, or to *annex particular incidents*, which, although not mentioned in the contracts, were connected with them. Evidence in such cases is admitted, to the present intention, to *seek* by the evidence of usage to *contradict* what the tenor of the note primarily imports, namely, that this was a contract with the defendants made as brokers. The evidence is based on this, that the usage can have no operation, except on the assumption of their having acted as brokers, and of there having been a contract made with their principal. But the plaintiff by the evidence seeks to show that, according to the usages of the trade, and as those concerned in the trade understand the words used, they mean that if the buying broker did not disclose the name of his principal, it would come a contract with the broker as principal. This evidence be treated as explaining the language used or adding a tacitly implied incident to the contract beyond those which are expressed, is not material. In either point of view it will be admissible unless it labours under the objection of introducing something repugnant to or inconsistent with the tenor of the written instrument, and upon consideration of the sense in which that objection must be understood with reference to this question, we think it does not. In a certain sense every material incident which is added to a written contract varies it, makes it different from what it appeared to be, and so far is inconsistent with it. If by the side of the written contract *without*, you write the same contract *with*, the added incident, the two would seem to import different obligations and be different contracts. Take a familiar instance by way of illustration. On the face of a bill of exchange payable at three months after date, the acceptor will be taken to bind himself to the payment precisely at the end of the three months; but by the custom he is only bound to do so at the end of the days of grace; which vary according to the country in which the same is made payable, from three up to fifteen. The truth is, that the principle on which the evidence is admissible is, that the parties have not set down on paper the whole of their contract in all its terms but those only which are expressed, and the rest is to be supplied by implication and tacit understanding. If a uniform usage would be understood to contract, and to be an exception, therefore,

(1) *Mana Sukrama v Rama Patter* 20 M 275 (1897)

(2) *Humphrey v Dale* W R (Eng) 1856-7 p 467. See also judgment of Parks B. in *Hutton v Warren*, 1 M &

W 474 cited in *Smith v Ludha Ghella* 17 B. 143 (1892), and see *Jaggamohan Ghose v Kaisreechund*, 9 Moo. I A., 260 261 (1862) [custom as to interest]

of repugnancy, the incident must be such as, *if expressed on the written contract*, would make it insensible or inconsistent. Thus, to warrant bacon to be prime, adding, 'that is to say, slightly tainted,' as in *Yates v Pym*(1), or to insure all the boats of a ship, and add 'that is to say, all not slung on the quarter,' as in *Blackett v The Royal Exchange Assurance Company*(2), and other cases of the same sort scattered through the books, would be instances of contracts in which both the two parts could not have full effect given to them, *if written down*. Therefore, when one part only is expressed it would be unreasonable to suppose that the parties intended to exclude the other also. Without repeating ourselves, it will be found that the same reasoning applies, where the evidence is used to explain a latent ambiguity of language.

"Merchants and traders with a multiplicity of transactions pressing on them and moving in a narrow circle, and meeting each other daily, *desire to write little and leave unwritten what they take for granted in every contract*. In spite of the lamentations of Judges, they still continue to do so, and, in a vast majority of cases of which Courts of Law hear nothing, they do so without loss or inconvenience, and upon the whole they find this mode of dealing advantageous even at the risk of occasional litigation. It is the business of Courts reasonably so to shape their rules of evidence, as to make them suitable to the habits of mankind, and such as are not likely to exclude the actual facts of the dealings between parties when they are to determine on the controversies which grow out of them. It cannot be doubted, in the present case, that in fact this contract was made with the usage understood to be a term in it, to exclude the usage *is to exclude a material term of the contract*, and must lead to an unjust decision." The case was affirmed on appeal. As has been well observed in reference to these cases of mercantile contracts—"The witnesses for this purpose may be considered to be the *sworn interpreters of the mercantile language in which the contract is written*." Indeed the observation applies to all usage evidence (3).

Where there is a usage or custom of trade, the intention of the parties to exclude a contract from its operation must be shown by the contract itself and cannot be proved by other evidence. Thus, where there was a sale of rum, no mention being made of warehouse rent, evidence was admitted that, by custom of trade, an allowance for warehouse rent was incorporated in such contracts, but evidence that the parties had orally agreed to make an allowance different from the customary one, was rejected (4). Usage and custom cannot be restored to control or vary positive stipulations in a written contract, and *a fortiori* not in order to contradict them. An express contract of the parties is always admissible to supersede, or vary, or control a usage or custom, for the latter may always be waived at the will of the parties. But a written and express contract cannot be controlled, or varied, or contradicted by usage or custom, for that would be not only to admit parol evidence to control, vary or contradict written contracts but it would be to allow mere presumptions and implications, properly arising in the absence of any positive expressions of intention, to control, vary, or contradict the most formal and deliberate declarations of the parties (5). Therefore, where an usage conflicts with the expressed intention of the document, the latter must be followed. So where in

(1) 6 Taun. 446

(2) 2 C & J, 244

v. *Depeyster*, Starkie 210, *Boxes v Shand* 2 App Cas 468 cited in *Smith v Ludha Ghella*, 17 B, 144 (1892)

(4) *Faukes v Lamb* 31 L J, Q B, 98

(5) *Story*, cited Field Ev 6th Ed 283, *Indur Chunder v Luchmi Bibi*, 7 B L R, 682 (1871), [custom cannot affect the express terms of a written contract].

Macfarlane v Carr, 8 B L R, 459 (1872) [custom at variance with contract], *Smith v Ludha Ghella* 17 B, 129 (1892), [usage repugnant to and inconsistent with contract] *Hari Mohun v Krishna Mohan*, 9 B L R, App 1 (1872), evidence was admitted, but *quare*, however, whether the custom was consistent with the terms of the instrument. See also *Morris v Panchnada Pillay* 5 Mad H C R, 135 (1870)

an agreement between an African merchant and an African captain, the latter was to have a commission of "£ 6 per cent on the net proceeds of the homeward *ges*," parol evidence was not admitted to trade between African captains and mer a commission on the whole amounts for which the cargo had been sold, and not merely the net profits (1) If the usage is inconsistent with the express terms of the contract evidence thereof is inadmissible, and the inconsistency may be evinced (a) by the express terms of the instrument, or (b) by implication therefrom (2) When the Court of first instance had permitted plaintiffs to put in evidence to show the terms on which the parties must be presumed to have contracted, as to which the document was silent, according to the provisions of this proviso, it was held on appeal that what the plaintiff sought to make use of was not any custom of the port or usage of trade, but the terms on which the plaintiff and defendant had dealt with each other on prior occasions and that evidence of previous dealings was admissible only for the purpose of explaining the terms used in a contract and not to impose on a party an obligation as to which the contract was silent (3) In a case in the Bombay High Court where it was contended that a contract to buy unascertained goods was subject to a trade custom according to which if the goods proved to be off sample the buyer was bound to take them with an allowance if with such allowance they could be considered a fair tender it was held that in the absence of a clause in the contract to that effect evidence of such trade custom was inadmissible (4) Under this section oral evidence is inadmissible to prove that the interest mentioned in a promissory note is not payable either by custom or agreement (5)

so (6) This Proviso relates to the admissibility of evidence necessary to point the operation of the document It relates to the admissibility of evidence necessary to which the words are rred to arbitration and at the time of the admission (7) Up to a certain stage and apart from any question of ambiguity extrinsic evidence is necessary to point the operation of the simplest instrument Thus were it the case of a deed conveying all the lands at A in the grant is occupation until it was defined by proof what lands were in his occupation the operation of the deed could not be known So, were it a case of a will and a bequest to the children of a party or even the testator's own children, to give effect to the bequest it would be necessary to define who the children were (8) "Some evidence" says Wood V C in the case undermentioned is necessary in any case of a will, that is to say evidence to show the subject and objects of the gift (9) And again "in interpreting any instrument which purports to deal with property some extrinsic information is necessary in order to make the words which are but signs fit the external things to which the signs are appropriate In reality, external information is requisite in construing every instrument but when any subject is thus discovered which not

(1) *Caine v Horsefall* 2 C & K 349

(2) *Smith v Ludha Ghella* 17 B 179
144 (1892)

(3) *Ghella v Nandubhai* 12 B
344 (1896)

(4) *Puttoji Raoji v Bombay United
Spinning and Weaving Co* 41 B 518
(1917)

(5) *Hay v Maistry* 10 Bur L T
247

(6) *Fai-un-nissa v Han-fun-nissa* 2
Al L J 360 365 (1905)

(7) *Haji Mahomed v Spinner* 24 B
510 515 525 (1900)

(8) *Goodeve v* 385 *Goodeve's L.
deace Act* p 57 *Greenleaf Ev* § 286
Babu Diunput v Sheik Jozahur 8 H
R 152 (1867) [Evidence of every
material fact which will enable the Court
to ascertain the nature and extent of the
subject matter of the instrument or of
other words to identify the things to which
that instrument refers is admissible. The
acts of the parties may also be explained
by parol evidence]

(9) In the matter of *Fellham* 1 Kay &
J 578

only is within the words of the instrument, according to their natural construction, but exhausts the whole of those words, then the investigation must stop, you are bound to take the interpretation which entirely exhausts the whole of the series of expressions used by the author of the instrument, and are not permitted to go any further. Thus to that extent the Court is always at liberty to go in interpreting a will, in other words, the Court is to place itself in the position of the testator with the knowledge of all the facts with which he was acquainted but it is not in the course of interpretation to introduce any evidence whatever of what were the intentions of the testator as contracted with, or extending or contracting the language which he has used" (1). So also Sir James Wigram says "The most accurate description possible must require some development of extrinsic circumstances to enable a Court to decide upon its sufficiency, and the least accurate description which is sufficient to satisfy the mind of a Judge or Jury as to a testator's meaning, must be within the same principle. The principle cannot be affected by the consideration that a more ample development of circumstances is necessary in one case than in another" (2).

These observations are cited only as illustrative of the principle. Practically it is upon some imperfection of the instrument, as applied to the facts that the difficulty as to determining its meaning usually arises, and nothing is more settled than that *evidence is receivable of all the circumstances surrounding the instrument* for the purpose of throwing their light on its interpretation. Indeed, it is by these as by a lamp the Court reads the document (3).

The question has more often arisen upon wills than upon other documents, and it is from cases on these, accordingly, that the law has mainly to be taken. The principles, however, which they enunciate are alike applicable to other instruments generally (4).

In *Doe d Hiscocks v Hiscocks* (5), a very leading authority on the subject Lord Abinger Chief Baron thus propounds the admissibility of this species of evidence and the purport of its admission —

It must be admitted that it is not possible altogether to reconcile the different cases that have been decided on this subject, which makes it the more expedient to investigate the principles upon which any evidence to explain the will of a testator ought to be received. *The object, in all cases, is*

(1) *Hebb v Bigg* 1 K. & J. 580 585 586 per Wood V.C.

(2) Wigram on Extrinsic Evidence p. 35.

(3) Goodeve Ex. 386.

(4) The principle is one of general application. See *Macdonald v Longbottom* 7 W. R. (Eng.) 307 *Munford v Gething* 8 W. R. (Eng.) 187 where it was applied to cases of mercantile contract. In the former case which was a contract for the purchase of wool the quantity the subject of purchase was not otherwise defined than by the expression *your wool* and evidence was admitted to show its meaning. Lord Campbell C.J. said "I am clearly of opinion that when a specific thing is the subject of a contract and it is doubtful upon the contract what that specific thing is then any fact may be given in evidence in order to identify it which is within the knowledge of both parties—meaning by that expression the knowledge upon

the strength of which both parties dealt. And Earle J. said the defendant says 'I will buy your wool now it is the universal practice to admit parol evidence to identify the subject matter of a contract as no Judge can have judicial knowledge of what it is. It is not contended that this contract is on the face of it void for uncertainty. Parol evidence must therefore be admissible to explain to what it refers.

(5) 5 M. & W. 363. And for other English cases see *In re Sharp Maddison* 111 C. A. (1908) 2 Ch. 190 *In re Jameson King v Hinn* (1908) 2 Ch. 111 *In re Ofner Samuel v Ofner* C. A. (1909) 1 Ch. 61 78 L. J. Ch. 50 *Great Western Ry Co v Bristol Corporation* 87 L. J. Ch. (H. L.) 419 474 478 *Loell v Hall* 104 L. T. 85 (C. A.) See 20 Law Quarterly Review 252—254 *Charington v Horder*, 1914 A. C. 71, 77.

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only is within the words of the instrument, according to their natural construction, but exhausts the whole of those words, then the investigation must stop, you are bound to take the interpretation which entirely exhausts the whole of the series of expressions used by the author of the instrument and are not permitted to go any further. Thus to that extent the Court is always at liberty to go in interpreting a will, in other words the Court is to place itself in the position of the testator with the knowledge of all the facts with which he was acquainted but it is not in the course of interpretation to introduce any evidence whatever of what were the intentions of the testator as contracted with or extending or contracting the language which he has used (1). So also Sir James Wigram says "The most accurate description possible must require some development of extrinsic circumstances to enable a Court to decide upon its sufficiency and the least accurate description which is sufficient to satisfy the mind of a Judge or Jury as to a testator's meaning must be within the same principle. The principle cannot be affected by the consideration that a more ample development of circumstances is necessary in one case than in another (2).

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an agreement between an African merchant and an African captain, the latter was to have a commission of "£ 6 per cent on the net proceeds of the homeward cargo, after deducting the usual charges," parol evidence was not admitted to show that, according to the course of trade between African captains and merchants, the captain was entitled to a commission on the whole amounts for which the cargo had been sold, and not merely the net profits (1) If the usage is inconsistent with the express terms of the contract, evidence thereof is inadmissible, and the inconsistency may be evinced (a) by the express terms of the instrument, or (b) by implication therefrom (2) When the Court of first instance had permitted plaintiffs to put in evidence to show the terms on which the parties must be presumed to have contracted, as to which the document was silent, according to the provisions of this proviso, it was held on appeal that what the plaintiff sought to make use of, was not any custom of the port or usage of trade, but the terms on which the plaintiff and defendant had dealt with each other on prior occasions and that evidence of previous dealings was admissible only for the purpose of explaining the terms used in a contract, and not to impose on a party an obligation.

In a case in the Bombay High Court where the plaintiff sought to buy unspecified goods was subject to the condition that if the goods proved to be off sample, the buyer was bound to take them with an allowance if with such allowance it was held that in the absence of a clause of such trade custom was inadmissible (4) Inadmissible to prove that the interest mentioned in a promissory note is not payable either by custom or agreement (5)

Proviso (6) This Proviso relates to the admissibility of evidence necessary to point the operation of the document. It relates to the admissibility of evidence necessary to make the words which are used fit the external things to which the words are appropriate (6) Thus if an undescribed dispute is referred to arbitration evidence is admissible to show what the actual dispute was at the time of the submission (7) Up to a certain stage and apart from any question of ambiguity extrinsic evidence is necessary to point the operation of the simplest instrument. Thus, were it the case of a deed conveying all the lands at 1 in the grantor's occupation, until it was defined by proof what lands were in his occupation the operation of the deed could not be known. So, were it a case of a will and a bequest to the children of a party, or even the testator's own children, to give effect to the bequest it would be necessary to define who the children were (8) "Some evidence," says Wood V C in the case undermentioned is necessary in any case of a will, that is to say, evidence to show the subject and objects of the gift (9) And again, "in interpreting any instrument which purports to deal with property, some extrinsic information is necessary in order to make the words, which are but signs, fit the external things to which the signs are appropriate. In reality, external information is requisite in construing every instrument but when any subject is thus discovered which not

(1) *Caine v Horsefall* 2 C & K. 349

(2) *Smith v Ludha Ghella* 17 B. 129
144 (1892)

(3) *Ghella v Nandubhai* 12 B.
344 (1896)

(4) *Ruttonji Roopji v Bombay United Spinning and Weaving Co.* 41 B. 518 (1917)

(5) *Fulay v Maistry* 10 Bur. L. T. 242

(6) *Alaunissa v Hanifun nissa* 2 Al. L. J. 360 365 (1905)

(7) *Haji Mahomed v Spinner* 24 B. 510 515 525 (1900)

(8) *Goodeve v* 385 *Goodeve's Evidence Act* p. 57 *Greenleaf Ev.* 1280
Babu Dhanput v Sheik Jozahur 8 W. R. 152 (1867) [Evidence of every material fact which will enable the Court to ascertain the nature and extent of the subject matter of the instrument or in other words to identify the things to which that instrument refers is admissible. The acts of the parties may also be explained by parol evidence.]

(9) In the matter of *Feltham* 1 Kay & J. 328

whether there exist any person or thing to which the description can be reasonably and with sufficient certainty applied, the presumption being that the testator intended some existing matter or person." And in another case (1) it has been said that to construe the will of a testator "you may place yourself so to speak in his arm chair and consider the circumstances by which he was surrounded when he made his will, to assist you in arriving at his intention."

The principles here propounded have been recognized by the Privy Council as applicable to India. In the undermentioned case (2), Turner L. J., in delivering the judgment of the Court, thus expresses himself—

"Thus, therefore, is the question which we are called upon to decide. It is a question between the estate of S. C. and the parties claiming under the gift over, and as it seems to us, it must depend wholly on the construction. What we must look to, is the intention of the testator. The Hindu law no less than the English law, points to the intention as the element by which we are to be guided in determining the effect of a testamentary disposition: nor, so far as we are aware, is there any difference between the one law and the other, as to the materials from which the intention is to be collected. *Primarily*, the words of the will are to be considered. They convey the expression of the testator's wishes, but the meaning to be attached to them may be affected by surrounding circumstances, and where this is the case those circumstances, no doubt, must be regarded. Amongst the circumstances thus to be regarded is the law of the country under which the will is made, and its dispositions are to be carried out. If that law has attached to particular words a particular meaning, or to a particular disposition a particular effect, it must be assumed that the testator, in the dispositions which he has made had regard to that meaning or to that effect, unless the language of the will or the surrounding circumstances displace that assumption. These are, as we think, the principles by which we ought to guide us, and we must first, therefore, endeavour to collect from the words of the will the meaning which we are to impute to this testator any collected from the words of his will."

It must be upon the ground that there are *extrinsic circumstances* which disprove the expressed intention, and prove the different intention. The expressed intention ought, as we conceive to prevail, unless the different intention be clearly demonstrated. We may doubt whether the testator really intended, what his words import, but a Court of Construction must found its conclusions upon just reasoning and not upon mere speculative doubts. Further, it has been held as regards the construction of Hindu Wills that it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property and from these infer the testator's intention (3).

And in the Privy Council the same view was adopted in a judgment by Lord Moulton (4). "In all cases the primary duty of a Court is to ascertain

(1) *Boves v. Cook* 14 Ch. D. 53. In *re Gibbs Martin v. Harding* (1907) 1 Ch. 465.

(2) See *113* *Soorje So v. Deo Bundoo Mullick* 6 Moo. I. A. 526 [cited in ...]

(3) *113* *Soorje So v. Deo Bundoo Mullick* 6 Moo. I. A. 526 [cited in ...] (1904) cited *ante* in Intro. to Ch. VI. *Mussunni v. Bhagbutti v. Cloudry Bhola Nath* 2 I. A. 256, 260 (1875) Act V. of 1865 s. 62. As to evidence of surrounding circumstances see *ante*, cases cited in

Intro. to Ch. VI.

(4) *Mahamed Shansool Hooda v. Shew alrai* P. C. (1874) 2 I. A. 7, 14 B. L. R. 226 and *Radha Prasad Mullick v. Pance Mani Dasse* P. C. (1908) 35 C., 896 35 I. A. 18, 8 C. L. J. 48. *Ponindra Nath Sen v. Herangini Das* (1908), 36 C. 1 *Sher Bahadur v. Ganga Baksh* P. C. 19 C. L. J. 277 (1914) 18 C. W. N. 401 36 A. 101 41 I. A. 1.

(5) *Mela Venkata v. Sri Raja Partha sarathy Appa Rao* P. C., 19 C. L. J. 369 (1913) p. 380 and see *Chuni Lal v. Bai Sa. Parth* P. C. 19 C. L. J., 563 (1913).

to discover the intention of the testator. The first and most obvious mode of doing this, is to read his will as he has written it and collect his intention from his words. But as his words refer to facts and circumstances, respecting his property and his family, and others whom he names or describes in his will, it is evident that the meaning and application of his words cannot be ascertained without evidence of all those facts and circumstances. To understand the meaning of any writer we must first be apprised of the persons and circumstances that are the subject of his allusions or statements, and if these are not fully disclosed in his work, we must look for illustrations to the history of the times in which he wrote and to the works of contemporaneous authors. All the facts and circumstances therefore respecting persons or property to which the will relates are undoubtedly legitimate and often necessary, to enable us to understand the meaning and application of his words." Again—"The testator may have habitually called certain persons or things by peculiar names by which they were not commonly known. If these names should occur in his will they could only be explained and construed by the aid of evidence to show the sense in which he used them in like manner as if his will were written in cypher, or in a foreign language. The habits of the testator in these particulars must be receivable as evidence to explain the meaning of his will."

In this case the testator, after the gift of a life estate to his own son John Hiscocks, devised the property in question to "John, the eldest son of the said John Hiscocks." The son had been twice married, and his actual eldest son was Simon, the child of his first marriage, but John was the eldest son by the second marriage and the question was which of the two sons was intended to take.

Cases indeed abound illustrative of the same principle, and from their general result the doctrine is thus stated by V. C. Wigram (1)—"In considering questions of this nature it must always be remembered that the words of a testator, like those of every other person, tacitly refer to the circumstances by which, at the time of expressing himself, he is surrounded. If, therefore, when the circumstances under which the testator made his will are known, the words of the will do sufficiently express the intention ascribed to him, the strict limits of the Court, in aid of the construction of the will, are not to be extended to circumstances, to which it is certain that, without such evidence the precise meaning of the words could not be determined but it is still the will which expresses and ascertains the intention ascribed to the testator. A page of history (to use a familiar illustration) may not be intelligible until some collateral extrinsic circumstances are known to the reader. No one however would imagine that he was acquiring a knowledge of the writer's meaning from any other source than the page he was reading because in order to make that page intelligible he required to be informed to what country the writer belonged, or to be furnished with a map of the country about which he was reading. The extrinsic evidence in the cases now adverted to does not per se approach the question of intention. It is wholly collateral to it. It explains the words only by removing the cause of their apparent ambiguity, where, in truth there is no real ambiguity. It places the Court which expounds the will in the situation of the testator who made it and the words of the will are then left to their natural operation."

So too in *Bernasconi v. Atkinson* (2) it was said by Wood, V. C., "the Courts have a right to ascertain all the facts which were known to the testator at the time he made his will, or to place themselves in his position, in order to ascertain

(1) Wigram on Extrinsic Evidence proposition

(2) *Bernasconi v. Atkinson* (1873) 12 Hare 345

whether there exist any person or thing to which the description can be reasonably and with sufficient certainty applied, the presumption being that the testator intended some existing matter or person." And in another case (1) it has been said that to construe the will of a testator "you may place yourself so to speak in his arm chair and consider the circumstances by which he was surrounded when he made his will, to assist you in arriving at his intention."

The principles here propounded have been recognized by the Privy Council as applicable to India. In the undermentioned case (2), Turner, L. J., in delivering the judgment of the Court, thus expresses himself—

"This, therefore, is the question which we are called upon to decide. It is a question between the estate of S. C. and the parties claiming under the gift over, and as it seems to us, it must depend wholly on the construction. What we must look to, is the intention of the testator. The Hindu law, no less than the English law, points to the intention as the element by which we are to be guided in determining the effect of a testamentary disposition, nor so far as we are aware is there any difference between the one law and the other as to the materials from which the intention is to be collected. Primarily, the words of the will are to be considered. They convey the expression of the testator's wishes, but the meaning to be attached to them may be affected by surrounding circumstances, and where this is the case those circumstances, no doubt must be regarded. Amongst the circumstances thus to be regarded, is the law of the country under which the will is made, and its dispositions are to be carried out. If that law has attached to particular words a particular meaning, or to a particular disposition a particular effect, it must be assumed that the testator, in the dispositions which he has made had regard to that meaning or to that effect, unless the language of the will or the surrounding circumstances displace that assumption. These are, as we think, the principles by which we ought to guide us, and we must first, therefore, ascertain the intention of the testator to be collected from the words of his will, and we are to impute to this testator any intention which may be collected from the words of his will."

It must be upon the ground that there are *extrinsic circumstances* which disprove the expressed intention, and prove the different intention. The expressed intention ought, as we conceive, to prevail, unless the different intention be clearly demonstrated. We may doubt whether the testator really intended what his words import, but a Court of Construction must found its conclusions upon just reasoning and not upon mere speculative doubts. Further, it has been held as regards the construction of Hindu Wills that it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property and from these infer the testator's intention (3).

And in the Privy Council the same view was adopted in a judgment by Lord Moulton (4): "In all cases the primary duty of a Court is to ascertain

(1) *Boyes v. Cook* 14 Ch. D. 53. In *re Gibbs Martin v. Harding* (1907) 1 Ch. 465.

(2) *S. v. S. Doornik v. D. o. bundoo Mullik* 6 Moo. I. A. 526 [cited in *Mathura Das Bhikhan* 19 A. 19 (1896)]. See also *Beti Malaram v. Collector of Etawah* 7 A. 198 209 (1894). *Succara v. Mura v. Kalidas Kalany* 18 B. 631 (1894) cited ante in Intro. to Ch. VI. *Mussummat Bhagbutti v. Chowdry Bhola Nath* 2 I. A. 256 260 (1875). Act X. of 1865 s. 67. As to evidence of surrounding circumstances see ante cases cited in

Intro. to Ch. VI.

(3) *Mahanad Siansool Hooda v. Sheuakra* P. C. (1874) 2 I. A. 7 14 B. L. R. 226 and *Radha Prasad Mullik v. Panee Man Dasse* P. C. (1908) 35 C. 896 35 I. A. 18 8 C. L. J. 48. *Ponindra Nath Sen v. Hemangini Dasi* (1908), 36 C. 1. *Sier Baladur v. Ganga Baksh* P. C. 19 C. L. J. 277 (1914), 18 C. W. N. 401 36 A. 101 41 I. A. 1.

(4) *Meka Venkata v. Sri Raja Parthasarathy Appa Rao* P. C. 19 C. L. J. 369 (1913) p. 180 and see *Chuni Lal v. Rai Sarathi*, P. C. 19 C. L. J. 563 (1913).

from the language of a testator what were his intentions. It is true that in so doing they are entitled and bound to bear in mind other matters than merely the words used. They must consider the surrounding circumstances, the position of the testator, his family relationships, the probability that he would use words in a particular sense and many other things—which are often summed up in the figure. The Court is entitled to put itself into the testator's arm chair. Among such surrounding circumstances which the Court is bound to consider none would be more important than race and religious opinions, and the Court is bound to regard as presumably (and in many cases certainly) present to the mind of the testator influences and aims arising therefrom.

This fundamental principle does not clash with the principle that the Court will not here take necessaries in the testator or of the Will as we have seen on English law no justification. That not only their intentions most important in mind.

When a letter had been addressed by the defendant to a Mrs H containing an acknowledgment of a debt it was held that evidence was admissible to show that Mrs S the defendant was known as Mr H and also for the purpose of identifying the debt to which the acknowledgment referred (1). Where a deed stated that the property was sold subject to the payment of all tax rates charges assessments leviable or chargeable leaving the question open as to what the taxes etc were which were leviable and chargeable it was held that extrinsic evidence of that was admissible for it neither contradicted nor varied the terms of the deed but explained the sense in which the parties understood the words of the deed which taken by themselves were capable of explanation (2). In cases where the question is whether a lease to a person named in it is perpetual or whether it is to him and his heirs evidence as to the surrounding circumstances is admissible because it explains what standing alone is incapable of explanation whether a grant to a person is a grant to him alone or to him and his heirs. The mere fact that words of inheritance do not occur in a lease does not make it the less a permanent lease if from the language of the document taken as a whole the object of the lease and the surrounding circumstances such as the conduct of the parties it appears that their intention was that it should operate as a lease in perpetuity (3). And evidence has been held admissible under this proviso because it showed how the document was related to existing facts and because the nature of the landed tenures was a special matter which could not be stated offhand and required to be elucidated by a reference to the particular facts (4).

The short exposition of the whole matter is that the knowledge of the external circumstances of which their proof puts the Court in possession places the party to the instrument in a position where he exercises the office of a trustee and is able to divert a charitable

(1) *Unsh Chandra v Sage* 51 L. R. 633 (1869) see *Palampuducherry Palmanabhan v Chonakaren* 5 Mad H. C. R. 370 (1850).

(2) *Dadoba v Collector of Bombay* 25 B. 714 51 (1901).

(3) *Latiff v Sitta am* 3 Bom. L. R. 68

(1901).

(4) *Kaja Gora Chandra v* 10 Makunda D. 9 C. W. N. 10.

(5) *Goolavee v* 302 *Kajh* 30 15 *Lakshmanrao Sal* 1 C. 36 B. 67 (1917).

bequest in altered circumstances to another charitable purpose *cy pres* on proof of a general charitable intention the Judge will decide each case according to the particular facts and circumstances proved (1) In an English decision to prove that the word securities had been used by a testator in the sense of investments and stock and shares in railway and other companies Vaughan Williams L J allowed independent evidence to be given and observed as follows — I think that evidence is admissible to show that the expressions used in the Will had acquired an appropriate meaning either generally or by local usage or amongst particular classes and that where any doubt arises upon the true sense and meaning of the words themselves or any difficulty as to their application under surrounding circumstances the sense and meaning of the language may be investigated and ascertained by evidence *id id id* the instrument itself for both reason and common sense agree that by no other means can the language of the instrument be made to speak the real mind of the party (2) In a recent case the facts were as follows In 1865 a possessory mortgage deed was passed in favour of the father of the defendant No 1 In 1867 the mortgagors sold by a document purporting to be a sale deed the equity of redemption to the plaintiff's assignor But plaintiff having sued for redemption of the mortgage of 1865 an issue was raised whether the transaction of 1867 was a mortgage or a sale Both the Lower Courts were of opinion that on the wording of the document itself viewed in the light of certain surrounding circumstances as to the value of the property inadequacy of consideration etc under this proviso the parties intended that the transaction was a mortgage On appeal to the High Court it was held that the document of 1867 was termed a sale deed and on the face of it was anything except a sale deed And that the Courts should not have taken into consideration extrinsic evidence in construing the document On general principles it would be extremely undesirable after the document had stood more than fifty years to allow evidence to be led to show that the document was not what appeared on the face of it Where the document itself is a perfectly plain straight forward document no extrinsic evidence is required to show in what manner the language of the document is related to existing facts There may be cases where such extrinsic evidence is required and it will therefore be admitted But it can only be in cases where the terms of the document themselves require explanation that extrinsic evidence can be led within the restriction laid down in this proviso of the section (3)

In another case where by a deed of settlement almost the whole of the settlor's immovable property was transferred to trustees together with buildings and appurtenances thereto and the question was raised as to whether certain specific properties were included in the deed *held* that the ambiguity in the deed being latent in construing the deed the subsequent conduct of the parties could be taken into consideration

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(1) *Ho asy Fra ji (n re)* (1907) 37 B 14 following *Camden Clarities* (in re) (1881) 18 Ch D 310 and *Lyons v Advocate General of Bengal* 1 App C 91 and *Advocate General of Bengal v Belchambars* (1908) 36 C 261

(2) *Raz er v Razner* 1 Ch 176 (1904)

and see s 98 post

(3) *Gunput Rao v Bap* 44 B 710

(4) *Subbanna Ayyar v Raja Rajeshwara Dorai* 40 M., 1016

(5) *Dinabandi v Nand Choudhurs v Mannu Lal Pak* 52 I C 443

exclusion
evidence
explain
amend
ambiguous
document

93. When the language used in a document is, on its face ambiguous or defective(1), evidence may not be given(2) of facts which would show its meaning or supply its defects.

Illustrations

(a) A agrees in writing to sell a horse to B for Rs. 1,000 or Rs. 1,500

Evidence cannot be given to show which price was to be given

(b) A deed contains blanks.

Evidence cannot be given of facts which would show how they were meant to be filled

Principle.—The main principle on which the rule is founded is that the intention of parties should be construed, not by vague evidence of their intentions, independently of the expressions which they have thought fit to use but by the expressions themselves. If extrinsic evidence were admissible in the case of patent ambiguities, it would be tantamount to permitting wills to be made verbally and would also be a violation of the principle that, where a contract, or other substantial matter of issue, has been reduced to writing, the writing is the only admissible proof of such contract or transaction(3). In the cases governed by this section the instrument fails for want of a legal expression. It is the province of the Court to interpret and not to make instruments for parties. It will construe the expressions the parties have themselves furnished, but will not supply others. And though evidence may be given to explain, it is inadmissible for the purpose of adding to the document. *See Notes post*

s. 3 ('Document')

s. 3 ('Fact')

s. 3 ('Evidence')

ss. 95—97 ('Latent ambiguities')

Steph. Dig., Art. 91, Wigram on Extrinsic Evidence, Taylor, Ev., §§ 1212, 1213 Wharton Ev., §§ 916, 937, Phipson, Ev., 5th Ed., 572, Roscoe, N P Ev., 29—33 Norton, Ev., 278—281, Powell, Ev., 9th Ed., 544, 553, 562, Wood's Practice Evidence 37—43, Starkie, Ev., 653, Gresley, Ev., 279, *et seq.*, Goodeve, Ev., 391, *et seq.*; Bow on Parol Evidence, 116—124, Thayer's Cases on Evidence, 1021

COMMENTARY.

This section embodies the rule with regard to "patent ambiguities," and sections 95—97 relate to "latent ambiguities." Ambiguities in documents are said to be either patent or latent, the former arising where the instrument on its face is unintelligible, as where in a will the name of a legatee is left wholly

(1) With reference to the term 'defective' in this section Norton Ev. 278, refers to the case of *Benodhee Lall v Dulloo Sircar* Marsh 620 (1863) in which it was held that parol evidence is properly admissible to supply words in an old deed lost in consequence of the parts on which they were written having been eaten by insects. But in this case the parol evidence was not admitted to explain the document but merely to show what the document expressed, the same rule which allows secondary evidence of a document entirely destroyed admits evidence to supply parts wanting by reason of partial destruction.

(2) In Markby Ev., 74 it is said

'This section can only apply where writing is required by law. If no writing is required by law, and if the writing is so incomplete that its meaning cannot be ascertained (which is I suppose the case contemplated), it may be disregarded as used as an admission and oral evidence given.'

(3) Starkie Ev. p. 653 I well Ev. 9th Ed. 555—Goodeve Ev., 391, 392 though this section does not affect the provisions of the Succession Act (s. 10 *post*), the rule thereunder (*see s. 63*) is the same as that enacted by this section. As to agreements void for uncertainty *see* Contract Act s. 29. As to conduct of ambiguity *see* notes to s. 92 *ante*.

patent ambiguity cannot be cleared up by extrinsic evidence

blank, the latter arising where the words of the instrument are clear, but their application to the circumstances is doubtful, as where a legacy is given to "my niece Jane," the testator having two nieces of that name. The admission of extrinsic evidence to explain ambiguities is confined to such as are latent. A patent ambiguity, or one in which the imperfection of the writing is so obvious that the idea that it was intended cannot be absolutely excluded, cannot be explained by parol. A patent ambiguity may exist either in the want of adequate artificiality in the composition or in the omission of something requisite to give operation to the document. The section thus applies to cases (a) in which either no meaning at all has been expressed, the sentence having been left unfinished [see Illustration (b)] or (b) where, though the language is intelligible, the meaning [see Illustration (c)] is such as to show the testator's own incapacity either from want of knowledge of the law or from want of the writing. His

meaning in a particular case. A patent ambiguity is one in which the mind of the writer himself is manifestly ambiguous in the thing intended for several reasons. He may

if so it is inadmissible to prove that he had an idea which would be to contradict the writing itself and which would make him say what he did not intend to say. Or a writing may be ambiguous because the writer intends it to be so as where a testator left his estate to his 'heir at law'. In such case extrinsic evidence of his intention is inadmissible as it would frustrate his real intention which was to have the question of heirship determined not by himself but by the Court (2). Or a document may be ambiguous for want of adequate artificiality in the composition. So where certain persons describing themselves as residents of Jarao Bas Mohan had given a bond for the payment of money in which as collateral and interests nature to admit

und, which it is not the business of the Court to decide, which it is the business of the Court to carry out the writer's intent. Hence an ambiguity. A latent ambiguity, which is not allowed to be removed by the same

means (4)

A good test of the difference between the two forms of ambiguities is to put the instrument into the hands of an ordinarily intelligent educated person. If

(1) Goodeve Ev. 391. Cunningham Ev. 262.

(2) See authorities cited in note post. *Pratap Chandra Saha v. Mahomed Ali Sarkar* 41 C. 342 (1914). 19 C. L. J. 66 per Jenkins C. J. and Mookerjee J. discussing *Monmota Nath Choudhury v. Nabu Chandra Sanyal* 14 C. W. N. 1100 (1910) not following *Mahomed Samsoodeen v. Moonshee Abdul Haq* W. R. 359 (1864) (decided before this Act).

(3) *Deoji v. Putambar* 1 A. 275 (1876).

(4) Wharton Tr. §§ 956, 957. See also Faylor Ev. §§ 1212, 1213, Phipson Ev. 5th Ed. 579. Roseoe N. P. Ev. 29—33 in which a large number of patent

and latent ambiguities will be found collected, Wigram on Extrinsic Evidence, Steph Dig. Art. 91, Powell Ev. 9th Ed. 567, 544, 555—Wood's Practice Evidence 37—43. Gressley Ev. 297, et seq., Goodeve Ev. 391 et seq. The rule was the same prior to this Act. *Ram Lochun v. Unnopoorna Dossee* 7 W. R. 144 (1876) [where there is a latent ambiguity in the wording parol evidence is admissible to explain it]. *Umesh Chunder v. Sage* 7 B. L. R. 633, 634 (1869). In *Hussanally v. Tribhovanadas* 25 C. W. N. 385 (1921) the Privy Council admitted extrinsic evidence to reconcile the words in the body and Schedule of a will.

but there is nevertheless an uncertainty as to latent, if he detects an ambiguity from merely patent. Thus in *Illustration (b)* to this section guties and they could not be filled in by parol testimony as to the intention of the parties or the like. In the *Illustration* to section 95, no one could detect any ambiguity from merely reading the instrument. The ambiguity does not consist in the language, but is introduced by extrinsic circumstances, and the maxim is *quod ex facto oritur ambiguum verificatione facti tollitur* (1). The distinction has prevailed since the time of Lord Bacon, who says "There be two sorts of ambiguities of words, the one is *ambiguitas patens*, and the other *latens*. *Patens* is that which appears to be ambiguous upon the deed or instrument, *latens* is that which seemeth certain and without ambiguity, for anything that appeareth upon the deed or instrument, but there is some collateral matter out of the deed that breedeth the ambiguity. *Ambiguitas patens* is never holpen by averment, and the reason is, because the law will not couple and mangle matter of speciality, which is of the higher account, with matter of averment which is of inferior account of law, for that were to make all deeds hollow and subject to averments, and so, in effect that to pass without deed, which the law appointeth shall not pass but by deed. Therefore, if a man give land to *J D* and *J S et hæredibus*, and do not limit to whether of their heirs, it shall not be supplied by averment to whether of them the intention was (that) the inheritance should be limited." "But if it be *ambiguitas latens* then otherwise it is, as if I grant my manor of *S* to *J F* and his heirs, here appeareth no ambiguity at all. But if the truth be that I have the manors both of *South S* and *North S*, this ambiguity is matter in fact and, therefore, it shall be holpen by averment, whether of them it was that the party intended should pass."

The above distinction which, as already observed, was originally taken by Lord Bacon, was so taken with reference to pleading upon instruments under seal, and cannot it has been said (2), be relied on as a test of the admissibility of evidence in the present connection, for there have been cases of patent ambiguity in the sense abovementioned in which evidence has been admitted in explanation thereof. "It is true that a complete blank cannot be filled up by parol testimony, however strong. Thus a legacy to Mr—— cannot have any effect given to it (3), nor a legacy to Lady—— (4). But if there are any words to which a reasonable meaning may be attached, parol evidence may be resorted to to show what that meaning is. Thus a legacy to a person described by an initial as to 'Mrs G,' admits explanation as by shewing that the testator was accustomed to speak of a particular person by the initial of her name (5). And when a blank was left for the Christian name, parol evidence has been admitted (6) to show who was intended' (7). And so also when the deceased, by his will

(1) Norton Ev 279

(2) Phipson Ev 5th Ed, 579—and criticisms collected in Browne on Parol Evidence p 117, et seq

(3) *Baylis v Attorney General* 2 Atk 239 See *Re Macduff*, 2 Ch 451 C A (1895)

(2) *Hunt v Hort* 3 Bro C C 311 The province of the Court is to interpret not to make. It is to construe the expressions the parties have themselves furnished not to supply others. Were the Court by the process of construction to insert in the blank person property or thing omitted as if it were to say *who* was the lady—this would be to supply not to interpret and though the law admits evi-

dence to explain it excludes that which would only be to add to a document. Goodeve Ev 302. As the language expresses no definite meaning if evidence were allowed to be given as to what the intention of the person using it was the effect would be not to interpret words but to conjecture as to intention and that this section forbids. Cunningham Ev 270

(5) *Abbott v Massie* 3 Ves 148
Clayton v Lord Nugent 13 M & W, 207

(6) *Price v Page*, 4 Ves, 680

(7) Per Sir J Hannen In the Goods of *De Rosas* L R 2 P D 66 69

appointed certain executors, and amongst others "Percival—of Brighton, the father," the Court admitted evidence of the circumstances under which the deceased made his will, and of the persons about him, in order to satisfy itself who was meant by the imperfect description of the executor contained therein (1). The cases in which evidence will be admitted is clearly denoted in the case of *In the Goods of De Rosaz* (cited *supra*), and in the statement of this rule by Sir J. Stephen in his Digest (2), viz., 'if the words of a document are so defective or ambiguous as to be *unmeaning*, no evidence can be given to show what the author of the document intended to say. In the last solution, Lord Bacon's famous and much vexed maxim has been said to amount to no more than this, that an incurable ambiguity (which is very rare) is fatal (3).

The principles upon which evidence is in this connection both admitted and rejected is explained in *Starke on Evidence* (p. 653), as follows—"By patent ambiguity must be understood an ambiguity *inherent in the words, and incapable of being dispelled*, either by any legal rules of construction applied to the instrument itself, or by evidence showing that terms in themselves unmeaning or unintelligible are capable of receiving a known conventional meaning. The great principle on which the rule is founded is that the intention of parties should be construed, not by vague evidence of their intentions independently of the expressions which they have thought fit to use, but by the expressions themselves. Now, those expressions which are incapable of any legal construction and interpretation by the rules of art, are either so because they are in themselves *unintelligible* or because being intelligible they exhibit a plain and obvious *uncertainty*. In the first instance, the case admits of two varieties, the terms, though at first sight unintelligible, may yet be capable of having a meaning annexed to them by extrinsic evidence, just as if they were written in a foreign language, as when mercantile terms are used which amongst mercantile men bear a distinct and definite meaning, although others do not comprehend them, the terms used, may, on the other hand, be capable of no distinct and definite interpretation. Now it is evident that to give effect to an instrument, the terms of which, though apparently ambiguous, are capable of having a distinct and definite meaning annexed to them, is no violation of the general principle, for in such a case effect is given, not to any loose conjecture as to the intent and meaning of the party, but to the expressed meaning and that, on the other hand, where either the terms used are incapable of any certain and definite meaning, or, being in themselves intelligible, exhibit plain and obvious uncertainty, and are equally capable of different applications, to give an effect to them by extrinsic evidence as to the intention of the party, would be to make the supposed intention operate independently of any definite expression of such intention. By patent ambiguity, therefore, must be understood an *inherent ambiguity, which cannot be removed* either by the ordinary rules of legal construction or by the application of extrinsic and explanatory evidence, showing that expressions, *prima facie* unintelligible, are yet capable of conveying a certain and definite meaning."

And Sir W. Grant in *Colpoys v Colpoys* (4), says "In the case of a patent ambiguity—that is, one appearing on the face of the instrument,—as a general rule a reference to matter *dehors* the instrument is forbidden. It must, if possible, be removed by construction, and not by averment. But in many

(1) In the *Goods of De Rosaz supra*. So also evidence was admitted when the legatee was merely referred to by a term of endearment (*Sullivan v Sullivan* 1 R., 4 Eq. 457) cited in *Phipson* Ev., 5th Ed. 579.—And where a document which began *I & B* was signed *C D* the ambiguity apparent on the face of the

writing was allowed to be explained by parol *Summers v Moorhouse*, 13 Q. B. D. 388.

(2) Art. 91 cited with approval in *Wharton's* Ev., § 956.

(3) *Browne* *op cit* 123, and see *Thayer's Cases on Evidence*, 1021.

(4) *Jacob*, 465.

if the parties to it should be collected from the

the words used, and, if those they cannot be explained away reasoning from probabilities (2) Extrinsic evidence is admissible only to explain a document, but not to contradict it. If the language is plain, no explanation is necessary for by the terms of the section the itself," and there is as evidently no latent ambiguity, for the language used in the document "applies accurately to existing facts" It follows, therefore, that there is no ground for the admission of explanatory extrinsic evidence. On the other hand, the admission of evidence to show that the language was not meant to apply to existing facts would be in effect to contradict the express provision of the document (3) The same rule applies with regard to construction simply. A deed must be construed according to the plain ordinary meaning of its terms; and words may not be imported into it, from any conjectural view of its intention which would have the effect of materially changing the nature of the estate thereby created (4) This section is a qualification of the rule contained in section 92 sixth Proviso (5) In a case in the Allahabad High Court where three villages had been mortgaged in 1864 and a second mortgage which was intended to affect them but in which one of them was described by a wrong name, had been executed in 1873, it was held that the language of the second mortgage deed was not plain and that this section did not debar the mortgagee from proving the mutual mistake in it which was indicated by the first mortgage deed (6)

Evidence as to document unmeaning in reference to existing facts

95. When language used in a document is plain in itself but is unmeaning in reference to existing facts, evidence may be given to show that it was used in a peculiar sense

Illustration

A sells to B by deed 'my house in Calcutta'

A had no house in Calcutta but it appears that he had a house at Howrah of which B had been in possession since the execution of the deed.

These facts may be proved to show that the deed related to the house at Howrah

Evidence as to application of language which can apply to one only of several persons

96. When the facts are such that the language used might have been meant to apply to any one, and could not have been meant to apply to more than one of several persons or things,

words then the investigation must stop. You are bound to take the interpretation which entirely exhausts the whole of the series of expressions used by the testator and are not permitted to go any further. *Webb v Byng* 1 K. & J. 580. The rule which is enacted by this section has been more recently affirmed by the House of Lords in *North Eastern Railway v Hastings* (1900), L. R. A. C. 260.

(1) *Babu v Sitaram* 3 Bom. L. R. 768 (1901) see however notes to s. 92, Prov. 6 ante.
(2) *Alagaya Tiruchettambala v Saminada Pillai* 1 Mad. H. C. R., 264 (1863), *Baboo Rambuddun v Ranee Koonwar, W*

R. 1864 Act X Rulings 22 24 *Byraj Nopani v Pura Sundary Das* 42 C. 56 (1915)

(3) *Norton* Ev. 281 Field Ev. 6th Ed. 284

(4) *Mussamat Bhagbutti v Chowdry Bholanath* 2 I. A. 256 (1875)

(5) *Ghellaibai v Nandubha* 21 B. 335 334 (1896) in which case it was held that the language of the document was not so plain in itself nor did it apply so accurately to existing facts as to prevent evidence being given

(6) *Malabar Prosad v Massutullah* 33 A. 103 (1916)

evidence may be given of facts which show which of those persons or things it was intended to apply to.

Illustrations

(a) *A* agrees to sell to *B* for Rs. 1,000, 'my white horse'. *A* has two white horses.

Evidence may be given of facts which show which of them was meant

(b) *A* agrees to accompany *B* to Haidarabad

Evidence may be given of facts showing whether Haidarabad in the Dekhan or Haidarabad in Sindh was meant

97. When the language used applies partly to one set of existing facts, and partly to another set of existing facts, but the whole of it does not apply correctly to either, evidence may be given to show to which of the two it was meant to apply

Evidence as to application of language to one of two sets of facts to neither of which the whole correctly applies

Illustration

A agrees to sell to *B* my land at *Y* in the occupation of *Y*. *A* has land at *X* but it is not in the occupation of *Y* and he has land in the occupation of *Y*, but it is not at *X*. Evidence may be given of facts showing which he meant to sell

Principle — See Notes *post*

s. 3 ('Document')

s. 3 ('Fact')

s. 3 ('Evidence')

Steph. Dig., Art. 91 Cls. (—8), pp. 170—174. Taylor, Ev., §§ 1202, 1206, 1209, 1215, 1218—1226. 1131. Goodeve Ev., 396, 398. Wigram's Extrinsic Evidence, *loc cit*, Thayer's Cases on Evidence 1014 *et seq*

COMMENTARY.

Latent ambiguity in the more ordinary application arises from the existence of facts external to the instrument and the creation by these facts of a question not solved by the document itself. A latent ambiguity arises when the words the circumstances is doubtful evidence, is allowed less of definition such cases traction to a term different e instances of latent ambi open to the doubt in which

of its two senses it was to be taken. It is not, however, to this class of cases that reference is now made, but to those in which the ambiguity is rather that of description, either *equivocal* itself from the existence of two subject-matters or two persons both falling within its terms (section 96), or *imperfect* when brought to bear on any given person or thing (2) (sections 94, 97)

Section 94 *ante*, provides that when the language of a document is plain Equivocation that modification of sets of

circumstances and cannot have been intended to apply to both, evidence may be given to show to which set it was intended to apply (3). Where a description applies equally to several different subjects an "equivocation" (which is a form of latent ambiguity) arises, and extrinsic evidence, including declarations of the author of the instrument, is admissible to identify the subject

(1) *Umesh Chandra v Sageman* 5 B

L R, 633 634 (1869), s. c., 12 W R.,

O J, 2

(2) *Goodeve Ev* 395

(3) *Cunningham Ev* 276

intended (1) Provided that such subject cannot be identified from the instrument itself (2) This proposition has been held to apply to the case of two persons bearing the same name as that mentioned in the document although one has also additional names not mentioned therein (3) In the *Illustrations* appended to the section the language is certain The doubt as to which of two similar persons or things the
 therefore be removed by ex
 be given of facts a term v
 observed even according to English law declarations of intention on the part of the author of the instrument are admissible To use the words of Lord Abinger (5) this evidence of intention can properly be admitted where the meaning of the testator's words is neither ambiguous nor obscure and where the devise is on the face of it perfect and intelligible but from some of the
 of an ambiguity arises as to which of the two
 two or more persons (each answering to the words
 ended to express Thus if a testator devise his
 manor of *S* to *A B* and has two manors of *North S* and *South S* it being clear he means to devise one only whereas both are equally denoted by the words he has used in that case there is what Lord Bacon calls an equivocation
 i.e. the words equally apply to either manor and evidence of previous intention may be received to solve this latent ambiguity for the intention shows what he meant to do and when you know that you immediately perceive that he has done it by the general words he has used which in their ordinary sense may properly bear that construction If the language of a document directly describes two sets of circumstances but cannot have intended to apply to both evidence may be given to show to which it is intended to apply (6)

The Indian Succession Act embodies the same rule as that contained in section 96 of this Act enacting that when the words of a will are unambiguous but it is found by extrinsic evidence that they admit of applications one only of which can have been intended by the testator extrinsic evidence may be taken to show which of these applications was intended (7) Thus a man having two cousins of the name of Mary bequeaths a sum of money to his cousin Mary It appears that there are two persons each answering the description in the will That description therefore admits of two applications only one of which can have been intended by the testator Evidence is admissible to show which of the two applications was intended (8)

Imperfect description (ss 95 97) As section 96 deals with equivocal descriptions so sections 95 97 may be said to deal with imperfect descriptions Both of the latter sections refer to latent ambiguities Section 97 is only an extension and application of the rule laid down in section 95 (9) The latter section formulates the general rule with regard to imperfect descriptions embodied in the maxim *falsa demonstratio non nocet* (a false description does not vitiate the document) while the former deals with a particular form of imperfect description namely when such description applies to a double and not to a single set of facts There may be enough of description in the instrument to have indicated some specific thing as the object

(1) *Doc H stocks* 5 M & W 363
Charter v Charter L R 7 H L 364
Taylor Ev §§ 1207 1208 *Doe v Needs*
 2 M & W 129 *Unesh Chandra v Sage*
nan 5 B L R 633 634 (1869)
 (2) *Doc v Westlake* 4 B & Ald 57
Webber v Corbett L R 16 Eq 515
 (3) *Be nett v Marshall* 2 K & J 740
Webber v Corbett L R 16 Eq 515
Doe v Allen 12 A & E 451 In re

Holverian 7 Ch D 197
 (4) *S* 3 ante
 (5) In *Doe v H stocks* 5 M & W at
 pp 368 369
 (6) *Naga Cho v M Se M* 10 Bur L
 T 245
 (7) Act X of 1865 s 67 extended to
 Hindu Will by Act XXI of 1870 s 2.
 (8) *Id* Illust
 (9) *Cunngham Ev.* 276

of its operation or might turn out, on matter or object, t provisions, but it supposed subject there was neither subject nor object in exact correspondence with it so that it would be uncertain on what, or in whose favour, the instrument was designed to operate. Thus where a deed of release was silent as to the claim released it was held that under section 95 extrinsic evidence was admissible to prove what claim was intended to be released by it (1). And thus where in the case of a devise of Trogue's farm "in the occupation of M" the testator had a farm called Trogue's but a portion of it only was in M's occupation the farm was allowed to pass (2). In such a case the extrinsic circumstances create the uncertainty, and the question which extrinsic circumstances create extrinsic evidence is admitted to clear up. The distinction is clear between clearing up an ambiguity and creating a subject (3). The cases under this heading are (a) where a description is partly correct and partly incorrect (section 95) and (b) where part of a description applies to one subject matter and part to another (section 97). If the document applies in part but not with accuracy to the circumstances of the case the Court may draw inferences from those circumstances as to the meaning of the document whether there is more than one, or only one thing or person to whom or to which the inaccurate description may apply (4). In the case of an ambiguity in the description of land in a mortgage deed it is open to a party to show by other evidence what land was actually covered by the deed (5). According to English law (6) declarations of intention on the part of the author of the instrument cannot be given in evidence in the cases above mentioned. But the propriety of a rule which excludes such evidence in the cases dealt with by sections 95 and 97 but admits it in the case dealt with by section 96 has been doubted. It being said that the evidence should be admitted or excluded in all cases alike (7). No such distinction between declarations of intention and other evidence is observed by this Act (8) and therefore in all cases where extrinsic evidence is admissible, whether under sections 95 and 97 or section 96 declarations of intention will be admissible (9). When declarations of intention are receivable in evidence, their admissibility does not depend upon the time when they were made. Certainly contemporaneous declarations will *ceteris paribus* be entitled to greater weight than those made before or after the execution but in point of law no distinction can be drawn between them unless the subsequent declarations instead of relating to what the declarant had done or had intended to do by an instrument were simply to refer to what he intended to do or wished to be done at the time of the speaking, (10).

When a description is partly correct and partly incorrect (section 95) and the former part is sufficient to identify the subject matter intended while the latter does not apply to any subject the erroneous part will be rejected on the maxim *falsa demonstratio non nocet cum de corpore constat* (11) (a false description will not hurt when it can co-exist with the subject itself) (*supra*) unless

Description partly correct partly incorrect (s 95)

(1) *Abraham v. The Lodge* Goodwill (1910) 34 M 156

(2) *Goodtitle v. Southern M & S* 299

(3) *Goodeve* Ev 395 396

(4) *Steph Dig* Art 91 cl (7)

(5) *Ra v. Clara; Das v. Ardad* 41 43 I C 721

(6) *Id* Taylor Ev §§ 1202 1206 1218 See note (4) *ante*

(7) *Steph Dig* pp 170—174

(8) It is to be noted however that while s 96 says evidence may be given

of facts (which would include statements under s 3) ss 95 97 say evidence may be given to show. It is conceived however that this verbal variation does not indicate any real difference

(9) *Field* Ev 6th Ed 284 *Cunningham* Ev 275—277

(10) *Taylor* Ev § 1209 and cases there cited

(11) *Taylor* Ev §§ 1218—1223 (For an application of this maxim see *Cowen v. Truefitt* Ld 1898 2 Ch 551)

it is introduced by way of exception or limitation (1) The principle is that so much of the description as has no application being laid aside as mere surplusage, what remains is sufficient to identify the thing really meant The words "in Calcutta" in the illustration have no application The words "my house" have application when it is shown that A had a house at Howrah (2) The description may not accurately specify even one person or thing, that is the description of the subject intended may be true in part but not true in every particular But the instrument will not in consequence of the inaccuracy be regarded as inoperative If after rejecting so much of the description as is false, the remainder will enable the Court to ascertain with legal certainty the subject matter to which the instrument really applies, it will be allowed to take effect upon the principle of the maxim above cited But the rule which rejects erroneous descriptions which are not substantially important, can, however, only be applied where enough remains to show the intent plainly (3)

Thus by a devise of "all that my farm called Trogue's farm, now in the occupation of C," the whole farm passed though it was not all in C's occupation (4) So also it was held that a devise of all the testator's freehold houses in Aldersgate Street, when in fact he had only leasehold houses there, was, in substance and effect, a devise of his houses in that street, the word "freehold" being rejected as surplusage (5) And when a sale certificate described as a *jotedari* interest what was really a *shikmi taluk*, this misdescription was held not to prejudice the purchaser's title (6) A mortgage deed of certain properties appertaining to the entire *bhag* of the plaintiff The *bhag* comprised (inter alia) the clause which set forth the particulars specified only two *gabhans*, one only of which belonged to the *bhag* and the other did not The deed then proceeded — "According to these particulars, lands, houses and *gabhans*, barn yards wells, tanks, *padars* and pasture land also, together with whatsoever may appertain to the *bhag*—all the properties appertaining to the whole *bhag* have been mortgaged and delivered into your possession . . . There is no other property appertaining to the said *bhag* of which mention is not made here" It was held that the particulars were "the leading description," and the supplementary description of them as constituting the entire *bhag* should be regarded as "falsa demonstratio" (7) A further illustration is afforded by a class of cases, of not infrequent occurrence in India, where there is a description of land in a conveyance, lease, or other document, such a description setting forth the boundaries and then specifying the quantity, as so many acres, *bighas* or the like Here the maxim *falsa demonstratio non nocet* applies, it is considered to be a mere false description, if there is an error in the quantity, and the land within the boundaries passes by the conveyance or lease, whether it be less or more than the quantity specified (8) And in the case cited it has been held

(1) Taylor Ev § 1224

(2) Field Ev 6th Ed 286

(3) Taylor Ev §§ 1218—1220

(4) *Goodtitle v Southern* 1 M & S 299 cited in *Umesh Chandra v Sageman* 5 B L R 613 634 (1869) and see *West v Louday* 1 H L C 384 *Travers v Blandell* 6 Ch D 436 cited and followed in *Tribhobandas Jekisondas v Krishnara Kuberrari* 19 B 283 288 (1893)

(5) *Day v Trig* 1 P Wms 286 and see other cases cited in Taylor Ev, § 1221

(6) *Shashik Kaleemooddeen v Ashruf Ali* 19 W R 276 (1873) *Taraknath Chuckerbutty v Joy Soonduree* 21 W R,

93 (1874)

(7) *Tribhobandas Jekisondas v Krishnaram Kuberrari* 18 B 283 (1893)

(8) Field Ev 6th Ed 286 *Pafalton Singh v Maharajah Mueshessur* 9 B L R 150 169 (1871) 1 W R P C 5 *Sheeb Chunder v Broj Nath Aditya* 14 W R 301 (1870) *Modce Huddin v Sandes* 12 W R 439 (1869) *Ka ce Abdool v Buroda Kant* 15 W R 394 (1871) *Zeenut Ali v Ram Doyal* 18 W R, 25 (1872), *Esan Chunder v Protap Chunder* 20 W R 224 (1873) *Pirajisondas Madhabdas v Mahomed Ali* 5 B 203 (1880) see Taylor Ev §§ 1220 1221

Part of
description
applying to
one subject
matter
part to
another
(s 97)

part to another
which the language
ratee may be so
to one claimant

The following has been stated to be a summary of the English law upon Summary these points(7) — From what precedes the following rules may be collected —

- 34 M 51 (1911)
(4) Taylor Ev § 1274 and cases
there cited
5 Ryall Ha a 10 Bea 6
Taylor E § 1216
(6) Taylor E § 1215 and cases there
cited Ph on F 5th Ed 588 and
Cloak Ha mond 34 Ch D 200 and
see Act N of 1865 (Ind an Success on)
s 630
(Taylor F § 1276

First, where in a written instrument the description of the person or thing intended is *applicable with legal certainty to each of several subjects*, extrinsic evidence including proof of declarations of intention, is admissible, to establish which of such subjects was intended by the author (1)

Secondly, if the description of the person or thing be *partly applicable and* 's, though extrinsic evidence of the 's, for the purpose of ascertaining to vet evidence of the author's declarations of intention will be inadmissible (2)

Thirdly, if the description be *partly correct and partly incorrect*, and the correct part be sufficient of itself to enable the Court to identify the subject intended, while the incorrect part is inapplicable to any subject parol evidence will be admissible to the same extent as in the last case, and the instrument will be rendered operative by rejecting the erroneous statements (3)

Fourthly, if the description be *wholly inapplicable* to the subject intended or said to be intended by it, evidence cannot be received to prove whom or what the author really intended to describe (4)

Fifthly, if the language of a written instrument, when interpreted according to its primary meaning, be insensible with reference to extrinsic circumstances, collateral facts may be resorted to, in order to show that in some *secondary sense* of the words, and in one in which the author meant to use them, the instrument may have a full effect (5)

First rule here given corresponds with section 96, *second* rule with section 97, *third* and *fifth* rules correspond with section 95 and *fourth* rule corresponds with section 91, while no distinction is made in any case between declaration of intention and other evidence (6)

The Indian Succession Act

The Indian Succession Act provides a similar rule enacting that, if the thing which the testator intended to bequeath can be sufficiently identified from the description of it given in the will, but some parts of the description do not apply, such parts of the description shall be rejected as erroneous and the bequest shall take effect (7) So also where the words used in the will to designate or describe a legatee or a class of legatees sufficiently show what is meant, an error in the name or description will not prevent the legacy from taking effect A mistake in the name of a legatee may be corrected by a description of him, and a mistake in the description of a legatee may be corrected by the name (8)

Evidence as to meaning of illegible characters etc

98. Evidence may be given to show the meaning of illegible or not commonly intelligible characters, of foreign, obsolete, technical, local and provincial expressions, of abbreviations and of words used in a peculiar sense

Illustration

A a sculptor agrees to sell to B all my models A has both models and modelling tools Evidence may be given to show which he meant to sell

Principle—This description of evidence is admissible in order to enable the Court to understand the meaning of the words contained in the instrument

(1) Wigr Wills 160

(2) *Doc v Hiscocks* supra

(3) Wigr Wills 67—70

(4) *Ib* 133

(5) *Doc v Hiscocks* supra Wigr Wills 11 cite Taylor G. § 1131

(6) Field Ev 6th Ed 286 287

(7) Act V of 1865 s 65 and see s 66 ib both applying to Wills of Hindus, Act XXI of 1870 s 2

(8) *Ib* s 63 applicable to Hindu Wills Act XXI of (1870) s 2

itself by themselves and without reference to the extrinsic facts on which the instrument is intended to operate (1) See Note, *post*

s. 3 ('Evidence.')

s. 49 (*Opinion as to meaning of words or terms*)

Steph Dig, Art. 91, cl 2, Taylor Fr, § 1102 Phipson Fr, 5th Ed, 571 593, Rogers' Expert Testimony, § 118

COMMENTARY.

The principle upon which words are to be construed in instruments is very plain—where there is a popular and common word in an instrument, that word must be construed *prima facie* in its popular and common sense. If it is a word of a technical or legal character, it must be construed according to its technical or legal meaning. If it is a word which is of a technical and scientific character, then it must be construed according to that which is its primary meaning, but before evidence can be given it must be satisfied from the case that the word ought

Meaning of characters, expressions, abbreviations and words

to be construed, not in its popular or primary signification, but according to its secondary intention (2). And in England it has been held that evidence that expressions were used in a technical sense ought not to be admitted without a distinct averment as to the particular words to which evidence is proposed to be directed and as to the technical or trade meaning which it is sought to attribute to them (3).

In the case cited it was held that in construing wills the test to be applied is what did the testator mean having regard to the words used and that technical words or words of known legal import, must have their legal effect even though the testator uses inconsistent words unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the terms in their proper sense (4).

Evidence may not be given to show that common words the meaning of which is plain and which do not appear from the context to have been used in a peculiar sense, were in fact so used. The general rule is that the meaning of an English word not a technical term cannot be made known by an examination of witnesses. It has, therefore, been held error in an action for libel to allow a physician to testify as to the meaning of the word 'malpractice' (5). It may happen, however, that from some peculiarity of the character in which it is written the instrument is itself illegible to the Court called upon to expound it, without the aid of persons skilled in decipherment its language may be foreign to the Court, or it may be of a technical character, or those of abbreviation may not be understood by the Judges.

peculiar usage an interpretation different from their ordinary and popular one, may be themselves equivocal. Accordingly until before the Court in a form deciphered, translated or, as to the meaning of particular characters or expressions, explained it would have no means of adjudication. Until brought before it by interpretation in a living shape it would be a dead letter only which the Court would be called on to expound and it is obvious accordingly,

(1) Goodeve Ex 374 citing Shore v Wilson *post*

(2) Holt & Co v Collyer 16 Ch D 718 520 per Fry J see Rayner v Rayner (1904) 1 Ch 176 cited in notes to s. 92 Prov 6 ante

(3) Sutton v Cicero (1890) 15 A C

144 Taylor Ex § 1101

(4) H Isor v Oakes (1908) 31 M 283 following Laht Mohan Singh v Chukkun Lal Roy P C 24 C 834

(5) Steph Dig Art 91 cl 2 Rogers of c t § 118

that to this extent at all events evidence must, from the very necessity of the case, be admitted. It is not because the language is ambiguous, however, but because it is *unknown* that for this purpose evidence is received—received not as proof of any particular *intention* in its use, but simply to *affix an interpretation* to characters or expressions used (1). The question whether language is ambiguous depends upon the question whether it is ambiguous when addressed to a person competent to interpret language. Words cannot be ambiguous because he cannot read, and within the same reason because the Court which is called upon to interpret particular facts, art, or science which words, and a knowledge of which is therefore necessary to a right understanding of the words he has used (2).

The principle is thus stated by Tindal, C J, in the case of *Shore v Wilson* (3): "Where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence *dehors* the instrument itself, for reason and common sense agree, that by no other means can the language of the instrument be made to speak the real mind of the party. Such investigation does of necessity take place in the interpretation of instruments written in a foreign language,—in the case of ancient instruments, where, by the lapse of time and change of manners, the words have acquired in the present age a different meaning from that which they bore when originally employed,—in cases where terms of art or science occur,—in mercantile contracts which, in many instances, use a peculiar language, employed by those only who are conversant in trade or commerce and in other instances in which the words, besides their general common meaning, have acquired, by custom or otherwise, a well known peculiar idiomatic meaning in the particular country in which the party using them was dwelling, or in the particular society of which he formed a member, and in which he passed his life. In all these cases, evidence is admitted to expound the real meaning of the language used in the instrument, in order to enable the Court or Judge to construe the instrument, and to carry such real meaning into effect.

In the same case the law is thus stated by Lord Wensleydale in a judgment which marks the distinction which exists between the *interpretation* of instruments and their *application* to facts. "I apprehend that there are two descriptions of evidence (the only two which bear upon the subject of the present enquiry), and which are clearly admissible in every case for the purpose of enabling a Court to *construe* any written instrument, and to *apply* it practically. In the first place, there is no doubt that not only where the language of the instrument is such as the Court does not understand, it is competent to receive evidence of the proper meaning of that language as when it is written in a foreign tongue, but it is also competent where technical words or peculiar terms, or indeed any expressions, are used, which, at the time the instrument was written, had acquired an appropriate meaning either generally or by local usage, or amongst particular classes. This description of evidence is admissible, in order to enable the Court to understand the meaning of the words contained in the instrument itself, by themselves, and without reference to the extrinsic facts on which the instruments are intended to operate. For the purpose of *applying* the instrument to the facts and determining what passes by it, and who take an interest under it, a second description of evidence is admissible (4), viz, every material fact that will enable the Court to identify the person or thing mentioned in the instrument, and to place the Court, whose

(1) Goode v Fy, 371, 372

(2) Wigram, Extrinsic Ev p 105

(3) 9 C & F 555

(4) See s 92 cl (6) ante

province it is to declare the meaning of the words of the instrument, as near as may be in the situation of the parties to it"

To the above citations may be added the short and terse statement by Gibbs, C J, in a case on a charterparty involving the meaning of the term 'privilege' (a sum in lieu of privilege having been reserved to the captain) where he says, "Evidence may be received to show the sense in which the mercantile part of the nation use the term 'privilege'—*just as you would look into a dictionary to ascertain the meaning of a word* and it must be taken to have been used by the parties in its mercantile and established sense"(1)

This might arise either from the use of cypher, or shorthand or other peculiarity of character as the medium of expression, or it might be merely bad writing (2) Referring to a case of cypher, Alderson, B observed "Words on paper are but the means by which a person expresses his meaning, and shorthand is, in this respect, like longhand, and equally admits of interpretation"(3) Experts have been allowed to be called to decipher abbreviated and elliptical entries in the book of a deceased notary (4)

A word may be both descriptive and distinctive. If a word is *prima facie* the name or description of an article evidence will be admitted that it is also generally associated with the name of a particular manufacturer But such evidence will not be conclusive that the word has become a distinctive one which cannot be used of the same article when made by others without risk of deception (5)

The translation in the High Courts of documents in the languages of this country, affords familiar illustration on the point of language foreign to the Court (6) Making a translation is not a mere question of trying to find out in a dictionary the words which are given as the equivalent of the words of the document, a true translation is the putting into English that which is the exact effect of the language used under the circumstances Not only is a competent translator required, but if the words in the foreign country had in business a particular meaning different from their ordinary meaning an expert will be admitted to say what that meaning is (7) But it is not competent for a witness called to translate writing in a foreign language to give any opinion as to its construction, that being a question for the Court (8) The opinion of experts is not binding on the jury, for it is with the jury and not with these witnesses that the determination of the case rests The weight due to the testimony of these witnesses is a matter to be determined by the jury and that weight will be proportioned to the soundness of the reasons adduced in its support (9) A question has been raised as to whether official or Court translations are conclusive, or whether it is open to the parties to question their correctness and give evidence of the true translation (10) Such evidence has,

Illegible or not commonly intelligible characters

Foreign obsolete, technical, local and provincial expressions and words used in a peculiar sense

(1) *Birch v Deycester* Starkie 210
Smith v Ludha Ghella 17 B 144 (1892)
See further as to wills ss 70 S6 87
Act N of 1865

(2) *Goodeve* Ev 376

(3) *Clayton v Nugent* 13 M & W 406

(4) *Sheldon v Benhan* 4 Hill 129
(Amer) cited in *Rogers* op cit p 276

(5) *Burberry & Co v Cording & Co* (1909)
Times L R 576

(6) *Goodeve* Ev 376

(7) *Clatnay v Brazilian Submarine Telegraph Co* 1891 1 Q B 79 92 See observation in *R v Tilak* 27 B 143 (1897)

(8) So in *Stearns v Huntzian* 17 C

B \ \ 56 a Belgian Consul was called to translate the following — Les informations sur Gustave Sichel sont telles que nous ne pouvons lui livrer les 2 500 caisses que contre connaissance Si vous voulez nous vous enverrons les connaissances et vous ne les lui délivrerez que contre paiement He was asked to what the article les referred and said it was applicable to the connaissances This was held to be error See also *Di Sora v Phillips* 10 H L Ca 624

(9) *R v Kali Prasanna* 1 C W N, 465 479 (1897)

(10) *Astarini Dass v Nundo Lal Cal H Ct* 15 h May 1900 Suit No 311 of 1898 The decision on the preliminary

however, on other occasions been admitted. So in the cases undermentioned(1) the accuracy of one of the Court translations was impugned, and in another(2) a translation of the defamatory matter prepared by the Court interpreter was put in by the prosecution. The Court interpreter was examined at the instance of the Court, and was cross examined by the accused. He was also corroborated by another witness. A translation of the poem was also put in by the defence, who as well as the prosecution, examined experts as to the meaning of the words used. Again, in the civil suit of *Malatala Bibee v Haleem uz za man*(3) the official translation of the words "*mukadarat mahalam*" in a Persian document being impugned, both the Court interpreter and non official expert witnesses were permitted to testify as to the correct translation of these terms. It is submitted that the true rule to be applied is that in the absence of any specific issue being raised as to the accuracy of a Court translation such translation is binding not because it is the act of a Court official, but because evidence is not generally admissible on points not specifically put in issue by the parties. But it is open to the latter to raise such an issue. If it were otherwise, the recovery of an estate worth a crore of rupees, or the innocence of a party charged with a crime, might be made to depend upon the decision of an official who, though in most instances both competent and honest, might in a particular case be wanting in either of these respects.

As regards obsolete expressions, the case of *Shore v Wilson*(4) may be taken as an example. Here it being necessary in modern times to put a construction upon an ancient charitable foundation, and as to who were designed to take under the terms "Godly preachers of Christ's Holy Gospel," evidence was allowed to be given from history, contemporaneous with the deed, of the existence of a particular sect assuming to themselves that denomination and of the founder's connection with them.

Local and provincial usage is admissible to explain local and provincial expressions. So in the case(5) of a lease of a rabbit warren where the lessee covenanted to leave on the warren at the expiration of the term 10 000 rabbits, the lessor paying for them £60 per thousand, evidence was received to show that, according to the local usage of that part of the country, 1,000 as applied to rabbits meant 1,200. So also evidence has been allowed to show that 13 pockets of Kent hops at 100s" meant at 100s per cut(6). Evidence has been admitted to show that the word "year" in a theatrical contract meant those

was open(7). In mercantile contracts it is admissible to annex unexpired and frequently been also admitted to explain the meaning of words, as for instance, whether "months" mean "calendar or lunar months"(9), to explain the word "days" in a bill of lading(10), and that "October" in a certain contract of Marine Insurance

argument in this case is reported in 26 C, 891. No cases were laid before the Court, which was informed that the practice was against the admission of this testimony. But as will appear from the test this is incorrect. See further as to this case post.

(1) *R v Tildak* 22 B 112 at pp 142, 143 (1897) *Harris v Brown* 28 C, 621, at p 634 (1901).

(2) *R v Kali Prasanna* 1 C W N, 465 479 (1897).

(3) 10 C L R 293 300 301 322 in appeal (1881) on behalf of the defendant Mahatala were examined Mr Owen the Chief Translator on the Original Side of

the High Court as also Major Jarrett, Moulvie Kabeeroodin Ahmed and Abdul Kazi and on the other side Boodin Ahmed and Mahomed Yusuf.

(4) 9 C & F 355.

(5) *Smith v Wilson* 3 B & Ad 728.

(6) *Spicer v Cooper* 1 Q & B 424.

(7) *Grant v Maddox* 15 M & W, 737.

(8) S 92 Prov 5 ante.

(9) *Jolly v Young* 1 Esp 196, *Simpson v Margitson* 11 Q B, 37.

(10) *Cochran v Relberg* 3 Esp 121, see *Nutten v Watt* 16 Q B D 67, *Norden Steamship Co v Deerpsey* 1 C P D 654.

meant from the 25th to the 31st of that month(1), to show the meaning of the word "bale"(2), and of the terms "within soundings"(3); "F O B," "Free Bombay Harbour," "Free Bombay Harbour and interest"(4), "regular turns of loading," "arrived in docks," "in turn to deliver," and other similar expressions(5) Evidence has been admitted to prove that the word "securities" was used by a testator in the sense of investments and stocks and shares in Railway and other Companies(6)

Thus a wager to run one greyhound against another concluded with the Abbrevia- initials "P. P." Evidence was received to show that it meant—"Play or tion pay" that is to say, win the match or forfeit the stakes(7) Alderson, B, observed in the case now cited—"Standing by themselves these letters are insensible, but the evidence confers a real meaning upon them, by showing what the parties intended by them, and that they were inserted with the view of expressing a given thing" So Parke, B—"There can be no doubt the evidence was receivable It is like the case of a word written in a foreign lan- guage" The *Illustration* to the section, which is taken from the case of *Goblet v Beechey*(8) affords another example of an abbreviation of a term of art The will of the celebrated sculptor, Nolchens, contained a bequest of his mod —tools for carving' The word "mod" was there contended on the one hand to mean modelling tools, and on the other, models which latter were of great value, and evidence of sculptors and others in interpretation of the word "mod" was admitted So also where by a will a legacy was given to a Mrs G, evidence was admitted to show that the testator was in the habit of calling a Mrs Gregg, "Mrs G," and the latter was allowed accordingly to take under the initial(9) As to abbreviated and elliptical entries in books v ante, pp 668, 669

99. Persons who are not parties to a document, or their representatives in interest, may give evidence of any facts tend- ing to show a contemporaneous agreement varying the terms of the document

Who may give evi- dence of agreement varying terms of document

Illustration

A and B make a contract in writing that B shall sell A certain cotton to be paid for on delivery At the same time they make an oral agreement that three months credit

(1) *Claurand v Angerstein* Peake R 43

(2) *Garrison v Perrin* 2 C B N S 681 "If the term bale as applied to gambier has acquired in the particular trade a signification differing from its ordinary signification evidence must be received on the subject otherwise effect is not given to the contract Per Cockburn C J So a bale of cotton may mean a bag in the Alexandrian trade and a compressed bale in the Levant trade according to the usage of either trade *Taylor v Briggs* 2 C & P 525

(3) *Aga Syud v Hajee Juckeriah* 2 Ind Jur 311 (1867)

(4) *Hajee Mahomed v Spinner* 24 B 510 519 (1900)

(5) See *Taylor Ex* § 1162 note (2) and *Shipson Ex* 5th Ed 593 etc where a large number of cases will be found collected So also the words 'to ship and shipment may acquire a particular meaning *Smith v Ludha Ghella* 17 B 140 144 145 (1892) in *Jadu Ra v Bhibotaran Nundy* 17 C 193 194 (1882) evidence of a special meaning of the word goods was rejected

(6) *Rayner v Rayner* (1904) 1 Ch 176

(7) *Daintree v Hutchison* 10 M & W 85

(8) 3 Sim 24

(9) *Abbott v Massie* 3 Ves 148 see also as to evidence of the habits of a testator *Kell v Charner* 23 Beav 190 *Blundell v Gladstone* 11 Sim. 467 *Lee v Pain* 4 Hare 201 *Beaumont v Fell* 2 P Wms 141 Where the writer has been in the habit of nicknaming or misnaming persons or things and these names appear in a document evidence of such habitual use of language may be given to explain the document in the same way as if it was written in cypher or a foreign language *Phipson Ex* 5th Ed 580

shall be given to *A*. This could not be shown as between *A* and *B*, but it might be shown by *C*, if it affected his interests.

Principle—The rule excluding parol evidence to vary or contradict written instruments is applicable only in suits between the parties to the instruments and their representatives. These latter are to blame if the writing contains what was not intended, or omits what it should have contained. But third persons are not to be prejudiced by things recited in writing contrary to the truth through the ignorance, carelessness, or fraud of the parties, or thereby precluded from proving the truth, however contradictory it may be to the written statement (1). This section is an enabling section as section 92 is a disqualifying section (2). See Note, post.

s 3 (Document")

s 3 ('Fact")

s 3 ('Evidence')

s 92 (Exclusion of evidence of oral agreement)

Steph Dig, Art 92, Taylor, Ev, § 1149, Greenleaf, Ev, § 279, Wharton, Ev, § 927

COMMENTARY.

Who may give evidence varying documents

In a dispositive document, so far as concerns the parties to it, the settled terms must, as has already been seen, be varied by parol because those terms were mutually accepted for the purpose of disposing of rights in certain relations. A document may, however, be dispositive as to the parties and non-dispositive as to all others. The party who utters a deed, prepares it deliberately in respect to all persons who through it may enter into business relations with him, but other persons are not contemplated by him, nor is the writing meant to bind him as to such persons who would in no way be bound to him. In respect to strangers, documents have usually no binding force, and hence a stranger against whom a document is brought to bear on trial may show, by parol mistakes in such writing. The rule forbidding the variation of writings by parol, applies only to parties and privies, and nothing in the rule protects them from attack by strangers (3). This section enables strangers to an instrument to prove the oral nature of the transaction by oral evidence. When therefore *A* purported to make a gift of land to his daughter *B*, it was open to a creditor of *X* the husband of *B* to prove by oral evidence that it was in reality a sale to *Y* and was therefore liable to decree obtained against him (4). It has been held that a party executing such a writing may prove by parol that he executed it with a third person (5). Thus where the question was, whether *A*, a pauper, was settled in the Parish of Cheadle and a deed of conveyance to which *A* was a party was produced, purporting to convey land to *A* for a valuable consideration, the parish, appealing against the order was allowed to call *A* as a witness, to prove that no consideration passed (6).

Doubts have been expressed (7) whether under this section, the right conferred on persons, other than the parties to a document or their representatives, of giving evidence of a contemporaneous oral agreement "varying" the document, must not be understood as restricted to "varying" in contradistinction to "contradicting, adding to, or subtracting from," its terms. There is no reason, however, to suppose that any such distinction, which is certainly unknown to English law, was intended. The word "varying" was no doubt employed as embracing (as in fact it does) both contradictions,

(1) Taylor Ev § 1149

(2) *Krishnaswami Aiyar v Mangala* 53 I C, 243

(3) Wharton Ev § 923

(4) *Jagat Mohini v Rakhal Das* 2 C

L J 7 (1905)

(5) Wharton Ev § 923

(6) *R v Cheadle* 8 B & Ad 333, Steph Dig Art 92 III (a), ib p 100

(7) Field Ev 441, ib, 6th Ed, 287

additions and subtractions (1) It has been recently held (2) that the word "varying" in the section covers the same ground as the words "contradicting, varying, adding to or subtracting from" in section 92 *ante*

100. Nothing in this Chapter contained shall be taken to affect any of the provisions of the Indian Succession Act (X of 1865) as to the construction of wills

Saving of provisions of Indian Succession Act relating to wills

The provisions referred to in this section are contained in Part XI of the Indian Succession Act (X of 1865), sections 61—77, 82, 83 85, 88—103, of which part have been extended by Act XXI of 1870 (Hindu Wills Act) to the Wills of Hindus, Jains, Sikhs, and Buddhists in the territories subject to the Lieutenant Governor of Bengal, and the towns of Madras and Bombay. It is therefore only to Wills other than those the subject of these Acts, and to instruments other than Wills, that the provisions of the present Chapter absolutely and unreservedly apply (3). The section does not, however, declare that the present Chapter shall not apply at all in other cases, but only that nothing therein shall be taken to affect (4) any of the provisions in the Acts above mentioned.

(1) Cunningham Ev. Notes to s. 99. See *ante* p. 610 and *Pattanmal v. Syed Kala* 27 M. 329 (1903).

(2) *Krishnaswami Aiyar v. Mangala thami* 53 I. C. 243.

(3) For construction of Khoja Wills

see *Hassanally Moledina v. Popatlal Parbludas* 37 B. 211 (1913).

(4) As to the meaning of the word "affect" see *Administrator General Bengal v. Prem Lal* 21 C. 774 (1894).

PART III.

PRODUCTION AND EFFECT OF EVIDENCE

IN Part I, the Act dealt with the material of belief or the facts which may be proved, and in Part II with the mode in which that material must be brought before the Court, viz, by oral or documentary evidence according to the circumstances of the case

From the question of the proof of facts, the Act passes to the question of the manner in which the proof is to be produced, and this is treated under the following heads (i) burden of proof, (ii) estoppel (iii) witnesses and their re examination, (iv) improper admission and rejection of evidence

In the first place the Act deals with the question as to which of the parties before the Court is bound to supply the evidence which is to form the material of belief on the question at issue, or in other words on which of the parties the burden of proof lies With regard to the burden of proof the Act lays down the broad rules well established in English law that the general burden of proof is on the party who if no evidence at all were given, would fail, and that the burden of proving any particular fact is on the party who affirms it After laying down the general principles which regulate the burden of proof (sections 101—106) the Act proceeds to enumerate the cases in which the burden of proof is determined in particular cases, not by the relation of the parties to the cause but by presumptions (sections 107—111) It notices two cases of conclusive presumptions (sections 112, 113) and finally declares in section 114 that the Court may, in all cases whatever, draw from the facts before it whatever inferences it thinks just In respect of presumptions, the framers of the Act have not followed the precedent of the New York Code in laying down a

matter in this matter not to presumptions have been express rule, the Judges might feel embarrassed These are—the presumptions relating to the continuance of life, partnership, agency, and tenancy, of ownership, good faith, legitimacy and cession of territory But the terms of section 114 are such as to reduce to the position of mere maxims which are to be applied to facts by the Courts in their discretion a large number of presumptions to which English law gives to a greater or less extent, an artificial value Nine of the most important of them are given by way of illustration (1)

Of the two topics, of the production and effect of evidence each legitimately embraces matters other than those dealt with in this portion of the Act Thus the rules enforcing the attendance of witnesses and production of documents fall under the head of the first topic, and are dealt with by the Civil Procedure Code And the subject of the effect of evidence would strictly be (2)

(1) Draft Report of the Select Committee—*Gazette of India* July 1st 1871 Part V p 273 Steph Introd 174 175, Cunningham Ev 52 As to presumptions

v ante notes to s 4
(2) v ante Introduction Kishori Lal Sircar's Evidence Act 3 24 218

This portion of the Act merely deals with the effect of evidence arising from the existence of presumptions as shifting the burden of proof, or as conclusive of facts, and from estoppels as precluding the admission of evidence upon the particular matter in respect of which the estoppels operate. Lastly, the Act deals with the effect of the improper admission or exclusion of evidence. The subject of the effect of evidence as produced by estoppels is dealt with by Chapter VIII. The subject of estoppels differs from that of presumptions in the circumstances that an estoppel is a personal disqualification laid upon a person peculiarly circumstanced from proving peculiar facts; whereas a presumption is a rule that particular inferences shall be drawn from particular facts, whoever proves them. Much of the English learning connected with estoppels is extremely intricate and technical, but this arises principally from two causes, the peculiarities of English special pleading, and the fact that the effect of prior judgments is usually treated by the English text writers as a branch of the law of evidence and not as a branch of the law of Civil Procedure (1).

Chapters IX and X of the Act consist of a reduction to express propositions of rules as to the examination of witnesses, which are well established and understood. In these rules as to the examination of witnesses, the Act has not materially varied the law or the practice of the Courts existing at the date of its introduction and has merely put into propositions the rules of English law upon this subject (2). One provision, however, in Chapter X requires special notice namely the power given to the Judge by section 165 to put questions or to order the production of documents. The framers of the Act considered it necessary, having regard to the peculiar circumstances of this country, to put into the hands of Judges an amount of discretion as to the admission of evidence which, if it exists by law, is at all events rarely or never exercised in England. Judges in this country are expressly empowered to ask any questions upon any facts relevant or irrelevant at any period of the trial subject to the provisions in the section above-mentioned (3).

Lastly, the Act in Chapter XI, deals with the subject of the effect of the improper admission and rejection of evidence, declaring that no new trial or reversal of any decision shall be held or made, if it shall appear that independently of the evidence objected to and admitted there was sufficient evidence to justify the decision, or that if the rejected evidence had been received, it ought not to have varied the decision. This Chapter is in accordance with the spirit of the present rules of the Supreme Court in England which with the view of avoiding new trials on purely technical grounds refuse a new trial except when a substantial wrong or miscarriage has been occasioned by the improper admission or rejection of evidence (4).

The rules relating to the examination of witnesses are contained in Chapter X of this Act (sections 135-166) and will be found considered in detail in the notes to the sections of that Chapter. The order in which witnesses are produced and examined is regulated by the Civil and Criminal Procedure Codes or, in the absence of any specific provision, by the discretion of the Court (5).

judicio Oaths
Act (6)
for other

purposes

(1) Steph Introd 175
(2) Steph Introd 176 Draft Report of the Select Committee—*Gazette of India* July 1st 1871 Part V p. 273
(3) Draft Report of the Select Committee—*Gazette of India* July 1st 1871 Part V p. 273
(4) O 39 r 6 Taylor E. §§ 1881—

1885 Best Ev § 82

(5) S 135 post

(6) Act X of 1873 (received the assent of the Governor General on the 8th April 1873. For a full discussion of the nature of judicial oaths and affirmations and the history of Indian legislation on the subject see *R. Mar* 10 A 70 (1898).

CHAPTER VII.

OF THE BURDEN OF PROOF

CERTAIN facts require no proof (1) All other relevant facts, however, must be proved by evidence, that is, by the statements of witnesses admissions or confessions of parties and the production of documents The present Chapter deals with the rules regulating the question upon which of the parties to the cause rests the obligation of adducing that evidence, or as it is technically called the "burden of proof" The term "burden of proof" fails to convey a precise idea, because the term is often interchangeably employed in two entirely distinct senses That in many cases this is done unconsciously in no way lessens the confusion, which arises, from transferring reasoning entirely applicable to the phrase in one sense to its use in another As commonly used "burden of proof" means (a) the burden of *establishing a case* whether by a preponderance of evidence or beyond a reasonable doubt, and (b) the duty or necessity of *introducing evidence* either to establish such a case or to meet an adverse amount of evidence sufficient to constitute a *prima facie* case Burden of proof in the sense of "the burden of introducing evidence" is analogous to the phrase in its (a) sense, but analogous only It rests, not as before, on the one party designated by the pleadings, but on the party, whether plaintiff or defendant, against whom the tribunal, at the time when the question is to be determined, would give its judgment, *no further evidence being introduced* Before evidence is gone into, it rests on the party, who has the affirmative of the issue, after evidence is gone into, as the tribunal will only give its judgment in favour of a *prima facie* case, the burden of introducing evidence is always on the party who has to meet such a *prima facie* case (2) The incidence of the burden of proof of a fact means that the person on whom it lies must prove the same But the meaning of proof in s 3 ante is not affected by the incidence of proof (3) The answer to the question on whom the burden of proof rests includes the answer to another, which frequently causes great controversy in the preliminary stages of a case, viz, which party has the privilege, or incurs the duty of, beginning Practically no point in the law of evidence involves more subtle principles of law, and none involves more important advantages and disadvantages, according to the circumstances, to the contending parties It is, however, needless to insist on the importance which necessarily attaches to the order in which parties are allowed to state their cases to the Court (4)

The general rule as to the *onus* of proof and the consequent obligation of beginning is, that the proof of any particular fact lies on the party who alleges it, not on him who denies it *ei incumbit probatio qui dicit, non qui negat* *Actori incumbit probatio* The issue must be proved by the party who states an affirmative, not by a party who states a negative (5) He who invokes the aid of the law must first prove his case The plaintiff is bound in the first instance to show at least a *prima facie* case, and, if he leaves it imperfect the Court will not assist him. Hence the maxim *Potior est conditio defendenti* (6)

(1) See Introduction to Ch III ante

(2) Best Ev, Amer Notes 11th Ed. 298-301

(3) *Mulam nad Tunus v Emp* 50 C, 318

(4) Powell Ev 9th Ed 151 Taylor

Ev § 378

(5) Powell Ev 9th Ed, 150 W & A Ev 2nd Ed, 28 Best, Ev § 267,

Taylor Ev 364 for a criticism of the rule see Wharton Ev, §§ 353, 357

(6) Best, Ev § 267

When however, the defendant, or either litigant party, instead of denying what is alleged against him, relies on some new matter which, if true, is an answer to it, the burden of proof changes sides, and he in his turn is bound to show a *prima facie* case at least and, if he leaves it imperfect, the Court will not assist him *Reus excipiendo fit actor* (1) The principle that the party who asserts the affirmative in any controversy ought to prove his assertion and that he who only denies an allegation may rest on his denial, until, at least, the probable truth of the matter asserted has been established, is one which has received the widest recognition The reason is obvious, to all propositions, which are neither the subject of intuitive or sensitive knowledge, nor probabilized by experience, the mind suspends its assent until proof of them is adduced, or as it has been said (2) "Words are but the expression of facts, and therefore, when nothing is said to be done nothing can be said to be proved" which is probably what is meant by the expression "*per rerum naturam factum negantis probatio nulla est*" (3) But in order to determine the burden of proof it is necessary to look for the affirmative in substance of the issue and not the affirmative in form Thus a legal affirmative is by no means always the party's case, the nature of

language is such that the same proposition may in general be expressed at pleasure in an affirmative or negative shape The rule may therefore more correctly be laid down that the issue must be proved by the party who states the affirmative in substance and not merely the affirmative in form (4) This general rule may be affected both by presumptions (*vis post*) or by legislative enactment casting upon a particular party the burden of proving some particular fact (5) There are two tests for ascertaining on which side the burden of proof lies, first, it lies upon the party who would be unsuccessful, if no evidence were given on either side (6), secondly, it lies upon the party who would fail if the particular allegation in question were struck out of the pleading (7)

The party on whom the *onus probandi* lies as developed by the record must begin When the party on whom lies the obligation of beginning is prepared with adequate evidence to begin is generally an advantage, since it enables him to impress his case first on the mind of the Court, and if evidence be given on the other side to have also the last word From this point of view it is called the *right* to begin In other cases, however, as where the party is unprepared with evidence, the obligation to begin may prove a burden to him, upon whom it rests (8) "Whenever either party claims the right to begin, he thereby undertakes to offer evidence on that issue in respect of which he

(1) Best Ev § 267

(2) Best Pres Ev 39 citing Gilbert Ev 145

(3) Best on Presumptions 39 40 and so in Co Litt it is laid down broadly "It is a maxim in law that witnesses cannot testify a negative but an affirmative From these and similar expressions it has been rashly inferred that a negative is incapable of proof—a position wholly indefensible if understood in an unqualified sense See Best Ev § 270 Wharton Ev § 356

(4) Powell Ev 9th Ed 152 Best on Presumptions 39 40 Best Ev §§ 271, 272

(5) See s 103 (unless it is provided

by any law that the proof of that fact shall be on any particular person) and ss 104 112 *post* Best Ev § 268

(6) S 102 *post* *Amos v Hughes* 1 M & Rob 464 and see other cases cited in Best Ev § 268 *Kripamoy Dabia v Durga Govind* 15 C 89 91 (1887) [The test which may well be applied in a case like this is who would win if no evidence were given on either side and it seems to us that upon the facts admitted the plaintiffs must win if the defendant does not prove the case set up by him, *per* Mitter & Ghose JJ]

(7) *Miller & Barber* 1 M & W, 427

(8) Powell Ev 333 Wills Ev, 2nd Ed 35 See 2 Hyde 182

has claimed it(1), he cannot claim the right to begin in the sense of merely addressing the jury on the issue. Where there are several issues, some of which are upon the plaintiff, and some upon the defendant, the plaintiff may begin by proving those only which are upon him leaving it to the defendant to give evidence in support of those issues upon which he intends to rely, and the plaintiff may then give evidence in reply to rebut the facts which the defendant has adduced in support of his defence (2). If, however, the plaintiff in such a case gives in the first instance any evidence on the issues, which lies on the defendant, he is bound to complete his whole case, and will not be entitled to call a portion of his evidence in reply (3).

The phrase "burden of proof" has two distinct meanings namely the burden of establishing a case and the burden of introducing evidence. The burden of *establishing a case* remains throughout the entire case, where the pleadings originally place it. *It never shifts*. The party, whether plaintiff or defendant, who substantially asserts the affirmative of the issue has this burden of proof. It is on him at the beginning of the case, it continues on him throughout the case, and when the evidence, by whomsoever introduced is all in if he has not, by the preponderance of evidence required by law, established his position or claim, the decision of the tribunal must be adverse to such pleader. On the other hand, the burden of proof, in the sense of *burden of evidence*, may shift constantly as evidence is introduced by one side or the other,—as one scale or the other preponderates over its fellow. To carry out the same metaphor, so often and so long as the scale containing an adverse amount of evidence preponderates to a certain extent by reason of evidence adduced in that behalf, the duty or necessity rests on a party to introduce opposing evidence which shall restore the equipoise, or if possible, strike a new balance.

This necessity or duty may, and usually does alternate constantly between the parties. This is "the burden of evidence"—burden of proof in the second of the senses abovementioned. But when the entire evidence is in, it is legally necessary to conviction, or other affirmative action by the tribunal, that the final balance should be one way, that a certain one of the scales should eventually preponderate and preponderate to a definite extent. This necessity has not any time shifted, but has remained constantly throughout the trial, on one of the parties alone, to wit on him who had the affirmative of the issue. This is the "burden of establishing"—burden of proof in the first of the senses abovementioned (4). The question of *onus* of proof only arises where there is a question of fact to be determined and there is no evidence one way or the other which will enable the Judge to come to a conclusion. In such a case the Court has to decide whether the burden of proving the fact lies upon the plaintiff or the defendant. If the burden of proof lies upon the plaintiff and the proof of that fact is essential to his case, then the plaintiff must fail because he has not discharged the burden which lay upon him. On the other hand if it lies upon the defendant and its proof is essential to his case, then the defendant must fail because he has not discharged the burden which lay upon him. Whether, however, the burden of proof lies upon the plaintiff or the defendant if there

(1) *R v Tooke* 25 St Tr 446 447
Smart v Bayner 6 C & P 721 *Oakely v Ooddeen* 2 F & F 656

(2) *Shaw v Heek* 8 Ex 392

(3) *Brerne v Murray* Ry & M 254
Wills v Taylor 26 27 28 2nd Ed 38,
Taylor v Taylor 11 394 386 See Civil Pr Code s 180

(4) *Best v Amer* Notes 269 270

Where all the evidence is in the debate as to *onus* is academical. All that remains to do is to draw the necessary inferences from the facts. *Shree Chidambora v Velrama Reddi* 27 C W N 245 256
See *Sudhanja Kumar Singh v Govt*
Chandra Pal 35 C L J 473 *Basiruddin v Mokima Bibi* 22 C. W N. 709 713
and next note

is evidence adduced by both the parties then the question of the burden of proof becomes immaterial and the Court has to determine upon the evidence before it (1)

As already observed the burden of proof may be affected by presumptions (2). The burden of proof is shifted by those presumptions of law which are rebuttable, by presumptions of fact of the stronger kind, and by every

that its effect becomes visible, as the opposite side is then bound to prove his negative (3). So sections 107—111, *post*, enumerate instances in which the burden of proof is determined in particular cases not by the relation of the parties to the cause (as is the case in sections 101—106) but by presumptions (4). It is in fact in this connection, perhaps, more strongly than in any other, that the force of a so-called "presumption of law" becomes evident. Such a presumption shifts the burden of proof in the sense of the "burden of evidence"—the burden of going forward with new evidentiary matter. The establishment by one party, in discharge of the onus of a legal presumption, casts on the other the burden of disproving it, in other words, it shifts the burden of evidence. When conflicting evidence on the point covered by the presumption of law is actually gone into, the presumption of law is *functus officio* as a presumption of law. The presumption of fact upon which such legal presumption was founded is to be weighed by the tribunal with the other evidence in the case (5).

In conclusion, the general principle with regard to the burden of proof may be stated to be that a party, who desires to move the Court, must prove all facts necessary for that purpose (sections 101—105). This general rule is however subject to two exceptions. (a) He will not be required to prove such facts as are especially within the knowledge of the other party (section 106), nor (b) so much of his allegations in respect of which there is any presumption of law (sections 107—113) or in some cases of fact (section 114) in his favour (6).

101. Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist Burden of proof

When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person

Illustrations

(a) A desires a Court to give judgment that B shall be punished for a crime which A says B has committed.

A must prove that B has committed the crime

(b) A desires a Court to give judgment that he is entitled to certain land in the possession of B by reason of facts which he asserts, and which B denies to be true

A must prove the existence of those facts

(1) *Hari Singh v. Tokharam Maruani* 52 I. C. 860 and see last note

(2) As to presumptions v. ante notes to s. 4. As to presumptions shifting onus see *Kundan Lal v. Mussamul Begum* 1914 2 C. W. N. 937 (P. C.)

(3) Best Ev. § 273. The party who asserts the negative must begin whenever

there is a disputable presumption of law in favour of an affirmative allegation Taylor Ev. § 367

(4) Steph. Introd. 174

(5) Best Ev. Amer. Notes pp. 269, 270

(6) See Taylor Ev. §§ 367, 376A

On whom
burden of
proof
lies

102. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Illustrations

(a) *A* sues *B* for land of which *B* is in possession, and which, as *A* asserts, was left to *A* by the will of *C*, *B*'s father

If no evidence were given on either side, *B* would be entitled to retain his possession. Therefore the burden of proof is on *A*.

(b) *A* sues *B* for money due on a bond.

The execution of the bond is admitted, but *B* says that it was obtained by fraud which *A* denies.

If no evidence were given on either side, *A* would succeed, as the bond is not disputed and the fraud is not proved.

Therefore the burden of proof is on *B*.

Burden of
proof as to
particular
fact

103. The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

Illustration

(a) *A* prosecutes *B* for theft, and wishes the Court to believe that *B* admitted the theft to *C*. *A* must prove the admission.

B wishes the Court to believe that, at the time in question, he was elsewhere. He must prove it (1).

Burden of
proving
fact to be
proved to
make evi-
dence ad-
missible

104. The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.

Illustrations

(a) *A* wishes to prove a dying declaration by *B*. *A* must prove *B*'s death.

(b) *A* wishes to prove, by secondary evidence, the contents of a lost document. *A* must prove that the document has been lost.

Principle.—See Introduction to Chapter VII, *ante*. The following notes give reported cases applying the rules laid down in these sections and referred to in the preceding introduction —

- | | |
|---|--|
| s. 3 ("Court") | ss. 101—106 (<i>Burden of proof determinable by relation of parties</i>) |
| s. 3 ("Fact") | |
| s. 3 ("Proved") | ss. 107—111 (<i>Burden of proof determinable by presumptions</i>) |
| s. 101 (<i>Definition of "burden of proof"</i>) | ss. 112—113 (<i>Conclusive presumptions</i>) |
| s. 3 ("Evidence") | s. 114 (<i>Presumptions of fact</i>) |

Steph Dig., Arts. 93—97A, Steph Introd., 174, Taylor, Ev., §§ 364—390, Best, Ev., §§ 265—277, Amer Notes to same, 11th Ed., 298—300, Powell, Ev., 9th Ed., 150—166, Starkie, Ev., 684, *et seq.* Best on Presumptions, Wharton, Ev., §§ 353—372, Granleaf, Ev., 74, 81, Roscoe, N. P. Ev., and Cr. Ev. (references to be sought for under the title dealing with the particular matter in question) Lawson on Presumptive Evidence, *passim*, Burr Jones, Ev., §§ 174—196, Wigmore, Ev., §§ 24, 83, *et seq.*, and the authorities, text-books and case law, cited in the following sections.

(1) For a criminal case in which this section was held to have been misapplied, see *Sadhu Sheikh v. R.*, 4 C. W. N., 576 (1900).

COMMENTARY.

See, as to the general principles regulating the burden of proof, the *Intro-* Burden of
duction to the present Chapter. Some illustrative reported cases in which proof
 those principles have been applied are cited hereafter, their subject matter
 being arranged in alphabetical order. It is incumbent on each party to dis-
 charge the burden of proof which rests upon him (1). Where the burden of
 proof lies on a party and is not discharged, the suit must be dismissed (2).
 When the issue raised by the Court is in substance whether the plaintiff's or
 defendant's story is true, it is possible that neither of the stories may be true,
 and the question then arises which of the two alternatives of the issue is the
 really material one. Usually the really material one is the first of the issue
viz., is the plaintiff's story true? If the defendant's defence is a plea in con-
 fession and avoidance, *viz.*, a plea which admits that the plaintiff's story is
 true but avoids it, then if the defendant fails to prove his case, the plaintiff
 may recover. But if the defence is substantially an argumentative traverse

issue, the consequence is that he must fail, and the defendant may say, "it
 is wholly immaterial whether I prove my case or not, you have not proved
 yours" (3). The burden of proof in the sense of the burden of introducing
 evidence may and constantly does shift during the trial (4). There are many
 cases in which the party on whom the burden of proof in the first instance lies,
 may shift the burden to the other side by proving facts giving rise to a pre-
 sumption in his favour (5) or by showing an admission (6). The amount of
 evidence required to shift upon a party the burden of displacing a fact may
 depend on the circumstances of each case (7). When the case of a plaintiff
 is scanty in point of evidence, it is a sufficient answer that from the situation
 of the plaintiff the evidence of that which is in contest between the parties is
 not so fully within his reach as it is within the reach of the other party, and
 that there is on the part of the plaintiff evidence enough *prima facie*, as it is
 said in England to go to a jury. It is then for the other side to consider how
 he shall meet that evidence. He may leave the plaintiff to prevail by the
 force of his own case contending that he is not called upon to answer it, unless
 it is such as, if unanswered, disposes of the case. But if, instead of relying
 upon the weakness of the plaintiff's case he meets it and undertakes to rebut
 it by counter evidence, the Court will look to the sort of evidence produced,
 and if it is not such as might have been expected the Court will draw conclu-
 sions adverse to him from this fact. So in appeal it being incumbent on the
 appellant to show that the judgment of the Court below is wrong, the Court
 must consider what was the nature of the whole of the evidence before that
 Court (8). The Court will generally, as respects the *quantum* of evidence

(1) *Bajrath Sahay v Rughonath Pershad* 12 C L R 186 193 (1892)

(2) *Appa Rau v Subbunna* 13 M 60 (1889)

(3) *Raja Chandranath v Ramjas Mazumdar* 6 B L R 303 308 (1870)
Arumugam Chetty v Perriyannam Sertai
 25 W R 81 82 (1876) *See Haji Khan*
v Baldeo Das 24 A 90 (1901)

(4) *v ante* pp 677 678 *Darlata v Ganesh Shastre* 4 B 295 (1880) *Nusta*
ram v Kali Pershad Dass 23 W R 431
 (1875) *Smields v Wilkinsons* 9 A 398
 (1887) *Govinda v Josha Premaji* 7 B

73 (1878) *Mano Mohon v Mothura Mohun* 7 C 225 (1881) *Rameshwar*
Koer v Bharat Pershad 4 C W N 18
 (1899) *Suleiman Kader v Mehndi Afzur*
 2 C W N 186 (1897) *Hem Chandra v*
Kali Prosanno 30 C 1033 1042 (1903)

(5) *Mano Mohon v Mathura Mohun* 7 C 225 (1881)

(6) *Bala v Shita* 27 B 271 278 (1902)

(7) *Cassumbhoy Ahmedbhoy v Ahmed bhoy Hubdhoy* 12 B 280 (1887)

(8) *Sooriah Row v Cotaghery Boochia,*
 2 Moo 1 A 113 124 (1888)

required consider the opportunities which in particular cases each party may naturally be supposed to have of giving evidence (1)

The general rule of evidence is that if, in order to make out a title it is necessary to prove a negative the party who avers a title must prove it (2) "A proviso is properly the statement of something extrinsic of the subject matter of a covenant which shall go in discharge of that covenant by way of defeasance an exception is a taking out of the covenant some part of the subject matter of it If these be right definitions, the plaintiff need never state a proviso, but must always state an exception and whether particular words form a proviso or an exception, will not in any way depend on the precise form in which they are introduced, or the part of a deed in which they are found" (3) This has been laid down as a rule of pleading but it holds good as a rule of procedure also upon the question of burden of proof So if a clause in an instrument such as a policy of assurance, be an exception the plaintiff must not only state it, but show that it is not applicable, if it be a provision the defendant must state it, and show that it applies (!) Owing to particular circumstances, in some cases where the burden of proof is on the plaintiff very slight evidence may be sufficient to discharge the *onus* and shift it to the other side In such cases slight evidence means evidence which does not go the whole length of proving a particular fact, but which suggests it But slight evidence must not be confounded with suspicious evidence or evidence which is open to question (5)

Accounts

When a claim is founded upon a distinct statement of account signed by the defendant, in which he acknowledges a particular sum to be due to the plaintiff, it is for the defendant to produce evidence to rebut the *prima facie*

yes a transaction to be a mortgage books of the defendant confirm the burden of proof is shifted the latter to produce evidence

to neutralize or explain away the effect of these entries (7) Where there is an obligation to render an account, it includes a duty to show *prima facie* that the account rendered is correct and complete, and that duty extends to both sides of the account (8) When the accounts of a mortgagee who has been in possession are being taken, his income tax papers are inadmissible as evidence in his favour, though they may be used against him It is the mortgagee's duty to keep regular accounts, and the *onus* lies in the first instance upon him If he has not kept proper accounts the presumption will be against him, but this does not mean that all statements of the mortgagor against him must therefore be taken as true (9) As to the burden of proof on taking of partnership accounts (10) and the presumption of dissolution of partnership from a brief account (11) see below In an agent account the plaintiff has only to show that the defendant is an accounting party and then it is for the latter to prove the amount of his receipts (12)

(1) *Rajah Kissen v Narendra Singh* L. R. 3 I A 85 88 (1875) see *Ram Prasad v Raghunanda Prasad* 5 A 738 (1885)

(2) *Pool v Behary v Watson & Co* 9 W R 190 192 (1868)

(3) *Thursby v Plant* 1 Wms Saund p 233b followed in *Aga Syud v Hajee Jackariah* 2 Ind Jur N S 308 310 (1867) as to pleading exceptions see *Rash Behary v Harnani Debba* 15 C 556-557 (1888)

(4) *Aga Sadick v Hajee Jackariah* 2 Ind Jur N S 308 310 (1867)

(5) *Hir Dyal v Roy Kristo* 24 W R

107 (1875)

(6) *Sinon Elias v Joravar Mull* 24 W R 207 (1875)

(7) *Corinda v Josha Prei aj* 7 B. 13 (1876)

(8) *Mayen v Alston* 16 M 245 (1892)

(9) *Shah Glola v Mussanati Emanuel* 9 W R 275 (1867)

(10) *Thirukunaresan Clatti v Subaraya Clatti* 20 M 313 (1895)

(11) *Joopoody Sarayya v Lakshmana* 13 P C 36 M 185 (1913)

(12) *Ram Dass v Bhagrat Dass* 1 All L J 347 (1904) *Ragunath v Ganpatih* 2 All 374

The burden of proof as to the relationship in the case of principal and agent Agency is dealt with by section 109, *post*, to the *notis* of which section reference should be made See as to agency account, last paragraph

When a claim has been made by a third party to property attached, it is Attachment for the claimant to begin, and he must prove that the property belonged to him or was in his possession (1) But if he starts his case sufficiently, as by favour by the judgment that the consideration of is on to the defendant (2)

When a judgment-creditor has obtained a writ of attachment against the property of his judgment-debtor, but such debtor has no property against which the writ can be enforced, the judgment creditor is entitled to an order for execution of his decree by attachment of the person of the debtor, and the burden of proof is on the latter to show that he has no means of satisfying the debt, and that he has not been guilty of any misconduct, not on the creditor to show that by sending the debtor to prison some satisfaction of the debt will be obtained (3) See the undermentioned case (1) as to the burden of proof in the case of allegation of the non observance of the formalities necessary to attachment Where the decree holder attached certain property in the hands of the judgement debtor's sons, it was held to be for the latter to prove that the property sought to be sold in execution was the joint ancestral property of themselves and their father and could not be attached in execution after the father's death (5)

Where an auction purchaser brought a suit to obtain possession of certain Auction-purchaser *julkurs*, which he alleged formed part of his zemindary of S, the defendant being in possession thereof, and his possession having been confirmed in an Act IV case, it was held that the burden of proof rested on the plaintiff to show that the *julkurs* in dispute formed part of the assets of the zemindary at the time of the perpetual settlement (6)

A person seeking to exercise the statutory right of avoiding an encum Avoidance of encum- brance given him by the 12th section, Ben Act VII of 1868, or by section 66 of Ben Act VI of 1869, must give some *prima facie* evidence to show that the encumbrance, which he seeks to avoid, comes within the purview of the section (7) In a suit to set aside a settlement where the defendant pleaded Settlement Sal Thakbust

was on the defendant Where a collector in to sell a *pattur taluk* the *onus* was on the plaintiff alleging it to show that he had no jurisdiction (9) Where a suit was brought under the provisions of the Bengal Tenancy Act, section 149, cl (2), and the plaintiff made out a very strong case in support of his title to the rents in deposit, it was held that the *onus* was then shifted on

(1) *Ngo Tha v Burn* 2 B L R F B 91 (1868) s c 11 W R F B 8
Govind Atmaram v Sanita 12 B 20 (1887)

(2) *Dignaburce Dossee v Banec Madiah* 15 W R 155 (1871)

(3) *Seton v Bishon* 8 B L R 255 (1872) s c 17 W R 165

(4) *Famirishna v Surfunnissa Begum* L R 7 I A 157 (1880) s c 6 C 129

(5) *Hemnath Rai v Janke Ra* 2 All L J 272 (1905)

(6) *Forbes v Meer Mahomed* 20 W R 44 (1873) referred to in *Nityanand*

Roy v Bansh Chandra 1 C W N 341 (1899) in which case it was said that no lard and fast rule could be laid down as to where the burden of proof began or ended

(7) *Koylashlashiney Dassee v Gocool sion Dassee* 8 C 230 (1881) *Gobind Nath v Reilly* 13 C 1 (1886) decided under s 66 of Bengal Act VIII of 1869 but see also *Rash Behari v Hara Moni* 15 C 557 (1888)

(8) *Natior Chand v Clunder Sikhur* 15 C 765 (1888)

(9) *Kal Koo ar v Maharajah of Biddan* 5 W R 39 (1866)

the defendant (1) The *onus* of proving that *tha'oust* proceedings are wrong lies on the person alleging it (2)

Benami
transactions

It is very much the habit in India to make purchases in the names of others and these transactions are known as *benami* transactions. But the person who imparts the apparent character of the *benami* transaction must show some thing or other to establish that allegation (3) An important criterion in these cases is to consider from what source the money comes with which the purchase money is paid (4) In a great number of cases they are made in the names of persons ignorant at the time of their being so made (5) Though the source of the money was consistent with the claimants having as the defence alleged intended to make a gift of the property to the holder of it and the right inference from the facts was that it was not held *benami* for the claimant but belonged to the defendant (7) But however inveterate the holding of land *benami* may be in India that does not justify the Courts in making every presumption against apparent ownership (8) In cases of alleged *benami* sales effect should be given to the evidence of possession and enjoyment since the purchase as showing who is the substantial owner. The burden of proof lies on the person who maintains that the apparent state of things is not the real state of things and the apparent purchaser must be regarded as the real purchaser until the contrary be proved (9) So the burden of proof is upon him who alleges that the

the question of
accordingly the
money was con
a person sues
tiff purchased
a *prima facie*

case and the allegation of the defendant does not shift the burden of proof (11) The presumption of the Hindu law in a joint undivided family is that the whole property of the family is joint estate and the *onus* lies upon a party claiming any part of such property as his separate estate to establish that fact. Where a purchase of real estate is made by a Hindu in the name of one of his sons the presumption of the Hindu law is in favour of its being a *benami* purchase and the burden of proof lies on the party in whose name it was purchased to prove that he was solely entitled to the legal and beneficial interest in such purchased estate. The same rule applies to Mahomedans (12) The

(1) *Tra lokhya Molins Dasi v Kali Prosanna Glose* (1907) 11 C W N 380

(2) *Leelanand Singh v Lucimunar Sankh* 10 C L R 172 (1890)

(3) *Hakim Maulvi Malomed v Blarat Ind* 23 C W N 321 P C

(4) *Bias Kunwar v Desraj Ranjit Singh* P C 37 A. 557 (1915) 42 I A 207
Dhurm Das Pandey v Shama Soon
dri Dbiak 3 Moo I A 239 (1883)
Parbati Dasi v Raja Bakuntha Nath
Dey 18 C W N 428 (1913)

(5) *Gopcekrishna Gossan v Gungapersaud Gossan* 6 Moo I A 53 72 74 (1854) For a case in which the Privy Council held that the *benami* transaction had been elaborated with a perfect on that is uncommon even in India see
Rutta Singh v Bajrang Singh 13 C L R. 280 (1883)

(6) *Ram Narayan v Mahomed Had* 23 C 7 (1898)

(7) *Ib id*

(8) *Munshee Buloor v Shumsounissa Begun* 11 Moo I A 551 607 (1867)
s c 8 W R P C 3

(9) *Deo Nath v Peer Khan* 3 Agra Rep 16 (1868) *Suleman Kader v Mehudi Afsur* 2 C W N 186 (1897)
Ramabai v Ramchandras Shyam 7 Bom. L R 293 (1905)

(10) *Bajunath Salay v Rughonath Pershad* 12 C. L. R 186 (1887) and see
Satya Moni v Bhagobutty Churn 1 C. L. R 466 (1878)

(11) *Huri Ram v Raj Coomarr* 8 C. 759 (1882) see *Mookto Khashe v Anund*
Clundra 2 C L R 48 (1878)

(12) *Huri Ram v Raj Coomarr* 8 C. 759 (1882) *Nagubhai v Abdulla* 6 B 717 (1882) But the evidence may destroy the presumption of *benami* *Sayed Ashgar v Syed Mehd* L R 20 I A 38 (1892)

law as to *benami* conveyances taken by a father in the name of a son, whether in Hindu or Mahomedan families, should be considered in all Courts in India as conclusively settled by the rule laid down by the Privy Council decision cited in note (5), p 681(1). But proof that the father's object was to affect the ordinary rule of succession as from him to the property in question will take the case without this rule (2). This rule is equally applicable to an account opened in a man's books in the name of his son as to a purchase by him in his son's name. The frequency of *benami* transactions in this country forbids any presumption being raised in either case contrary to that which arises in favour of the person who provides the funds (3). When a purchase is made by a Hindu or Mahomedan in the name of his son, and when the rights of creditors are in issue, very strict proof of the nature of the transaction should be made, and the burden of proof lies with the plaintiff that the purchase was in the name of the son. If there was no evidence that a son had a separate fund, it was held that there was a strong presumption that property purchased had been bought by his father in his name and was not the son's self-acquired property (5). In a suit to declare certain sales *benami* in a case where the property of a husband was sold to realize a fine of Court and passed from hand to hand until it was sold to the wife who moreover was in possession of the property when the sale of the husband's right and interest took place, it was held that the plaintiff was entitled to a clear finding as to whether the wife held the property in her right or in trust for her husband, and that the *onus* of showing the source whence the money came was on the wife. An uninquiring purchaser from a Hindu wife whose husband is living at the time is in no sense a *bona fide* purchaser without notice (6). But it has been stated that the general principle laid down in this case has been overruled by the Privy Council (7). *Quare*, whether in the absence of any evidence to show the source from which the purchase money was derived, there is a presumption that property purchased in the name of a Hindu wife is the property of her husband and has been purchased with his money. *Semble*—There is no presumption one way or the other, but the burden of proof in each particular case must depend upon the pleadings and the position of the parties as plaintiffs or defendants (8). In a recent case in the Privy Council where a Hindu

(1) *Ruknadoola v Hurdwar Mull* 5 B L R 578 583 (1870) s c 14 W R P C 14 13 Moo I A 395

(2) *Ib* and see *Raja Chandranath v Rariyas Mazin dar* 6 B L R 303 (1871)

(3) *Aslaba v Hay, Rahimtulla* 9 B 115 122 (1885)

(4) *Naginbhai v Abdulla* 6 B 717 (1882) *Ruknadoola v Hurdwar Mull* 5 B L R 578 (1870)

(5) *Parbati Dasi v Raja Bakuntha Nath Dey* 18 C W N 428 (1913) (P C)

(6) *Bindo Bashisee v Pearcee Mohun* 6 W R 312 (1866) and as to the *onus probandi* to prove the source of the purchase money see *Sreeman Chunder v Gopal Chunder* 11 Moo I A 28 (1866) s c 7 W R P C 10 explained in *Roop Ram v Saseeram* 23 W R 141 (1875) *Fazal Buksh v Fukeerooddeen Mahomed* 14 Moo I A 234 (1871)

(7) *Clarendon v Tarini Kanth* 8 C, 545 548 553 554 (1882)

(8) *Ib* reversed on the facts 13 C,

182 distinguished in *Nobin Chunder v Dokhobala Dasi* 10 C 686 (1884) where it was pointed out that the question considered was whether as between a husband or a purchaser at a sale in execution against the husband, there is any presumption that property standing in the name of the wife is held by her *benami* for her husband which question is entirely different from that whether a wife a member of a joint family is as regards property held in her name in the same position as her husband with respect to property acquired in his name and subject to the same presumption in favour of the joint family see also *post sub voc Hindu Law Joint property*. According to the law as prevailing in the Bombay Presidency a purchase by a husband in the name of his wife does not raise any presumption of a gift to the wife or of an advancement for her benefit. *Motivahu v Purshotam Doyal* 6 Bom. L. R. 975 (1904) see also *Barkatunnissa v Fazl Haq* 26 A., 272 288 (1904) in

with two wives had a Mahomedan mistress for whom he had already provided and bought a house with his own funds in her name and registered it in her name but kept possession and took the rent of the house, it was held that on evidence this was a *benami* transaction (1) In Hindu law there is no presumption that transactions which stand in the name of the wife are the husband's transactions (2) When a wife acquires property by her own exertions, she is entitled to hold it independently of her husband and on her death it descends to her heirs (3) When a plaintiff claims land as purchaser in good faith from a *benamidar* who has been registered as owner and who by the act of the true owners had been allowed to become the apparent owner, the burden of proof lies upon the plaintiff (4) The *onus* of proving a particular transaction to be *razm farzi* lies on the person alleging it (5)

Bonds

In a suit on a bond it is for the plaintiff to prove the amount of the debt and this will be done sufficiently in the first instance by proof of the execution of the bond. It is for the defendant to prove in answer, if he can, that the amount is less than the sum sued for (6) Where the plaintiff in a suit on a bond accounted for not producing it by alleging that the defendant had stolen it, and the defendant admitted execution but alleged that he had satisfied it, it was held that the defendant was bound to begin and to prove payment either by evidence to the fact or by the production of the bond, or both (7) In the undermentioned case (8), the plaintiff sued on a deed which purported to be of absolute sale. It was admitted that an *ekrar* had been executed in favour of the mortgagor restoring to him the equity of redemption. But the plaintiff produced this *ekrar* and said it had been made over to him by the mortgagor who had relinquished the equity of redemption. The defendant alleged that the *ekrar* had been lost and had somehow found its way to the plaintiff. It was held that the presumption of law was in favour of the plaintiff, and that it lay on the defendant to prove its loss. Where the plaintiff sued on a bond

When the plaintiff sued on two bonds, and the defendant in his written statement as well as in his deposition admitted execution of the bonds, but pleaded non receipt of consideration, it was held that the question of execution could not be gone into, and that the only question which could be tried was non receipt of consideration (10) Where the plaintiff was, as regards the promise, the only person *prima facie* entitled to payment, it was held to be for the promisor to show that a payment to a third party was binding on the plaintiff (11) See further "*Consideration*," and "*Recitals*," post

Boundaries

In a question of disputed boundaries the *onus probandi* lies upon the plaintiff to prove by independent evidence his right to recover (12) In a question

which it was held that there was no presumption of advancement

(1) *Bilas Kunwar v Desraj Ranjit Singh* P C, 37 A, 557 (1915) 42 I A 202

(2) *Manada Sundari v Mahananda Sarnagar* 2 C W N 367 (1897)

(3) *Muthu Ramkrishna Naicken v Marimutha Goundan* 38 M, 1036 (1915)

(4) *Rulta Singh v Bajrang Singh* 13 C, L R 290 (1883)

(5) *Guman Singh v Chakkar Singh* 8 O C 349

(6) *Sitaram Aiyar v Samu Aiyar*, 1 Mal H C 447 (1861)

(7) *Chuni Kuar v Uday Ram* 6 A. (1883)

(8) *Raj Coomarr v Ram Suhaye* 11 R 151 (1869)

(9) *Rajeshwar Kuar v Bal Krishan* A 713 (1887), s c L R, 14 I 142

(10) *Gorakh Babaji v Vithal Narayan* 11 B 435 (1887)

(11) *Adarkhala v Chetty v Marimutha* 22 M 126 (1899)

(12) *Raja Leelanund v Mahara Mokeskur*, 10 Moo I A, 81 (1864) s c 3 W R P C 19 *Leelanund v S. A. Luchnani* Singh 10 C L R 169 (1903)

boundary the Judicial Committee, the Court of last resort is extremely reluctant to reverse the judgment of an Indian Court, and will not do so unless they are, upon the facts and evidence, satisfied that the decision of the Courts below was clearly wrong. There is a strong presumption against a plaintiff who seeks to set aside an award made by Government officers on a revenue survey, after full local inquiry, for the purpose of obtaining a rectification of the boundaries between two estates, and the *onus* of proof that the award was wrong lies on the party impeaching it (1). But when a disputed line of division runs between waste lands which have not been the subject of definite possession the ordinary rule regarding the *onus* upon a plaintiff seeking demarcation does not apply. The duty is on the defendant as on the plaintiff to aid the Courts in ascertaining the true boundary (2). In those cases where scientific accuracy in regard to boundaries cannot be attained and especially in cases where the disputed line of division runs between waste lands which have not been the subject of definite possession the ordinary rule in a suit of the *onus* falling on the plaintiff has no application. The parties to the suit are in the position of counter claimants and it is the duty of the defendant as much as the plaintiff to aid the Courts in ascertaining the true boundary referred to. When the defendant in a suit for recovery of possession of land is clearly shown or found to have been in actual possession of the disputed area the burden falls on the plaintiff to establish his title (3). In a question of the boundary between a *lakhtay* tenure and a zemindar's *mal* land there is no presumption in favour of one or the other but the *onus* is on the plaintiff to prove his case (4). Lands admittedly situate within the boundaries of zemindary are *prima facie* to be considered as part of the zemindary and it is for those who allege that they have been separated from the general lands of the zemindary and that they have been settled as a *shikmi talul* to establish this allegation (5). When land is within the ambit of the plaintiff's zemindary and the defendants set up an adverse title by reason of an undertenure the burden of proof is on the defendant. But where the plaintiff admits that there is a *houla* within his zemindary and that the defendant has lands in that *houla* but alleges that he has exceeded the boundaries of that *houla* and has encroached upon his lands the *onus* is on the plaintiff to show that the defendant has encroached (6). When a dispute arises regarding the direction of a boundary which one of the parties to a suit has demolished and the other party proves its general direction the *onus* of proof that the direction is wrongly stated if it be so lies on the former who removed the boundary (7).

Where the defendant objects that the plaintiff omitted in a former suit to civil
 1. which he then had a procedure
 2. proof lies on the
 3. are the defendant
 asserts that it is overvalued the *onus* of proving the truth of the assertion is on
 him (9). When a party complains in appeal that certain evidence has been
 rejected by a lower Court he must be able to show that the evidence was

Rajah Leelanund v Rajah Mo d a a	5 H sc Bloob t Mojec O Moo
13 Moo 1 A 57 (1869)	I \ 165 171 (1863) s c 3 W R P
(1) Rajah Leelanund v Raja Mo der	C 5
nara n 13 Moo 1 A 57 (1869)	(6) Riedos A sto Vob Cl under
(2) Lukl Nara n v Mala aja Jod 71	17 C L R 457 (1830) see \ ar ce
I A 39 (1893) s c 21 C 304	Kal per lad Dass 23 W R 431
(3) Mal araja S r Mamindra Cl a tra v	(1875)
Sarad ndu Raj 27 C L J 599 s c 45	7 J doo all Will ck v Kal e Krsto
I C 767	W R 54 (1855)
(4) Beer Cl u der Ka u 8 W	(8) Sk n er & Co Ra Sla a 19
R 209 (1867) and see G ga ala	W R 479 (1873)
Choudhri v Mallab Cl der 10 W	(9) Un a Sankar M rsur At S E
R 413 (1868)	L R App 6 (1860)

tendered and rejected (1) As to the *onus* in criminal and civil appeals respectively, v Notes, s 3 If a person other than the defendant alleges that he has been dispossessed, in the execution of a decree, from land or other immovable property which was *bond fide* in his possession on his own account or on account of some person other than the defendant, and that it was not included in the decree, or if included in the decree, that he was no party to the suit in which such decree was passed, it was held under section 230, Act VIII of 1859 that it lay on him to prove his possession that he might, if he wished, give evidence of title beyond possession, but it was not absolutely necessary for him to do so in the first instance (2) The burden of proving that a summons was not served under the 19th section of Act VIII of 1859, now O IX, r 13, of the Civil Procedure Code, lies upon the person claiming the benefit of the section (3) A defendant who pleads the minority of the plaintiff as a bar to the suit is bound to substantiate his plea (4) When a defendant impeaches the correctness of an Ameen's report, the *onus* is on him and not on the plaintiff, who should not in the first instance be called upon to support its correctness (5) In a suit for confirmation of a sale held in execution of a decree, the *onus* lies on the defendant to prove that there was a material irregularity in publishing and conducting it (6) In suits for mesne profits when the defendants have been in possession

inscribed on the books as the payee, it was held that the *onus* lay on the Government to show that the right was inalienable (8) In a claim by judgment debtors to properties seized in execution of a decree against them as representatives of the original debtor the burden of proof was held to lie on the decree holder who asserted that the property seized in execution of his decree was the property of the deceased debtor and as such in the possession of the judgment debtors (9) The plaintiff in a suit under O XXI, r 63 of the Civil Procedure Code is neither in a better nor in a worse position than he was as a claimant in the summary proceeding It is sufficient for him to produce evidence of possession or title If he shows that he is in possession, section 110 of this Act throws the *onus* on the defendant (10) Plaintiff filed objection to attachment of property which was disallowed and then brought a suit under O XXI, r 63, of Civil Procedure Code Held, that the *onus* lay on the plaintiff objector to prove that the deed he relied on If a defendant insists that an executor is a that he, the executor lives within the local Court in which the suit is brought (12) It lies on him who asserts it to prove

(1) *Modee Kalthooscrow v Coovor bhaee* 6 Moo I A 448 (1856)

(2) *Radha Pyari v Nobin Chundra* 5 B L R, 729 (1870), *Brindaban Chunder v Taraci and Bundopadhyaya* 11 B L R 237 (1873) *Jusan Khatun v Ramnath Sen* 7 B L R App 26 (1871) *Sharada Mojee v Nobin Chunder* 11 W R, 235 (1869) *Mahomed Ausar v Prokash Chunder*, 3 W R, 8 (1867)

(3) *Torab Ali v Clooramun Singi* 24 W R 262 (1875)

(4) *Chyet Narain v Buntaree Singh* 23 W R 395 (1875), *Nil Monee v Zuhcerunnissa Khanum* 8 W R 371 (1867)

(5) *Gourree Narain v Madhoosoodun Dutt* 2 W R (Act X) 1 (1865)

(6) *Bandi Bibi v Kalla* 9 A, 602

(1887) see also *Shib Singh v Mukot Singh* 18 A 437 (1896)

(7) *Brayendra Coomar v Madhub Chunder* 8 C 343 (1882)

(8) *Shambhoo Lall v Collector of Surat* 8 Moo I A 1 (1859) 4 W R, P C, 55

(9) *Abdul Rahman v Mahomed Anim* 4 C W N xxviii (1899)

(10) *Palaneappa Chetti v Maung Pro Song* U E R (1905) See *Narayan Ganesh v Bhurrag* 2 N L R 87

(11) *Laig Ram v Thola Singh* 47 P L R (1919) And see as to proof of possession *Maung Po Hnin v Ma Hlaym* 37 I C 767, s c 10 B L T 238

(12) *Kumar Saradindu v Dharendra Kant Roy* 2 C L J 484

that the law of a foreign State differs from ours, and in the absence of such proof it must be held that no difference exists, except possibly so far as the law here rests on the Specific Acts of the Legislature (1) See "*Attachment*," "*Auction purchaser*," "*Avoidance*," ante, "*Notice*," post

It is the established practice of the Courts in India, in cases of contract to require satisfactory proof that consideration has been actually received, according to the terms of the contract, and a contract under seal does not, of itself, in India import that there was a sufficient consideration for the agreement. A plaintiff however, suing to set aside a security admittedly executed by himself must make out a good *prima facie* case before the defendants can be called on to prove consideration (2) As to recitals of receipt of consideration in documents, see post, "*Recitals*." In a suit on an instrument the plaintiff is entitled to recover upon showing that it was executed by the defendant. The *onus* lies upon the defendant of showing the want of consideration (3) Mere denial by the vendor of receipt of consideration acknowledged in the recitals of deed of sale is not in all cases sufficient to cast upon the vendee the burden of proving the payment of consideration. Where the plaintiff wished to set aside a contract of sale of which there had been performance and under which the defendant had been in possession and enjoyment of the subject-matter and in possession of the title deeds he must establish at least a good *prima facie* title to the relief which he seeks (4) In a suit to set aside a deed perfected by possession on the ground of failure of consideration it lies upon the plaintiff to make out the case alleged by him and to establish at least a good *prima facie* title to the relief prayed for so as to cast on the defendants the burden of proving the consideration. A party who comes into Court to enforce a bond is in a very different position from him who is suing to set aside a contract under which there has been possession and enjoyment and of which so far as it has yet been capable of being performed there has been performance (5) It has been held that a recital of the receipt of such consideration in a deed may be sufficient proof of the receipt of such consideration for such deed and an admission by recital in a document of further charge of the receipt of consideration upon a previous mortgage may be sufficient evidence of the receipt of consideration upon that mortgage (6) But in a later case it has been held that the recital of receipt of consideration in a mortgage deed of which the execution has been proved only raises a rebuttable, though strong presumption that the consideration was paid (7) and in another that recitals are not in themselves conclusive evidence of the facts alleged (8) Where the defendant had admitted the receipt of consideration before the registering officer the *onus* was held to be upon him to disprove such receipt (9) And where a mortgagor whose bond contained an admission of receipt of consideration denied receipt of consideration before the Registrar it was held that

Consideration

(1) *Raghunathji Mital and J. Vandas Madanje* 8 Bom L R 525 and as to proof that settler of a settlement was a foreigner with foreign domicile see *Bonnaud v Charriot* 32 C 631

(2) *Raja Sahib v Budli Singh* 2 B L R 111 P C (1869) see *Baboo Ghansu v Chukource Singh* W R (1864) 197

(3) *Juggut Chunder v Bhugwan Chunder Marsh* Rep 27 (1862)

(4) *Ramful Ram v Suba Singh* 4 Pat L J 517 s c 53 I C 83 as to *onus* on plaintiff in case of denial see *Neki Ram v Khushi Ram* 39 P L R, 1919

(5) *Kalepershad Tewaree v Pershad Sen* 17 Moo I A 282 (1869) s c 2 B L R P C 122

(6) *Priyanath Chatterjee v Bissessur Dass* 1 C W N 600 (1897) As to however admission dispensing with proof of attestation see *Abdul Karim v Solimam* 27 C 190 (1899)

(7) *Babbu v Sita Ram* 36 A 478 (1914) per Richards C J

(8) *Khub Lal Singh v Ajodhya Misser* 43 C 576 (1916) see *Brij Lal v Mola Kunwar* P C 36 A 187 (1914)

(9) *Ali Khan v Indar Parshad*, 32 C, 950 (1896)

the *onus* of proving non receipt of consideration lay upon the mortgagor (1) But in the Allahabad High Court it has been held that the withholding of possession without protest raises a counter presumption that the consideration has not been paid (2) And in another case where the plaintiffs who were usufructuary mortgagees, did not claim possession till the period of limitation had almost expired and the defendant pleaded that the consideration had not been paid, it has been held that the burden of proof of the payment of the consideration had been shifted to the plaintiffs (3) In the undermentioned case the plaintiff rested his case entirely upon the bond and the defendant's acknowledgment thereon that Rs 8000 were received in cash. At the trial the defendants proved that acknowledgment to be fictitious and that only part of the money had been advanced, held that the *onus* was upon the plaintiff to prove in some other way the advance which he alleged (4) When the execution of a mortgage or other conveyance is proved it is not necessary to prove as against a third person that the consideration passed (5) If in a suit on a *hundi* the execution is admitted by the executant, the burden of proving special circumstances exonerating him from liability to the amount of the *hundi* lies on the executant (6) In a suit to impeach a deed to which he has been a party the *onus* lies on the plaintiff to make out a case for setting aside on equitable grounds a deed duly executed for valuable consideration (7) See further ante, 'Bonds' and post "Receipts"

Contract
conveyance

Where a party alleges a contract and breach thereof with resulting damages it will of course, be upon him, in the first instance, to prove the contract the facts of its violation, and injury suffered thereby. But if a defendant answers to a contract made by him that he acted exclusively as agent for he set up infancy fraud payment contract to sow

indigo, not sowing would be *prima facie* evidence of dishonesty, and in order to claim the benefit of the fourth clause of the fifth section of Regulation VI of 1823 the *onus* is on the person claiming the benefit to show that the negligence to sow had been accidental (9) The question of the burden of proof in cases of accidental injury to goods bailed depends upon the particular circumstances of each case and, if the bailee gives an explanation of the nature of the accident, which is not contradicted nor *prima facie* improbable the *onus* is shifted (10) In the case cited the *onus* was placed on plaintiff to prove negligence of bailee (11) Where a *razinama* is alleged to have been obtained by fraud or duress, the *onus* lies on the person alleging it to prove the fraud it is not sufficient to say that it is a case of doubt, that there are su

(1) *Malabar Prasad v Bala Dyal* 1 All L J (Dary) 186 (1904) s c 27 A 71

(2) *Ichobandl v Malabar* (1896) 9 A 641

(3) *Bhargava v Panchandra* A C (1911) 33 A 483 Distinguishing *Malabar Prasad v Bishan Dyal* supra

(4) *Lala Laksh v Sayed Haddar* 4 C W N 82 (1899)

(5) *Chinnan v Ranelandra* 15 M 54 (1891) at p 55 and see *Lal Achal v Raja Karsin* 9 C W N 477 s c 32 I A 113 121 (1905) *Rup Chaud v Sarbess v Clandra* 10 C W N 47 (1906) at p 751

(6) *Ran Das v Muthra Das* 6 P L R (1905)

(7) *Ashibagi v Ibd Ha Ha Mahomed* 31 B 271 following *Melbo n Bank of Corporal on v Brougha* (1897) 7 A C 307

(8) *Wharton F. § 35* and *1st Payment Chuni Kiar v Udaya Rao* (1883) 6 A 73 See as to *onus* on subsequent purchaser without notice in suit for specific performance 4 Pat L W 157

(9) *Lall Mahomed v Watson & Co* 1 Ind Jur 3 (1866)

(10) *Sl cids v Hishon* 9 A 28 (1887) *Panpal Singh v Murray & Co* 27 A 164 (1899) cf *Wharton F. § 363-365*

(11) *Dr Arkanath Rajmohun Chowdhury v R or Steam Navigation Co* 77 C L J 615 P C.

circumstances &c, &c (1) In a suit by *zur i peshgi* mortgagees for possession and to set aside a *mukururee* lease, which it was alleged by the defendant was granted to him by the mortgagor before the mortgage it was held that as the *mukururidars* were in possession under a Magistrate's order, the *onus* was on the plaintiffs, in the first instance, to give some evidence to impeach the validity of the lease but this having been done and a strong case made out the *onus* was shifted, and it was incumbent on the *mukururidars* to show that the *mukururee* was executed before the *zur i peshgi* mortgage and was granted *bonâ fide* for a real consideration and was intended to be operative (2) Where a claimant against the estate of a deceased Hindu relied upon a document which purported to be executed by his widow, it was held that the *onus* of proving the execution was upon the claimant (3) *Primâ facie* when the execution of a mortgage or other conveyance is proved, further evidence is not required to show that the purchaser has taken the interest which the document purports to convey (4) The *onus* is on the grantor of a maintenance grant (which is *primâ facie* resumable on the death of the grantee) to show that he has a right to take minerals from the grantee's property during the subsistence of the grant (5)

When the law makes the validity of a document depend on certain formalities, then they must be duly proved by the plaintiff. If an act, for instance, makes a document inoperative unless duly registered or stamped, then the document cannot be put in evidence without proof of such registry or stamp. But a *primâ facie* compliance with the law in this respect is sufficient for the plaintiff's case. If the document is, on its face duly executed, then it will be presumed that the execution was regular, and the burden of contesting the execution falls on the party assailing the document (6) If one of the contracting parties alleges that an agreement is opposed to public policy, it is for him to set out and prove those special circumstances which will invalidate the contract (7) In order to make a broker liable on the ground of want of authority, the *onus* is on the plaintiff to prove such want of authority (8) See "Accounts," "Agency," "Bonds," "Consideration," ante, "Fraud," "Good and Bad Faith," "Insurance," "Landlord and Tenant," "Partnership," "Payment," "Recitals," post.

The *onus* of proving everything essential to the establishment of the charge against the accused lies upon the prosecution who must prove the charge substantially as laid. That *onus* never changes. For every man is to be regarded as legally innocent until the contrary be proved and criminality is never to be presumed (9)

So the burden of proving guilty intention lies upon the prosecution where the intent is expressly stated as part of the definition of the crime (10)

(1) *Motee Lall v Jaggurnath Gurg* 1 Moo I A 1 (1835)

(2) *Shanarain v Administrator General of Bengal* 23 W R 111 (1875)

(3) *Ram Ratai v Vanda* 19 C 249 (1891)

(4) *Chinnan v Ramclandra* 15 M 54 (1891) at p 55

(5) *Prin v Mahomed v Rani Dhojmani* 1 Cal L J 20 (1905)

(6) *Wharton Ex* § 369

(7) *Bakshi Das v Vadu Das* 1 Cal L J 26 (1905)

(8) *Bissessur Das v Smidt* 10 C W N 14 (1905)

(9) See notes to s 3 ante and cases there cited *Wharton Ex* § 1244 and

Hathem Mondal v King Emperor 24 C W N 619

Panchanan Bose v Emperor 23 C W N 693

Khorshed Kasbi v R 8 C L R 542 (1881)

Madapuri Srim vasa v Tirunallai Kasturi 4 M 393 (1881)

Ramasami v Lokanada 9 M 387 (1885)

[newspaper libel effect of Act XXV of 1867 in throwing *onus* on accused]

And for proof of intent on in sedition v ante p 208

In re *Pandya Nayak* 7 M 436 (1884)

In re *Routhakanni* 9 M 431 (1885)

R v Balkrishna Vithal 17 B 573 579 (1893)

Delâ Singh v R 5 C W N 413 (1901)

(10) *Mahomed Siddiq v R* (1907) 11 C W N 91

Thus an accused cannot be convicted of the offence of fabricating false evidence under section 193 of the Penal Code in the absence of a finding that his intention was that the false entry might appear in evidence in a proceeding as contemplated by section 192 of the Penal Code (1). But if there are several different intentions specified in a section of the Penal Code it is not necessary to prove specifically which of the several guilty intentions the accused had it will be enough if it is shown that the intention must have been one or other of those specified in the section in question though it may not be certain which it was (2). And though the prosecution must prove the existence of some one or more of the intentions in the Code the proof need not be direct that is by the confession of the accused showing that his intention was one of those mentioned in the Code or by the evidence of witnesses proving that he admitted to them that such was his intention. It will be enough if it is proved like any other fact (and the existence of intention is a fact) by the evidence of conduct and surrounding circumstances (3). And the intention may be deduced as when it is inferred from the fact that the offenders inflicted injuries which they knew were likely to cause death (4). Thus in some later decisions in the Allahabad High Court where several men attacked another with *lathis* and he died from his injuries they were convicted of murder (5) but even in later similar cases in the Bombay High Court the verdict was changed to culpable homicide on appeal as it was held to be possible that the blow had been more violent than was intended (6). So also guilty knowledge must when necessary be proved by the prosecution. Where facts are as consistent with a prisoner's innocence as with his guilt innocence must be presumed and criminal intent or knowledge is not necessarily imputable to every man who acts contrary to the provisions of the law (7).

These general rules laying the burden of proof upon the prosecution are qualified by those contained in sections 105, 106 *post*.

An accused person is not bound to account for his movements at or about the time an offence was committed unless there has been given legal evidence

In a reference by a President of the Code of Criminal Justice has been committed

by an accused person it lies on the prosecution to make out that an offence has been committed and under the circumstances the prosecution must begin (9). When a former valid subsisting marriage has been proved the onus is entirely upon the defence to show that the earlier subsisting marriage has been validly dissolved (10). When an accused person alleges that an offence with which he is charged has been compounded so as to take away the jurisdiction of the Criminal Courts to try it the onus is on him to show that there was a

(1) *Balnaki d Ran v Ghansa Pam* 22 C 391 403 (1894) for s 106 *post* applies only to cases where the accused sets up an intent in his defence see also *Deputy Legal Remembrancer v Karuna Baistobi* 27 C 164 173 (1894) *Klor shed & Co v R* 8 C L R 542 (1881) *In re Ror thokann* 9 M 431 (1885) As to the effect to be given to the word knowingly in a penal enactment see *R v Fisher* 14 M 359 (1891)

(2) *Balmakund Ram v Ghansam Ram* *supra* 403 404

(3) *Balnaki d Ran v Ghansam Ram* *supra* 406 *Deputy Legal Remembrancer v Ka oona Baistob* *supra* 163 174 *R v Ishri* (1907) 22 A 46 *R v Mulla*

37 A 395 (1915) *R v Goya Bhor* 38 A 517 (1916) *Sellanthu Pillam* *vs Karuppan* 35 M 185 (1912)

(4) *Elam Molla v R* (1907) 37 C. 19

(5) *R v Ram Neuz* 35 A. 46 (1913) *R v Hanuman* 35 A 560 (1913) *R v Kanha* 35 A 329 (1913)

(6) *R v Sardarkhan Ja Khan* 41 B 2 (1917)

(7) *R v Nobokristo Ghose* 8 W R. Cr 87 89 (1867)

(8) *R v Bep n Birtas* 10 C. 973 (1884)

(9) *R v Haradhan* 19 C 380 (1872)

(10) *In re Mlard* 10 M 218 (1887)

composition valid in law (1) Where the prosecution proved that a place was a foreshore, that was held sufficient to throw the *onus* on the accused to show that the foreshore was a private market within the meaning of the Bombay Municipal Act (2) Where the prosecution proved that an accused person had been found in the complainant's house at 2 A M and had not explained his presence there it was held that his presence there at that hour raised a presumption of guilty intent which it was for him to rebut (3) When an order is passed by a Magistrate under the Criminal Procedure Code, requiring any person to "show cause" why he should not be ordered to furnish security for the peace, the *onus* lies upon the prosecution to establish circumstances justifying the action of the Magistrate in calling for security (4) But section 7 of Act XXV of 1867, throws the *onus* on the accused (5)

In a trial of an accused under sections 304 and 325, Indian Penal Code, certain witnesses, who deposed to seeing the homicide take place and who gave evidence before the Magistrate, were not called and examined in the Court of Session *Held* that every witness who was present at the commission of such an offence ought to be called (6), and that even if they give different accounts, it is fit that the jury should hear their evidence so as to enable them to draw their own conclusions as to the real truth of the matter (7) *Held*, also, that the duty of producing the evidence *prima facie* devolves on the public prosecutor (8), and though the burden of the prosecution is not to be thrown upon the Judge (9), there is an obligation upon him not merely to receive and adjudicate upon the evidence submitted to him by the parties but also to enquire to the utmost into the truth of the matter before him (10)

It is the duty of the prosecution to produce all available witnesses and not merely those who support the charge (11) This rule is not a technical one but is founded on justice and humanity And when the prosecution refrains from calling witnesses able to give important evidence, an inference adverse to it the prosecution to show
ers guilt has been estab

It is incumbent upon a party to a suit, who relies upon a custom as overriding the general law of the land, or that of the community to which he belongs, to specify that custom distinctly and to establish it without any reasonable doubt (13) So it has been held that the *onus* of proving that the adoption Custom

(1) *Murray v R* 21 C 103 (1893)

(2) *R v Budloobai* 7 Bom L R 726 (1905)

(3) *R v Mulla* 37 A 395 (1915)

(4) *R v Abdul Kadir* 9 A 452 (1886) *R v Niranjun Singh* All H C R p 451 (1870) *Behari Patak v Mahomed Hyat* 4 B L R F B 46 (1869)

(5) See *R v Phanendra Nath Mitter* (1908) 35 Cal 945

(6) See *Nibaran Chandra Roy v R* (1907) 11 C W N 1085 and cases cited ante in Intro to Part III

(7) *R v Holden* 8 C & P 610

(8) *R v Dhanoo Kazi* 8 C 121 (1881) [referred to in *Sadu Sheikh v R* 4 C W N 576 (1900)] *R v Kasinath Dinkar* 8 Bom H C R Cr, 153 (1871)

(9) *R v Page* 2 Cox C C 221

(10) *R v Dharma Porhya* 16 Ind, Jur

N S 58 (1891) citing *Melvil J in R v Tukaram* 17th August 1871

(11) *Ram Ranjan Roy v Emperor* 42 C 422 (1915) *Anrita Lal Hasra v Emperor* 42 C, 957 (1915), see *R v Holden* 8 C & P 606 (1838)

(12) *Kunchan Mallik v Emperor* 42 C 374 (1915) See 34 M L J 48

(13) *Mussumut Nalukhee v Choudhry Chintaman* 20 W R 247 248 (1870) *Gopal Narhar v Hanmant Ganesh* 3 B 373 (1879) *Hirbai v Gorbai* 12 Bom H C 294 (1875) *Rahmatbai v Hirbai* 3 B 34 (1877) *Rajah Mahendra v Johha Singh* 19 W R 211 (1873) *Thakoor Jitnath v Lokenath Sahre* 19 W R 239 (1873) *Adrushappa v Gurushidappa* 4 B, 494 (1880) *Gosain Rambharti v Gosavi Ishvarbharti* 5 B 682 (1880) *Cassumbhoy Ahmedbhoy v Ahmedbhoy Hubbhoy*, 12 B 280 (1887) s c. in appeal 13 B, 534 (1887) *Maharaja of Mysore v*

of a stranger is valid by custom rests on the adopted child. (1) And the more unusual a custom is, the stricter must be the proof. (2) So, as the impartibility of a *Raj* does not render it inalienable as a matter of law, its inalienability depending upon family custom, the latter must be proved by him who alleges it. (3) And where a party alleges a *Raj* to be indivisible, and that he is as heir, entitled to succeed to the whole, the *onus* of proof is upon him. (4) The question whether an estate is impartible is one of fact and in the absence of proof of the specific terms of a grant the circumstances must be considered. (5) The burden of proving that the custom in a particular family of primogeniture regulates the succession to their property is upon him who claims to inherit in that family and a

family of any particular caste, lies upon the person asserting exemption. (9) The *onus* of proving that a particular form of vicinage gives a preferential right of pre-emption rests on the persons asserting it. (10) When a person relies upon a local usage regulating the right to and the subject of alluvion or diluvion, the burden of proving such local usage lies upon him. (11) As to the law governing Hindu converts to Mahomedanism, the following principles may now be regarded as settled: (a) Mahomedan law generally governs converts to that faith from Hinduism, but (b) a well established custom of such converts following the Hindu law of inheritance would override the general presumption. (c) This custom should be confined strictly to cases of succession and inheritance. (d) If any particular custom of succession be alleged which is at variance with the general law applicable to these communities, the burden of proof lies on the party alleging such special custom. As under Mahomedan law adoption is not recognized, the *onus* of proving a custom of adoption contrary thereto lies on the person alleging it. (12)

If evidence is given as to the general prevalence of Hindu rules of succession in a Mahomedan community in preference to the rules of Mahomedan law, the burden of proof is discharged, and it then rests with the party disputing the pre-emption sphere. Among Native Christians and Hindu usages, others retain these usages in a modified form, and others again wholly abandon them. Before the Indian Succession Act (X of 1865) the Christian convert could elect to attach himself to any one of these particular classes, and he would be governed by the usage of the class to which he so attached himself. (13) The same principles are applied to the case of Hindu converts to Mahomedanism: such

Vikrama Deo Garu 32 C L J 91 (P C), s c 24 C W N 226 *Moman v Musst Dhanu* 1 Lahore 31

(1) *Moman v Musst Dhanu* 1 Lahore 31

(2) *Ganga Singh v Cheds Lal* 33 A 605

(3) *Rajah Udaya v Jadab Lal Aditya* S I A 248 (1881) s c 8 C, 199

(4) *Girdharee Singh v Koolahul Singh* 6 W R, P C 1 (1841) see *Narasimha Appa Row v Parthasarathy Appa Row* P C, 37 M, 199 (1914)

(5) *Bajinath Prasad Singh v Tej Bah Singh* 38 A 590 (1916) *Narasimha Appa Row v Parthasarathy Appa Row*, 37 M 199 (1914) *Mallikarjuna v Durga* P C. 13 M 406 (1906) 17 I A 134, see as to proof of custom *Mahamaya*

Debi v Haridas Haldar 42 C 455 (1915), *Janki Misr v Ranno Singh* 35 A 472 (1913)

(6) *Garudhazaya Prasad v Supern dhuaya Prasad*, 23 A 37 (1900)

(7) *Maharaja of Jeypore v Vikrama Deo Garu* 24 C W N 226, s c, 31 C L J 91

(8) *Bhola Singh v Babu* 1 Lahore 464

(9) *Rajah Valad v Krishnabhat* 3 B 232 (1879)

(10) *Dhumimal v Kalu* 67 P R (1905)

(11) *Rac Manick v Vadhoram* 13 M I A 1 (1869), see s 2 Beng Reg XI of 1825

(12) *Ghulam Ali Shah v Shakh Singh* 3 P R (1905)

(13) See *Abraham v Abraham* 9 Moo I A 195 (1863)

as Khojas and Cutchi Memons (1) The main question for determination in the case cited was whether an alienee of ancestral immovable property from the person governed by custom is bound to prove necessity or enquiry as to necessity with respect to a debt due by the alienor to an antecedent creditor and which had been discharged by the alienee. In other words, is it the duty of the alienee to enquire not only as to the existence of the antecedent debt but also into the nature of the necessity thereof. *Held* per Sadi Lal, J., that an alienee discharging an antecedent debt is not required to make an enquiry into the nature thereof and that this is in accord with the rule laid down in *Debidutta v Soudagur Singh* 65 P R 1900 (T B). *Held* per Le Rossignol, J., that the principle laid down in *Debidutta v Soudagur Singh* is that the initial onus lies on the outsider alienee to show that the debts were due and when he has discharged that onus the turn of the opposite party then comes to show that the alienee made no proper enquiry or that if he made one he must have learned of the real nature of the debts. The words "made no enquiry whatever" in *Debidutta v Soudagur Singh* refer to an enquiry as to the existence of the debts but include also an enquiry as to their nature if the party challenging the alienation can show that the result of the first enquiry should have raised doubts in the mind of an ordinarily prudent man as to the morality or reasonableness of the debts (2).

In a suit for damages for defamation of character the onus is on the plaintiff to prove that he was not guilty of the offence charged before the defendant can be called upon to show that he made the imputation in good faith and for the public good (3). Defamation

Where a right of the nature of an easement is claimed the onus of proving the existence of such right will be on the person claiming the right (4). Possession of an easement by order of a Magistrate passed under section 532 of the Code of Criminal Procedure (Act X of 1872) will not relieve the claimant from imposing new or increased restriction. The burden is on the person whose hut was replaced by a two-storied building no additional burden was imposed on the servient tenement (6). Easements

The party who maintains the validity of an election notwithstanding infringement of rule must satisfy the Court that the result of the election was not affected by the error or irregularity. Estoppel cannot be pleaded where statutory requirements are disobeyed with full knowledge by the officers entrusted with the discharge of public duties (7). Election result

A religious office can be held by a woman under the Mahomedan law unless there are duties of a religious nature attached to the office which she cannot perform in person or by deputy, and the burden of establishing that Exclusion from religious office

(1) As for progeniture and rule in deograt on of Hindu Law see *Shymarund Das Mahapatra v Rai akanta Das Mahapatra* 32 C 6 & *Abdul Hossain v Habbullah* 18 P R (1906), *Badon Kumari v Suraj Ku aris* 28 A 458 *Bai Baijee v Bai Santok* 20 B 53 (1894).

(2) *Jlindu v Nian at Khan* 1 Lahore 472

(3) *Mohendra Chandra v Surbo Khoja* 11 W R 534 (1869) *Raghobendra v Aswinath Bhat* 19 B 717 726 (1894). See *Jardine J* I see no difficulty in extending to cases like the present the rule as to burden of proof laid down

in *Abrath v North Eastern Ry Co, Ltd*, 11 Q B D 440 455 H L 11 App Cas 247

(4) *Har Mohun v Kissen Sundari* 11 C 52 (1884) *Onraet v Kissen Soon durree* 15 W R 83 (1871)

(5) *Obhoy Churn v Lukhy Monsee* 2 C L R 555 (1878) overruling *Puchas Khan v Abed Sirdar* 21 W R., 140 (1874)

(6) *Suresh Chandra Biswas v Jagendra Nath Sen* 32 C L J, 27

(7) *Shyam Chand Basak v Chairman Dacca Municipality* 47 C. 524

of a stranger is valid by custom rests on the adopted child (1) And the more unusual a custom is the stricter must be the proof (2) So as the impartibility of a *Raj* does not render it inalienable as a matter of law, its inalienability depending upon family custom the latter must be proved by him who alleges it (3) And where a party alleges a *Raj* to be indivisible and that he is as heir entitled to succeed to the whole the *onus* of proof is upon him (4) The question whether an estate is impartible is one of fact and in the absence of proof of the specific terms of a grant the circumstances must be considered (5) The burden of proving that the custom in a particular family of primogeniture regulates the succession to their property is upon him who claims to inherit in that

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family of any particular caste lies upon the person asserting exemption (9) The *onus* of proving that a particular form of vicinage gives a preferential right of pre-emption rests on the persons asserting it (10) When a person relies upon a local usage regulating the right to land and the subject of alluvion or diluvion, the burden of proving such local usage lies upon him (11) As to the law governing Hindu converts to Mahomedanism the following principles may now be regarded as settled (a) Mahomedan law generally governs converts to that faith from Hinduism but (b) a well established custom of such converts following the Hindu law of inheritance would override the general presumption (c) This custom should be confined strictly to cases of succession and inheritance (d) If any particular custom of succession be alleged which is at variance with the general law applicable to these communities the burden of proof lies on the party alleging such special custom As under Mahomedan law adoption is not recognized the *onus* of proving a custom of adoption contrary thereto lies on the person alleging it (12)

If evidence is given as to the general prevalence of Hindu rules of succession in a Mahomedan community in preference to the rules of Mahomedan law the burden of proof is discharged and it then rests with the party disputing the fact to show that it is excluded from the sphere of the community Among Native Christians c
old Hindu usages others retain these usages in a modified form and others again wholly abandon them Before the Indian Succession Act (X of 1865) the Christian convert could elect to attach himself to any one of these particular classes and he would be governed by the usage of the class to which he so attached himself (13) The same principles are applied to the case of Hindu converts to Mahomedanism such

Vikrama Deo Garu 32 C L J 91
(P C) s c 24 C W N 226 *Moman*
v Mustt Dhann 1 Lahore 31

(1) *Moman v Mustt Dhann* 1
Lahore 31

(2) *Ganga Singh v Cheds Lal* 33 A
605

(3) *Rajah Udaya v Jadab Lal Aditya* S
I A 248 (1881) s c 8 C 199

(4) *Grdharee Singh v Koolahui Singi*
6 W R P C 1 (1841) see *Narasimha*
Appa Row v Parthasarathy Appa Row
P C 37 M 199 (1914)

(5) *Bajjath Prasad Singh v Tej*
Bah Singh 38 A 590 (1916) *Narasimha*
Appa Row v Parthasarathy Appa Row
37 M 199 (1914) *Mall karjuna v Durga*
P C 13 V 406 (1906) 17 I A 134
see as to proof of custom *Maha naja*

Debi v Haridas Haldar 42 C 455 (1915)
Janki Misr v Ranno Singi 35 A 472
(1913)

(6) *Garuradhwaja Prasad v Superna*
dhwaja Prasad 23 A 37 (1900)

(7) *Malharaja of Jeypore v Vikrama*
Deo Garu 24 C W N 226 s c, 31
C L J 91

(8) *Blola Singh v Babu* 1 Lahore 464

(9) *Rajah Valad v Krishnabhat* 3 B
232 (1879)

(10) *Dhummal v Kalu* 67 P R (1906)

(11) *Rac Manick v Madhoram* 13 Moo
I A 1 (1869) see s 2 Beng Reg VI
of 1825

(12) *Ghlan Al Shah v Shahdol*
Singl 3 P R (1905)

(13) See *Abraham v Abraham* 9 Moo
I A 195 (1863)

as Khojas and Cutchi Memons (1) The main question for determination in the case cited was whether an alienee of ancestral immovable property from the person governed by custom is bound to prove necessity or enquiry as to necessity with respect to a debt due by the alienor to an antecedent creditor and which had been discharged by the alienee. In other words, is it the duty of the alienee to enquire not only as to the existence of the antecedent debt but also into the nature of the necessity thereof. *Held*, per Sadi Lal, J., that an alienee discharging an antecedent debt is not required to make an enquiry into the nature thereof and that this is in accord with the rule laid down in *Debidutta v Sowdagur Singh*, 65 P R 1900 (1 B). *Held* per Le Rossignol, J., that the principle laid down in *Debidutta v Sowdagur Singh* is that the initial onus lies on the outsider alienee to show that the debts were due and when he has discharged that onus the turn of the opposite party then comes to show that the alienee made no proper enquiry or that if he made one he must have learned of the real nature of the debts. The words 'made no enquiry whatever' in *Debidutta v Sowdagur Singh* refer to an enquiry as to the existence of the debts but include also an enquiry as to their nature if the party challenging the alienation can show that the result of the first enquiry should have raised doubts in the mind of an ordinarily prudent man as to the morality or reasonableness of the debts (2)

In a suit for damages for defamation of character the onus is on the plain Defamation
tiff to prove that he was not guilty of the offence charged before the defendant
can be called upon to show that he made the imputation in good faith and for
the public good (3)

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A religious office can be held by a woman under the Mahomedan law Exclusion
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(1) As for primogeniture and rule in deagation of Hindu Law see *Shymanund Das Malapatra v Raniakanta Das Mahapatra* 32 C 6 & *Abdul Hossain v Habibullah* 18 P R (1906) *Badom Kumari v Suraj Kumari* 28 A 458 *Bai Baijee v Bai Santok* 20 B 53 (1894)

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(3) *Mohendra Chandra v Surbo Khoja* 11 W R 534 (1859) *Raghobendra v Kasimath Bhat* 19 B 717 726 (1894) See *Jardine J* I see no difficulty in extending to cases like the present the rule as to burden of proof laid down

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(4) *Hari Mohun v Kissen Sundari* 11 C 52 (1834) *Onraet v Kissen Soon durree* 15 W R 83 (1871)

(5) *Obhoy Churn v Lukhy Monee* 2 C L R 555 (1878), overruling *Puchan Khan v Abed Sardar*, 21 W R 140 (1874)

(6) *Suresh Chandra B suas v Jogendra Nath Sen* 12 C L J 27

(7) *Shyam Chand Basak v Chairman Dacca Municipality* 47 C 324

a woman is precluded from holding a particular office is on those who plead the exclusion (1)

In the undermentioned case(2) the Privy Council observed "The habit may be superinduced by the manifold cases of fraud with which they have to deal, but Judges in India are perhaps somewhat too apt to see fraud every where." However this may be, fraud like everything else is not to be presumed or inferred lightly. The burden of proving that any transaction has been effected by fraud and misrepresentation(3) duress, intimidation undue influence and the like(4) lies upon the persons seeking to impeach its validity on these grounds. Fraud must be charged in the plaint, and vague allegations of fraud are not sufficient. When fraud is charged, it is a rule of pleading that the plaintiff must set forth the particulars of the fraud which he alleges. General allegations, however strong may be the words in which they are stated are insufficient even to amount to an averment of fraud of which any Court ought to take notice (5). When fraud is charged, the evidence must be confined to the allegations (6). It is a well known rule that a charge of fraud must be substantially proved as laid and that when one kind of fraud is charged an other kind cannot, on failure of proof, be established for it (7). A plaintiff who charges another with fraud must himself prove the fraud and he is not released from this allegation because the defendant has himself told an untrue story (8). When the plaintiff alleges that fraud only came to his knowledge at a certain time, it is for the defendant to prove that he was cognisant of it before that time (9). In a suit for a declaration that a decree in a certain rent suit was fraudulent the plaintiff must prove that the rent decree is fraudulent and collusive. If that fact is not proved the plaintiff fails, and if in the absence of direct proof the circumstances which are established are equally consistent with the allegation of the plaintiff as with the denial of the defendant the plaintiff fails, of course, but he is bound to establish the affirmative of the

(1) *Kassi v. Hassan v. Hara Begim* 32 C L J 152

(2) *Monshee Bloor v. Simsoonnissa Begum* 11 M I A 602 (1867)

(3) *Rajinder Narain v. Bja Gornid* ? M I A 181 246 (1839) *Achunth Singh v. Kishen Pershad* W R 37 (1864) *Mt Sahordur v. Joyanarain* 1 W R 327 (1864) *Anand Moyee v. Shib Dyal* 2 W R 2 (1866) *Nauab Syed v. Mt Ananee* 19 W R 149 150 (1878) *P C Kishen Dhun v. Ram Dhun* 6 W R 235 (1866) *Grish Chunder v. Mohesh Chunder* 10 W R, 173 (1868) *Ram Gutty v. Mumtaj Bibee* 10 W R 280 (1868) *Lala Rodroo v. Binode Ram* 10 W R 32 (1868) *Raj Narain v. Poashun Mull* 22 W R 124 (1874) [Mere speculation and probability will not in law support a finding of fraud] *Roop Ram v. Saseeram Nath* 23 W R 141 (1875) *Bibee Kubeerun v. Bibee Sufeehun* 24 W R 388 (1875) *Kubee roodeen v. Jugal Shaha* 25 W R 133 (1876) *Sikher Chund v. Dulputty Singh* 5 C 363 (1879) 5 C L R 374 If the Court discredits the plaintiff's witnesses as regards the *bona fides* of a transaction which is impugned it is at liberty to dismiss the suit although the defendant gives no substantial evidence of fraud *Brageshuare Peshakar v. Budhanuddi*, 6

C 268 (1880) *Shib Narain v. Shankar Panigrahi* 5 C W N 403 (1900)

(4) *Motee Lal v. Jigghonmath Curg* 1 M I A 1 (1886) *Zemindar of Ram nad v. Zemindar of Yettapoor* 7 M L A 441 (1859)

(5) *Gung Narain v. Tisickra v. Chowdhry* 15 C 533 (1888) s c 15 I A 119 *Prosunno Kumar v. Kali Das* 19 C 683 (1892) *Krishnaji v. Wannaji* 18 Bom 144 146 (1873) Instances must be given it being unreasonable to require the opposite party to meet a general charge *Joonna Pershad v. Joyram Lal* 2 C L R 26 (1878) *Land Mortgage Bank v. Roy Lucimput* 8 C L R 447 (1881) *Wallingford v. Mutual Society* 5 App Cas 697 701 As to oral evidence of witnesses deposing in general terms being insufficient see *Sheboosoonnduri Debra v. Syed Mahomed*, W R, 1864 137

(6) *Krishnaji v. Wannaji* 18 B 144 147 (1893)

(7) *Abdul Hossein v. Turner* 11 B 620 (1887) 14 I A 111

(8) *Mahomed Golab v. Mahomed Sullman* 21 C 612 (1894)

(9) *Naiha Singh v. Jodha Singh* 6 A 406 (1884) as to proof of knowledge of fraud see *Rahimbhoy Hubhibhoy v. Turner* 20 I A 1 (1892)

proposition (1) The burden rests upon the person who has committed a fraud to prove conclusively that the person injured by his fraud has had clear and definite knowledge of those facts which constituted the fraud at a time which is too remote to allow him to seek the assistance of the Court (2) But though fraud must be alleged specifically and proved as alleged the proof offered need not be in all cases of a direct kind It is a truth confirmed by all experience that in a great majority of cases fraud is not capable of being established by positive and express proofs It is by its very nature secret in its movements and if those whose duty it is to investigate questions of fraud were to insist upon direct proof in every case the ends of justice would be constantly if not usually defeated We do not mean to say that fraud can be established by any less proof or by any different kind of proof from that which is required to establish any other disputed question of fact or that circumstances of mere suspicion which lead to no certain result should be taken as sufficient proof of fraud or that fraud should be presumed against anybody in any case but what we mean to say is that in the generality of cases circumstantial evidence is our only resource in dealing with question of fraud and if this evidence is sufficient to overcome the natural presumption of honesty and fair dealing and to satisfy a reasonable mind of the existence of fraud by raising a counter presumption there is no reason whatever why we should not act upon it (3) An exception to the general rule with regard to the burden of proof exists where one party stands in a position of active confidence towards another as to which see the notes to section 111 *post* *v* *rt* thereby it is for him of the fraud at a time 4) When a transfer of ing a fraudulent transfer ust first of all prove his interest by showing conveyance for value If the consideration be grossly inadequate fraud is presumed and the transferee must prove that he took it in good faith (5)

Good faith in a contracting party is a rebuttable presumption akin to the presumption of innocence and therefore a person who charges bad faith has the burden of proving it (See notes to section 111 *post*) Section 111, *post* however enacts an exception den of proof, where one of the parties stands towards the other (*ib*) As to Criminal p

Where the plaintiff sues to recover the amount of excess payment on account of Government revenue on behalf of co sharers to save the estate from sale the *onus* is on them to prove their shares and the amount of revenue payable on them (6) But where a defendant pleads previous payment of his quota of the revenue to the plaintiff he is bound to prove it (7) Where an agent of a talukdar had received sums fraudulently from a creditor, the *onus* as to whether particular sums had been received by the manager and used for payment of Government revenue was upon the creditor, the presumption being that the rents should have covered the revenue due and thus having to be met, it was for the creditor to bring proof to overcome it (8)

(1) *Amjad Ali Ha. v Ismail* 27 C L J 137 s c 44 I C. 504

(2) *Ram Kishor Tewari v Sit l Ran Panja* 27 C L J 528

(3) *Mallika Pandey v Ram Rida* 3 B L R. A C 108 110 111 *per* Dwarkanath Mitter J s c 11 W R 482

(4) *Sukh Lal v Madhury Prasad* 2 All L J 350 (1905) *Rajah Ratan*

Singh v Thakur Man Singh 1 N L R, 20

(5) *Inanendra Nath Bose v Gadadhar Prasad* 50 I C 463

(6) *Aglori Rari v Ramollee Saloo* 24 W R 209 (1874)

(7) *Mahadeo Misser v Lahore Misser* 24 W R 250 (1875)

(8) *Partab Singh v Chitpal Singh* 19 C 174 (1891)

Hindu
Law
Joint
property

The following paragraphs which are not, and are not intended to be, exhaustive of the subject, should be read in conjunction with the matter treated under the same heading in the commentary to section 111. In consequence of the presumption that while a Hindu family remains joint, all property, including acquisitions made in the name of a single member, is joint family property, the burden of proof, generally speaking, lies on that member who claims any portion of the property as self acquired. "There is a good deal of conflict, probably more apparent than real, between the decisions of the High Court of Bengal as to the question upon whom the *onus* of proof lies where property is claimed by one person as being joint property and withheld by another as being self acquired, or *vice versa*." (1) The normal state of every Hindu family is joint. Presumably every such family is joint in food, worship, and estate. In the absence of proof of division, such is the legal presumption, but the members of the family may sever in all or any of these three things (2) and there is no presumption that a family, because it is joint, possesses joint property or any property. It has been held that where it is proved or admitted that a joint family possesses some joint property (3), and the property in dispute has been acquired or held in a manner consistent with that character, 'the presumption of law is that all the property they were possessed of was joint property until it is shown by evidence that one member of the family is possessed of separate property.' And the Privy Council has held that where a family is joint and a nucleus of joint property is shown to exist, the *onus* is on the party asserting a separate estate (4), this ruling has been recently followed by the Calcutta High Court in a case in which it was said that jointness is becoming less and less the rule and that the presumption is losing strength and may soon disappear (5). This presumption would not be rebutted merely by showing 'that it was purchased in the name of one member of the family and that there are receipts in his name respecting it. For all that is perfectly consistent with the notion of its having been joint property, and even if it had been joint property, it still would have been treated in exactly the same manner (6). Under Art 127 (Limitation Act) the *onus* is on the defendants to prove that exclusion from the joint family became known to the plaintiff more than twelve years before the suit (7). To render property in the hands of the members of a joint Hindu family joint property, the consideration for its purchase must either have proceeded out of ancestral funds or have been produced out of the joint property or by joint labour. But neither of these alternatives is matter of legal presumption (8).

(1) *Mayne's Hindu Law* 6th Edition § 289. See *ib* §§ 290, 291 from which this paragraph is in part taken. (Ib 8th Ed. The Same articles). See also Field Evidence 6th Ed 314. As to sons' suit to recover share of property sold see 5 Pat L W 127 and separate property 20 O C 398.

(2) *Acclikr sto Deb v Beerchander* 12 Moo I A 540 (1869) s c 3 B L R (P C) 13 12 Suth (P C) 21. *Nara gunty v Vengama* 9 Moo I A 92 (1864) s c 1 Suth (P C), 30.

(3) *Bhagibhai v Tikaram* 7 Bom L R 169 (1905). [The absence of any nucleus of joint property is important in the determination of the question whether the property gained by each co-parcener was his self acquisition, for the mere fact that a family is joint does not raise the presumption of joint property in the

absence of family property.]

(4) *Anandrao Ganpatrao v Isantrao Madhavrao* P C, 11 C. W N 418 (1907) 5 C L J 338.

(5) *Ganpat Marwari v Bai akund Behara* 18 C L J 548 (1913) per Carnduff J.

(6) *Dhirm Das v Shania Soondari* 3 Moo I A 229 240 (1843) s c 6 Suth (P C) 43 referred to in *Kankhalal v Debi Das* 22 A 141 (1899). *Umrithnath v Gourcenath* 13 Moo I A 542 (1870) s c 15 W R (P C) 10. *Rampershad Texary v Sheochurn Dass* 10 Moo I A 490 505 (1866) *Tootleydas Ludh v Premji Tricunddas* 13 B 61 (1883).

(7) *Rama Nath Chatterjee v Kusum Kamini* 4 Cal L J 76.

(8) *Hem Nath Rai v Janki Rai* A W (1907) 212 2 All L J, 658.

The difficulty arises from attempting to lay down an abstract proposition of law, which will govern every case however different in its facts. But it is impossible to say generally of any piece of property in the possession of any member of the family that it is presumably joint estate. All that is laid down by the Bengal cases is that it is impossible to say what the presumption is, until it is known what proposition the plaintiff and defendant respectively put forward. The Judges say tell us what your case is when we find how much of it is admitted by the other side we will then be able to say whether you are relieved of the necessity of proving any part of your case and how much of it' (1)

A plaintiff coming into Court to claim a share in property as being joint family property must lay some foundation before he can succeed in his suit. He starts with a presumption in his favour, but this presumption must be taken along with other facts and those facts may so far remove the presumption arising from the ordinary condition of a Hindu family as to throw back the burden of proof on the other side (2). It has been held in some decisions that the rule that the possession of one of the joint owners is the possession of all will apply to this extent that, if one of them is found to be in possession of any property, the family being presumed to be joint in estate the presumption will be not that he was in possession of it as separate property acquired by him, but as a member of the joint family, but this has been contradicted in other rulings (3). Again if the plaintiff's case is that the property was ancestral and the defendant admits that it was purchased with his father's money but alleges that the purchase was made in his own name and for his own exclusive benefit, the burden of proof would lie on him (4). Similarly, if the case is that the property is purchased out of the proceeds of the family estate and it is admitted that there was family property of which the defendant was manager, the *onus* would be on the defendant to show that there was a separate acquisition (5). The same presumption will apply where the property is acquired by a member of a joint family and there is an admitted nucleus of family property (6). Where there was no evidence that property was purchased with money belonging to a son or that he had a separate fund, it was held by the Privy Council that there was decisive presumption that it was not self-acquired by him (7). Whereas in the case of a family governed by the Dayabhaga

(1) *Maynes Hindu Law* 8th Ed § 291 *Ram Pershad Singh v Lakhpati Koer* 30 C 231 (1902) *Gannu Singh v Bhagwati Koer* 3 I A 234 (1902)

(2) *Bholanath v Ajoodha* 12 B I R 336 (1873) s c 20 Suth 65 *Bodh Singh v Lonesh Chander* 12 B L R (P C) 317 (1873) s c 19 Suth 356 *Thakurani Tara Kumari v Chaturbhuj Narayan Singh* 42 I A 192 (1915)

(3) *Tarrack Chunder v Jogesh Chunder* 11 B L R 193 s c 19 Suth 178 (1873) overruling *Shri Colani v Baran Sing* 1 B L R (A C) 164 (1868) s c 10 W R 198 differed from in *Bholanath v Ajoodha* 12 B L R 336 s c 2 Suth 65 and in *Denonath v Harynara* 12 B L R 349 affirmed in *Gobind Chunder v Doorga Persaud* 14 B L R 337 s c 22 Suth 248 *Soshee Mohun v Mukhi* 25 Suth 232 (1876) *Jedatalli v Narayana* 2 M 19 (1877), differed from in *Durga Prosad Raghunath v Goodhan Das* 13 Bom L R 133 (1910)

(4) *Gopekrishna Gosain v Gangapershad*

Gosain 6 Moo I A 53 (1854) *D s sessor Lall v Lichmessur Singh* 6 I A 233 (1879) s c 5 C L R 477 (1879) See also *Beer Narain v Tecu Coirce* 1 W R, 316 (1864) [Suit by member of joint family for share of joint property plaintiff stating property to be joint admission by defendant that at one time it was joint held that *onus* was on the defendant to prove separation]

(5) *Luxmon Rou v Miller Roa*, 2 Kn 60 5 W R (P C) 67 (1866) *Pedru v Doguoni* Mad Dec of 1890 8, *Janokee Dassee v Kisto Komal Marsh*, 1 (1859)

(6) *Frankristo v Bhageritce* 20 Suth 158 (1873) *Woolji Lilla v Gokuldass* 8 B 154 (1893) *Lakshman v Jannabai* 6 B 225 (1882) see *Anand Rao Ganpatrao v Vasantrao Vadhavrao* P C 11 C W N 478 (1907) 5 C L J 338 *Ganpat Maruani v Balakund Belara* 18 C L J, 548 (1913)

(7) *Parbati Das v Rajah Baskuntha Nath Dey* P C 18 C W N 428 (1913), 19 C L J 129

there is no jointness in property between the father and the sons, if property in dispute is acquired in the name of one of several brothers during the life time of their father and is in possession of that brother, the burden of proof in such a case rests upon the party who asserts that the property in reality belonged to the father (1) The wives and mothers of the members of a joint undivided Hindu family, so long as they continue to live in the family and are supported out of its income, are just as much members of that family as their husbands and sons When a Hindu husband and wife carry on a trade together the property purchased with the profits of the trade is joint, but her interest on it is her stridhanam (2) So far as the ordinary and usual course of things is concerned, the practice of making *benami* purchases in the names of female members of joint undivided Hindu families is just as much rife in this country as that of making such purchases in the names of male members and the presumption against separate acquisition is no less strong in the former case than in the latter (3) But if it is neither proved nor admitted that the family are living together or have their entire property in common a plaintiff seeking to recover property as ancestral estate must prove the title set up by him (4) And if it is denied that there ever had been any family property or admitted that the defendant was not the person in possession of it the plaintiff would fail if he offered no evidence whatever Where a Hindu, who had a son and that son's son living with him made a gift of his property in favour of that grandson and in the deed the property was described as self acquired and the deed was attested by the son who was shown to have had knowledge of its contents it was held that these facts led to the inference that the property was self acquired (5)

In the undermentioned case it was laid down that a person suing for a share in joint family property must show, not only that the property is joint family property but also that he has had possession of his share or received payments on account of it within twelve years (6) And where the plaintiff admitted that certain properties were not acquired by the use of patrimonial funds, and the defendants had not acknowledged that such properties were acquired by any joint exertion of the plaintiff it was held that the mere circumstances of the parties having been united in food at the time of the acquisition raises no presumption so as to relieve the plaintiff from the *onus* of proving his averment that he had a joint share and interest in the acquisition (7) Also where the whole property is self acquired the *onus probandi* will lie on the person seeking a share and alleging that the estate is joint (8) But where a member of a Hindu family sued for a division of the family estate and admitted in his plaint that he took possession of part of the family property and had for sixteen years

(1) *Saroda Prosad v. Malananda Roy* 31 C 448 (1904) The headnote of this case is incorrect in stating that the presumption was held to be generally inapplicable to joint families governed by the Dayabhaga In this case there was no joint ownership between father and sons as there might have been between the sons themselves on the death of their father and see *Kharsondas Dharamsey v. Gangabai* (1908) 32 B 479 (different kinds of joint family)

(2) *Muthu Ramkrishna Naicken v. Marimuthu Goundan* 38 M 1036 (1915)

(3) *Chunder Nath v. Kristo Konui* 15 W R 357 (1871) followed in *Nobin Chunder v. Dhokibala Das* 10 C, 686 (1884) *v. ante Belani* p 684 *Bas Kunwar v. Desraj Ranjit Singh* P C. 37

A 227 (1915) 42 I A 202

(4) *Bano v. Kaslee Ram* 3 C 312 (1877) *Obhoy Churn v. Gobind Chander* 9 C 237 (1882) *Tooley Das v. Premji Tricundas* 13 B 61 (1888) (Unless there is an admitted nucleus of family property the *onus* of proof lies on the claimant)

(5) *Kallany Ranelod v. Beza Ali Nasar uany* (1908) 32 B 512

(6) *Cossan Dass v. Siroo Koomares* 12 B L R, 219 (1873)

(7) *Kishoree Lall v. Chummun Lall S D R* (1852) 111 see *Shiu Golam v. Baran Singh* 1 B L R (A C) 164 (1868) overruled by *Tarak Chunder v. Jogeshur Chunder* 11 B L R 193 (1873)

(8) *Soobhedur Dossee v. Belara De van* W R Sp No 57 (1862)

lived separate, it was held that the *onus* lay on him to prove that the circumstances under which he became possessed of his portion of the property were consistent with his statement that the family remained undivided (1) And where a member of a joint Hindu family left the family home and started a shop with funds of his own, admittedly non ancestral, it was held that any member of the family claiming to have a share in the shop must show by clear evidence that he was in some way associated with the business so as to be a partner (2) A property acquired without the aid of joint funds or joint exertions may become joint property by being thrown into the common stock, but those who allege this must prove it (3) In the case cited where a managing member had kept one account of his ancestral and self acquired property and had devoted the whole income to joint purposes and there was evidence that he had regarded his self acquired property as separate it was held that it had become joint (4) In the case cited it was held that the succession of a Mahomedan being an individual succession there is no presumption in the case of a Mahomedan such as exists in the case of a Hindu joint family that property purchased in the name of a member of the family was purchased out of joint undivided property. that *prima facie* therefore property bought in the name of a deceased brother was bought with his money (5)

A Hindu family, admitted or shown to be joint, is presumed to continue in a state of union, and, therefore, where a plaintiff alleges that the property has been divided and has by partition or otherwise become separate, the presumption being the other way, the *onus* is on him to prove it (6) But where there has actually been a partition, the burden of proving a re union is on the person alleging it (7), and to establish it, it would be necessary to show not only that the parties already divided, lived or traded together, but that they did it with the intention of altering their status thereby Separate residence is not of itself conclusive, or even strong, evidence of partition (8)

Hindu
Law
Partition

In a case in the Privy Council where it was admitted that there had been a partition of another part of a joint estate, and there were separate entries in the Revenue record in the names of the members of the family as regards

(1) *Somangouda v. Bharmangouda* 1 Bom H C R 43 (1863) see also cases *post*, *sub voc* 'Self acquisition' and for a case in which a large number of authorities were reviewed the evidence being held to establish separation see *Ram Pershad v. Lakshpati Koer* 30 C, 231 (1902), distinguished in *Ganpat Marwari v. Balmakund Behara*, 18 C L J, 548 (1913)

(2) *Rishu Ram v. Mohan Lal* 25 P R (1906)

(3) *Bhagya v. Tukaram* 7 Bom L R, 169 (1905)

(4) *Munshi Inder Sahai v. Kunwar Shyam Bahadur*, 17 C L J 299 (1913)

(5) *Muhammad Wali Kahn v. Muhammad Mohi ud din* 24 C W N 321

(6) *Cheetha v. Mstheen Lal*, 11 Moo I A 380 (1867) *Ram Chunder v. Chunder Coomar*, 13 Moo I A 198 (1869) *Prankishen Paul v. Mathoor Mohun Paul* 10 Moo I A 403 441 (1865), *Katama Natchier v. Raja of Shinganga* 9 Moo I A 539, 543 (1863), *Laxman Row v. Muller Row* 5 W R, 67, s c, 2 Knapp's Rep 60 P C. [The *onus* of proof is on the party seeking to except any

property from the general rule of partition according to Hindu Law] *Bissumbhur Sircar v. Soorodhun Dassee* 3 W R 21 (1865) *Bhugobutty Misran v. Domun Misser*, 24 W R, 365 *Amrit Nath v. Gouri Nath* 6 B L R, 232 (1870), *Bissunbiur Sircar v. Soorodhun Dassee*, 3 W R 21 (1865) *Mun Mohini v. Sodamonee Dabee* 3 W R, 31 (1865), *Gooroo Pershad v. Kele Pershad* 5 W R, 121 (1866) *Tricolochun Roy v. Rajkishen Roy* 5 W R 214 (1866), 3 B L R (P C), 41 *Prit Koeri v. Mahadeo Pershad* 21 J A 134 (1894), s c 22 C, 85 *Ram Glulam v. Ram Behari*, 18 A., 90 91 (1895) As to proof of re union, see 5 Pat L W, 127

(8) *Prankishen v. Mothooramohun* 10 Moo I A 403 (1865), s c, 4 Suth. (P C), 11 *Gopal v. Kanaram*, 7 Suth, 35 (1867) *Ram Hari v. Trihram*, 7 B L R, 336 (1871) s c, 15 Suth 42; *Venkata Gopala v. Lakshmi Venkama*, 3 B L R (P C), 41 (1869) *Balkrishen Das v. Ram Narain*, 7 C W N, 578 (1903)

(8) *Ranganatha Rao v. Narayanaram Naicker* (1908), 31 M, 482

specified areas, and the members did not give evidence to show how these facts were consistent with jointness, it was held that the *onus* had been on them to prove this and that, in default of such proof the facts were only consistent with jointness (1)

Similarly after a general separation in the family, if one of several brothers comes into Court with property originally joint continues to remain joint (2) But one member can sever his share without affecting the jointness of the others (3) Any member is entitled to require partition which does not give him a title but enables him to demand what is already his own though undivided An unequivocal intention to separate evinced by a declaration or by conduct amounts to a valid separation whether the co sharers concur or not (4) Where the plaintiffs by their own evidence destroyed the presumption that the family was, and it was held to lie upon the defendant to show that the property would entitle them to the partition admitted that there had been a partition had fallen to the defendant, but alleged that the partition was only a temporary one and that it had come to an end, it was held that the *onus* lay on the plaintiff to prove his plea (6) *A fortiori*, where there have been admitted self acquisitions and an actual partition, if one of the members sued subsequently for a share of the property left in the hands of one of the members as his self acquired property, alleging that it was really joint property, or if a member of the family admitted a partition among some of the members, but asserted that the others had remained undivided, the *onus* would lie upon him to make out such a case (7) Where, though there had been a partition, there was no evidence to show that a certain passage had been allotted to either party exclusively, it was held that there was a rebuttable presumption that the passage remained joint (8) In the case cited, the Privy Council held that though a Hindu father may in certain cases bind his minor sons by a partition, it may be impeached as made without consideration if by it a share is given to a stranger, unless such gift can be proved to be a *bona fide* compromise of a claim, and that a gift to a son invalidly adopted is made to a stranger (9) A decree for partition made in a suit instituted by a member of a joint family is *res judicata* between all members who were parties to the suit (10)

(1) *Ram Singh v. Must Tursa Kunwar* P. C., 17 C. W. N., 1082 (1913) 18 C. L. J. 234 per Amir Ali J.

(2) *Ram Gobind v. Hosain Ali* 7 W. R. 90 (1897)

(3) *Girja Bai v. Sadashi Dhundiraj* P. C., 43 C. 1031 (1916), 43 I. A., 151, (see for this point Mr. Justice Amir Ali's judgment)

(4) *Karal Narain v. Prabhu Lal* 44 I. A., 159 (1917) *Narain Prasad v. Sarnam Singh*, 44 I. A., 163 (1917)

(5) *Ram Ghulam v. Ram Behari* 18 A. 90 (1895)

(6) *Obhoy Churn v. Huri Nath* 8 C. 72 (1881), s. c. 10 C. L. R., 81, see *Hindoy Nath v. Mohobutnissa Bibee*, 20 C., 285

(7) *Badul Singh v. Chutterdhore Singh*, 9 Suth. 558 (1868), *Banoo v. Kashree Ram* 3 C. 315 (1877) *Radha Churn v. Krishna Sindhu* 5 C., 474 (1879), *Obhoy Churn v. Gobind Chunder* 9 C., 237 (1882) *Bata Krishna v. Chintaman*, 12

C. 262 (1885), *Upendra Narain v. Gopje Nath* 9 C. 817 (1883) In the two latter cases it was held that the mere fact that one member of the family had separated from the joint stock raised no presumption that the other members had separated *inter se*, dissenting from *Radha Churn v. Krishna Sindhu* 5 C., 474 (1879) *Mavnes Hindu Law* 6th Ed. § 291 See converse case *Kristnappa Chetty v. Ramaswamy Iyer* 8 Mad. H. C., 25 (1875)

(8) *Nathubhai Dhirajram v. Ba Hangantri* 36 B., 379 (1912)

(9) *Ramkishore Kedarnath v. Julara v. Ramrachpal*, P. C., 40 C., 966 (1913), 40 I. A., 213 see *Balkishen Das v. Ram Narain Sahu* P. C. 30 C., 738 (1903), 30 I. A., 139 *Anand Rao Ganpatrao v. Jassu Rao Madhatrao* P. C. 11 C. W. N., 478 (1907), s. c. L. J., 338, *Ganpat Maragari v. Balmaurud Behara* 18 C. L. J., 548 (1913)

(10) *Nalini Kanta Lahiri v. Sarnamoy Debby* 41 I. A., 247 (1914)

The general presumption being that, where there is admitted to be some joint property, all the family property is joint, the *onus* lies on the member of the family claiming property as self acquired to prove it (1) If one of the members of the family is found in possession of any property, the presumption would be, not that he was in possession of it as separate property acquired by him, but as a member of the joint family (2) On the other hand, if the property is admitted to be originally self acquired, but stated to have been thrown into the common stock, this would be a very good case, if made out, but the *onus* of proving it would be heavily on the person asserting it (3) In a case (4) for partition of property alleged to be the property of a joint Hindu family of which the plaintiff was a member it was held that, as the defendants set up their separate acquisition in a suit for the partition of a joint family which admittedly was possessed as such, of some property, the presumption was that the whole of the property of each individual belonged to the common stock and the burden of proving separate self acquisition lay on the person asserting it *ante*, "*Joint property*"

Where after the death of a Hindu widow, the plaintiff claimed as the reversionary heir of her husband, certain properties, some of which were inherited from her husband and some acquired by her after her husband's death, held that there was no presumption that property acquired by a Hindu widow after her husband's death forms part of his estate, and that the plaintiff must start his case with proofs sufficient to shift the *onus*, proof at least of facts from which an inference can be drawn (5) The proposition that when a widow is found in possession of property of the acquisition of which no account is given and it is shown that her husband died possessed of considerable property, then there is a presumption of law that the property found in the

Hindu Law: Self-acquisition.

Hindu Law Stridhan

(1) *Janumulu Venkayamah v. Boochi Venkondora* 13 Moo I A 333 (1870) *Rampershad Texary v. Shochurn Das* 10 Moo I A 490 (1866) *Lalla Beharee v. Lalla Modho* 6 W R 69 (1860) *Sheo Rutun v. Gour Beharee* 7 W R 449 (1867) *Radha Ruion v. Phool Kumaree* 10 W R 28 (1868) *Nilony Bhooya v. Ganga Narain* 1 W R 334 (1865) *Umbica Curn v. Bhugobutti Churn* 3 W R 173 (1865) (Suit for share in joint family property denial that property was joint within period of limitation and allegation of separation Held plaintiff must show joint enjoyment within the period of limitation which having been done it lay on defendants to prove the alleged separation) *Bipro Pershad v. Kena Dayee* 5 W R (1865) *Shusce Mohun v. Aukhil* 25 W R 232 (1876) *Vedavalli v. Narayana* 2 M 1 (1877) *Chand Hurce v. Rajah Norendra* 19 W R 231 (1873) *Moolji Lila v. Gokuldas Vulla* 8 B 154 (1883) *Anundo Mohun v. Lamb* 1 Marsh 169 (1862) *Sidapa v. Pancakooty, Morris* 100 *Hait Singh v. Dabee Singh* 2 N W P 308 (1870) *Jadoomoney Dassee v. Gangadhur Seal* 1 Boulton 600 (1856), *Bainee Singh v. Bhurth Singh, Agra H C*, 162 (1866) *Aund Ram v. Chootoo* 1 Agra H C 255 (1866) *Nursing Das v. Varain Das* 13 N W P 217 (1871) *Dabee Subhas v. Sheo Dass* 1 Agra P C, 285 (1866) [Admission of property

being joint ancestral throws the burden of proving exclusive and adverse possession beyond limitation on the sharer refusing to admit other heirs *Gopeekristo Gossain v. Gungapersaud Gossain* 6 Moo I A, 53 (1854) *Chand Hurce v. Rajah Norendra* 19 W R 231 (1873) *Nuronath Dass v. Goda Kohla* 20 W R 342 (1873) [Suit for possession of land under a pottah issued by eldest member of joint Hindu family *onus* of proving eldest brother's right to give such title is on the plaintiff] *Mikhu Lal v. Ram Lal* 3 C W N 134 (1898) [Presumption that business was started with funds of joint family rebutted] In *Imayak Nursingh v. Datto Gound* 25 B 367 (1900) in which the defendant pleaded self acquisition and limitation it was held under the circumstances of the case that the *onus* lay on the plaintiffs See 20 C 398

(2) *Tarak Chunder v. Jogeshur Chunder* 11 B L R 193 (1893) differs from *Bholanath v. Ajoodhia* 12 B L R 336 (1873) s c 20 Suth 248

(3) *Maynes Hindu Law* § 291 6th Ed *Munshi Inder Sahai v. Kunwar Shiam Bahadur*, 17 C L J 299 (1913)

(3) *Kanhia Lal v. Debi Das* 23 A, 141 (1899)

(5) *Dakhina Kali v. Jagadeshwar Bhattachary* 2 C W N 197 (1897) As to *onus* on person setting up Stridhan, see 45 I C, 879

widow's possession was of the Privy Council, in property through some that person, a rule which is as equally applicable to movable as to immovable property (1) A person claiming under a deed of gift from a Hindu widow, which recites that the property to be conveyed was *stridhan*, must prove this in order to succeed in property from must prove it Hindu woman her brother in marriage was celebrated (4)

Hindu Law Alienation by widow

If a Hindu widow mortgages or alienates property which in the ordinary course would descend to reversionary heirs on her death, or escheat to the Crown, the *onus* is upon those who derive their title from her to show that such alienation or mortgage was made with the consent of the immediate heirs (5), or for a purpose for which a Hindu widow is by Hindu law competent to charge the estate (6), and as between the widow and the person dealing with her, the transaction must be absolutely free from fraud and must be shown to have been entered into after the fullest explanation to her of its nature and consequences (7) In a Full Bench decision of the Calcutta High Court it was said

(1) *Dewan Run v Indarpal Singh*, 4 C W N 1 (1899)

(2) *Chunder Monce v Jockissen Sircar* 1 W R 107 (1864) [Referred to in *Dakhina Kali v Jagadeshwar Bhattacharj* 2 C W N 199 (1897)] *Bissessur Chuckerbutty v Ram Joy* 2 W R 326 (1865)

(3) *Brojomohun Maitte v Radha Koomarec* W R 60 (1864)

(4) *Mahendra Nath Maity v Girish Chandra Maity* 19 C W N 1287 (1915) and see *Muthu Ramakrishna Naicken v Marimuthu Goundan* 38 M 1036 (1915) *Kenakammal v Ananthamanethi Ammal*, 37 M 293 (1914) *Marja Pillai v Sivabagayathachi* 2 M W N 168 (1911) *Basiraman v Jagjivandas Kashidas* 41 B 618 (1917)

(5) *Chunder Monce v Jockissen Sircar* 1 W R 107 (1864) Such consent is only a factor in the proof of legal necessity *Moti Raju v Laldas Jabhai* 41 B 93 (1917) See same case for reversioners consent to acceleration of their interests and *Khauani Singh v Chet Ram* 39 A 1 (1917) and *Behari Lal v Madho Lal* P C 19 I A 30 (1891) Contra as to effect of consent *Nobokishore Sarma Roy v Hari Nath* 10 C 1102 (1884) but see *Debi Prosad Choudry v Gholap Bagt* F B, 40 C 721 (1913) 17 C L J, 449 As to compromise of litigation by Hindu Widow, see 47 I C 697

(6) *Mayne's Hindu Law* 8th Ed §§ 639 640 *Banga Chandra Dhur Biswas v Jagat Kishore* P C, 44 C 186 (1917), *Maheshwar Bahsh v Ratan Singh*, 23 I A, 57 (1896) *Cavalry Venkata v Collec-*

tor of Masulipatam 11 Moo I A, 619 (1867) 10 W R (P C) 47, and *Collector of Masulipatam v Cavalry Venkata* 8 Moo I A 500 (1861) 2 W R (P C), 61 *Raj Lukhee v Gocool Chunder*, 13 Moo. I A 209 (1869) s c 3 B L R (P C) 57, 12 Suth (P C) 47, *Kali Coommar v Ram Dass* W R 153 (1864) *Bissonath Roy v Lall Bahadoor* 1 W R, 247 (1864) *Ram Dhona v Ishanet Dabee* 2 W R 123 (1865) *Dhondo Ramchandra v Balkishna Goring* 8 B 190 (1883), *Laksman Bhaukhokar v Radhaba* 11 B 609 (1887) *Rangubhai Kalyandas v Vajayak Visnu* 11 B 666 (1887) *Mahomed Shumsool v Shevukram* 22 W R, 409, *Rao Kurun v Fiaz Alee* 10 B L R 112 (1871) s c 14 Moo I A 176 (There is no doubt that those who take security from a person having only a limited power to grant it are bound to show *prima facie* at any rate that the money was raised for a legitimate purpose) *Mohima Chundar v Ram Kishore*, 15 B. L. R. 142 (1875) The estate of a Hindu family in which after the death of the father and his widow a daughter held an interest for life comprised a family trade carried on by a manager on her account. Held that the restriction upon her power to alienate remained the same (notwithstanding the trade) without being relaxed on that account. It is for the plaintiff to state and prove all that will give validity to the charge *Sham Sundar v Achhan Kuar*, 21 A, 71 (1898)

(7) *Mahomed Ashruf v Brijeswarore Dasee* 19 W R, 426 (1873) [The alienation by a Hindu widow of a portion of her estate in order to enable her to

that to uphold such an alienation it must be shown either that there was legal necessity or that after reasonable enquiry there was honest belief in such necessity or that there was such consent of the next heirs as would serve a presumption of legal necessity or of reasonable enquiry and honest belief concerning it or lastly, that there was a consent of the next heirs which involved an entire relinquishment of her interest and an acceleration of theirs (1) And in a case in the Privy Council it was said that it is the practice of the Privy Council to attach great weight to the sanction of the expectant reversioners as affording evidence that the alienation was lawful and valid (2) But there must be positive evidence of such consent and that it was made with full knowledge (3) An alienation without such consent is voidable but not void, thus till it is avoided the alienee can recover the estate from a stranger (4), and the reversioners can make it valid by ratifying it (5) The right to bring a suit to set aside an alienation belongs, as a rule, to the nearest reversioner, unless he has precluded himself, as by collusion (6) The Bombay and Allahabad High Courts have held that the consent of the reversioners can only validate alienations to others when made for a consideration, since its value depends on the inference of legal necessity, and so cannot validate gift (7) And the Calcutta High Court has held that it cannot validate a bequest, for the widow's Will would not operate till her interest had ceased (8) The consent of the next reversioners at the time of the alienation will conclude another person not a party to it who is the actual reversioner upon the death of the widow Ordinarily the consent of the whole body of persons constituting the next reversion should be obtained, but there may be cases in which special circumstances may render the strict enforcement of that rule impossible (9) Acts of alienation by a Hindu widow for pious and religious purposes calculated to promote the spiritual welfare of her deceased husband are no doubt valid (10) but acts of alienation for her own spiritual welfare, or that of persons other than the deceased owner, will be voidable (11) A daughter who takes her father's property on the death of the widow, in default of a son, takes the inheritance with a qualified power as in no better situation than the widow herself, and her father succeeds as his heir of her father's estate as his heir hasier from a Hindu widow is however, not bound to see to the application of the money It is sufficient if he satisfied himself as to the necessity for the loan; but he does not necessarily lose his rights, if upon *bona fide* inquiry he has been deceived

make a pilgrimage to Gya to perform her husband's *sradh* was held good and proper] *Bhagat Dyal Singh v Debi Dyal Sahu* (1908), 35 C 420

(1) *Debi Prasad Chowdry v Golap Bhagat* F B 40 C, 721 (1913), 17 C L J, 499 *Bagrani Singh v Manikarnika Bakshi*, 35 I A, 1 (1907)

(2) *Bejoy Gopal Mukerjee v Girindra Nath P C*, 41 C, 793

(3) *Hari Kishore Bhagat v Kashi Pershad P C* 42 C, 876 (1915), 42 I A, 64

(4) *Deonandan Pershad v Udit Narain Singh* 18 C W N, 940 (1914)

(5) *Modhu Sudan Singh v Rooke P C*, 25 C, 1 (1908), *Bijoy Gopal v Krishna Mahishi Debi P C* 34 C, 329 (1907)

(6) *Rani Anund Koer v Court of Wards*, 8 I A, 14 (1880), *Jhandu v Tarif, P C*, 37 A, 45 (1914)

(c) *Kharhani Singa v Chief Ram*, 39

A 1 (1917) *Moti Raji v Laldas Jebhai*, 41 B 1 (1917)

(8) *Durga Sundari v Ram Krishna Poddar*, 18 C L J, 162 (1914)

(9) *Bagrani Singh v Manikarnika Bakshi Singh, P C* (1907), Times L R, 24 p 46 See *Debi Prasad Chowdry v Golap Bhagat, F B*, 40 C, 721 (1913) [Such consent throws on actual reversioner the onus of disproving the inference]

(10) *Puran Dai v Jai Narain A*, 482 (1882)

(11) *Deo Prashad v Lujoo Roy* 20 W R, 120 (1873) (void, see post)

(12) *Ram Gopal v Buldeb Bose W R*, 385 (1864), *Ram Pershad v Najbungsh Koer*, 9 W R, 501 (1868), *Amar Nath v Achhan Kwar*, 14 A, 420 (1892) [It must be at least shown that the grantee was led, on reasonable grounds, to believe that there was a legal necessity for the alienation]

widow's possession was originally that of her husband, is according to a decision of the Privy Council, inconsistent with the general rule that he who claims property through some person must show the property to have been vested in that person, a rule which is as equally applicable to movable as to immovable property (1) A person claiming under a deed of gift from a Hindu widow, which recites that the property to be conveyed was *stridhan*, must prove this in order to succeed in his property from liability (2) must prove it (3) The Hindu woman governed by Dayabhaga Law her *ajantula stridhan* devolves on her brother in preference to her husband irrespective of the form in which her marriage was celebrated (4)

Hindu Law Alienation by widow

If a Hindu widow mortgages or alienates property which in the ordinary course would descend to reversionary heirs on her death, or escheat to the Crown, the *onus* is upon those who derive their title from her to show that such alienation or mortgage was made with the consent of the immediate heirs (5), or for a purpose for which a Hindu widow is by Hindu law competent to charge the estate (6) and as between the widow and the person dealing with her, the transaction must be absolutely free from fraud and must be shown to have been entered into after the fullest explanation to her of its nature and consequences (7) In a Full Bench decision of the Calcutta High Court it was said

(1) *Devan Run v Indarpal Singh*, 4 C W N 1 (1899)

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(6) *Maynes Hindu Law* 8th Ed §§ 639 640 *Banga Chandra Dhur Biswas v Jagat Kishore* P C 44 C, 186 (1917) *Maheshwar Baksh v Ratan Singh* 23 I A, 57 (1896), *Cavalry Venkata v Collec-*

tor of Masulipatam 11 Moo I A, 619 (1867) 10 W R (P C) 47, and *Collector of Masulipatam v Cavalry Venkata*, 8 Moo I A 500 (1861) 2 W R (P C), 61 *Raj Lukce v Gocool Chunder*, 13 Moo I A 209 (1869) s c 3 B L R (P C) 57 12 Suth (P C) 47, *Kali Coommar v Ram Dass* W R 153 (1864), *Bissonath Roy v Lal Bahadoor*, 1 W R, 247 (1864) *Ram Dhone v Ishanee Dabee* 2 W R 123 (1865) *Dhondo Ramchandra v Balkisina Govind* 8 B 190 (1883), *Laksman Bhaulohkar v Radhaba* 11 B, 609 (1887), *Rangibhai Kalyandas v Vinayak Visnu* 11 B 666 (1887) *Mahomed Shumsool v Sheaukrum*, 22 W R, 409, *Rao Kurun v Fyaz Alee* 10 B L R 112 (1871) s c 14 Moo I A 176 (There is no doubt that those who take security from a person having only a limited power to grant it are bound to show *prima facie* at any rate that the money was raised for a legitimate purpose.) *Mohima Chunder v Ram Kishore* 15 B L R 142 (1875) The estate of a Hindu family in which after the death of the father and his widow a daughter held an interest for life comprised a family trade carried on by a manager on her account. Held that the restriction upon her power to alienate remained the same (notwithstanding the trade) without being relaxed on that account. It is for the plaintiff to state and prove all that will give validity to the charge *Sham Sundar v Achhan Kuar*, 21 A, 71 (1898)

(7) *Mahomed Ashruf v Brijeswar Dasee* 19 W R, 426 (1873) [The alienation by a Hindu widow of a portion of her estate in order to enable her to

that to uphold such an alienation it must be shown either that there was legal necessity or that after reasonable enquiry there was honest belief in such necessity or that there was such consent of the next heirs as would serve a presumption of legal necessity or of reasonable enquiry and honest belief concerning it or lastly, that there was a consent of the next heirs which involved an entire relinquishment of her interest and an acceleration of theirs (1) And in a case in the Privy Council it was said that it is the practice of the Privy Council to attach great weight to the sanction of the expectant reversioners as affording evidence that the alienation was lawful and valid (2) But there must be positive evidence of such consent and that it was made with full knowledge (3) An alienation without such consent is voidable but not void, thus till it is avoided the alienee can recover the estate from a stranger (4), and the reversioners can make it valid by ratifying it (5) The right to bring a suit to set aside an alienation belongs, as a rule, to the nearest reversioner unless he has precluded himself as by collusion (6) The Bombay and Allahabad High Courts have held that the consent of the reversioners can only validate alienations to others when made for a consideration, since its value depends on the inference of legal necessity, and so cannot validate gift (7) And the Calcutta High Court has held that it cannot validate a bequest for the widow's Will would not operate till her interest had ceased (8) The consent of the next reversioners at the time of the alienation will conclude another person not a party to it who is the actual reversioner upon the death of the widow Ordinarily the consent of the whole body of persons constituting the next reversion should be obtained but there may be cases in which special circumstances may render the strict enforcement of that rule impossible (9) Acts of alienation by a Hindu widow for pious and religious purposes calculated to promote the spiritual welfare of her deceased husband are no doubt valid (10) but acts of alienation for her own spiritual welfare or that of persons other than the deceased owner, will be voidable (11) A daughter who takes her father's property on the death of the widow, in default of a son, takes the inheritance with a qualified power as regards alienation in respect of which she is in no better situation than the widow On the death of the daughter, the heir of her father succeeds as his heir not as her heir (12) The lender to, or purchaser from a Hindu widow is however not bound to see to the application of the money It is sufficient if he satisfied himself as to the necessity for the loan, but he does not necessarily lose his rights, if upon *bona fide* inquiry he has been deceived

make a pilgrimage to Gya to perform her husband's *shraddh* was held good and proper]
Blagat Dyal Singi v Debi Dyal Sahi
 (1908) 35 C 420

(1) *Debi Prosad Choudry v Golap Bhagat* F B 40 C 721 (1913) 17 C L J 499 *Bagranji Singh v Manikarnika Bakti* 35 I A 1 (1907)

(2) *Bejoy Gopal Mukerjee v Girindra Nath* P C 41 C 793

(3) *Hari Kishore Bhagat v Kasli Pershad* P C 42 C 876 (1915) 42 I A 64

(4) *Deota dan Pershad v Udit Narain Singh* 18 C W N 940 (1914)

(5) *Modhu Sudan Singh v Roole* P C 25 C 1 (1908) *Bijoy Gopal v Krishna Mahishi Debi* P C 34 C 329 (1907)

(6) *Rani Anund Koer v Court of Wards* 8 I A, 14 (1880) *Jhandu v Tarif* P C 37 A 45 (1914)

(c) *Ahazhani Singa v Chief Ram* 39

A 1 (1917) *Moti Raji v Laldas Jebhai* 41 B 1 (1917)

(8) *Durga Sundari v Ram Kishna Poddar* 18 C L J 162 (1914)

(9) *Bagranji Singh v Manikarnika Bakti Singh* P C (1907) *Times L R*, z 24 p 46 See *Debi Prosad Choudry v Golap Bhagat* F B 40 C 721 (1913) [Such consent throws on actual reversioner the onus of disproving the inference]

(10) *Pirai Dai v Jai Narain* 4 A 482 (1882)

(11) *Deo Prosad v Lujoo Roy* 20 W R 120 (1873) (void see post)

(12) *Ram Gopal v Buldeb Bose* W R, 385 (1864) *Ran Pershad v Najbungsh Koorer*, 9 W R 501 (1868), *Amar Nath v Achhan Kuar*, 14 A 420 (1892) [It must be at least shown that the grantee was led on reasonable grounds to believe that there was a legal necessity for the alienation]

as to the existence of the necessity which he had reasonable grounds for supposing to exist (1) But a recital in a bond given for money borrowed by a Hindu widow is not sufficient evidence of the fact in a suit against the heirs or in a suit to charge the estate (2), neither is a recital in a deed of sale, as a rule, sufficient evidence of the existence of the necessity (3) In a case where

(defendant) to show that the plaintiff had derived any benefit from the money It was sufficient for the plaintiff to prove her title (4) Where a voluntary transfer by a Hindu widow is alleged, the burden of proving that it was a free gift, made with knowledge by her of her rights, is on the donee (5) In the case of alienation by one of two widows the burden of proof was held to be on the plaintiff to prove that the other widow did not consent to the sale (6) The consent of the daughter to the alienation of immovable property by the widow does not raise a presumption of law that the purpose for which it was made was proper nor is it any evidence of the propriety of the transaction (7) But consent of some only of reversioners may be evidence of the propriety of the transfer Where in a suit by reversioners the consent raises no presumption that the sale was necessary or proper, the *onus* of validating the sale lies on the defendant (8)

Where a guardian of a Hindu minor (who is often the widow mother) alienates or charges the estate or any portion of it, the *onus* is on the mortgagee or person relying on the charge to show that there was a necessity therefor,

or a direct ancestor) is entitled to be a natural guardian, but alienations, by a *de facto* guardian, even when made without necessity, need not necessarily be set aside, if shown to be for the benefit of the estate (10) A maternal guardian has not, as such, any power to affect the estate of the ward by admission of previous transaction (11) "The power of the manager for an infant heir to charge the estate, is a limited and qualified power, it can only be exercised in a case of need or for the benefit of the estate But where the charge is one that a prudent owner would make in order to benefit the estate, the *bond fide*

(1) *Kameshwar Pershad v. Run Bahadur* 6 C., 843 (1880) 8 C. L. R. 361 L. R., 8 I. A., 8

(2) *Sunker Lall v. Juddoobuns Suhaye*, 9 W. R., 285 (1868)

(3) *Rajlukhee Debia v. Gokool Chunder* 12 W. R. (P. C.) 47 (1869) 3 L. R. (P. C.), 57 For case where recital held sufficient in the circumstances see *Banga Chandra Dhur Biswas v. Jagat Kushore*, P. C., 44 C., 186 (1917)

(4) *Sreemutty v. Iukhee Narain* 22 W. R., 171 (1874)

(5) *Deo Kuor v. Man Kuor*, 17 A. 1 (1894)

(6) *Mahadevappa v. Basagouda*, 7 Bom. L. R., 258 (1905)

(7) *Bepin Behari Kundu v. Durga Charan Banerji* (1908), 35 C., 896

(8) *Chandi Singh v. Jangi Singh*, 8 C. L. R., 21

(9) *Hun Raj Mohi v. Pershad v. Mussamut* 1 A., 392, 423 (1856)

Babooee 6 C.

[*Ref. in Vat Vatta Nair v. Kenath Puthen Vittal* 36 M. L. J. 630] *Konkar Doorganath v. Ram Chander*, 2 C., 341, 351 (1876), *Bemola Dossee v. Mahun Dossee*, 5 C., 792, 797 (1880), *Lala Banseedhar v. Kunwar Bindeseree* 10 M. L. A., 454 (1866), *Narayan v. Political Agent* 7 Bom. L. R. 172 As to debts and alienation by manager of Hindu joint family and *onus* of proof of legal necessity see *Guruswamy Nadan v. Gopalaramu Odayar*, 42 M., 629; s. c., 50 I. C. 775, *Nauab Nazir Begum v. Rao Raghu Nath Singh*, 36 M. L. J., 521 P. C., *Anant Ram v. Collector of Etah*, 34 M. L. J., 221 P. C.

(10) *Thayammal v. Kuppana Kondan* 38 M., 1125 (1915) (Art. 44 of the Limitation Act does not apply to an alienation by an unauthorized guardian)

(11) *Manokerrani Debi v. Haripada Mitter* 18 C. W. N. 718 (1914) P. C. per Jenkins C. J. and Woodroffe J.

lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted or the benefit to be conferred upon it in the particular instance is the thing to be regarded. The lender is bound to enquire into the necessities for the loan and to satisfy himself as well as he can with reference to the parties with whom he is dealing that the manager is acting in the particular instance for the benefit of the estates. If he does so enquire and act honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of the application to the applicant from any mistake or advantage of his own wrong to support a charge in his own favour against the heir grounded on a necessity which his wrong has helped to cause. Where it is not shown that the lender has acted *malâ fide* he will not be affected, although it be shown that with better management the estate might have been kept free from debt. Money to be secured on an estate being obtainable on easier terms than a loan which rests on mere personal security, the mere creation of a charge securing a proper debt is not to be viewed as mismanagement. The purposes for which a loan is wanted are often future as respect the actual application and a lender can rarely have, unless he enters on the management, the means of controlling and rightly directing the actual application and a *bondâ fide* creditor, who has acted honestly and with due caution ought not to suffer should it turn out that he has himself been deceived. A lender of money may reasonably be expected to prove the circumstances connected with his own particular loan, but cannot reasonably be expected to know or to come prepared with proof of the antecedent economy and good conduct of the owner of an ancestral estate.

If therefore the lender proves the circumstances of his own particular and proper enquiry the transaction was efficiently discharged and he is able to lay down any general and inflexible rule as to the person on whom should be placed the burden of proving that any particular alienation was *bondâ fide*. The presumption, proper to be made, will vary with circumstances, and it must be regulated by and is dependent upon them. In Malabar law there is no presumption

(1) *Hooan Pershad v. Mussuut Babooce* 6 Moo I A 425 (1856) *Radha Ashtore v. Mirtoonjoy Gow* 1 W R 23 (1867) Fields Evidence Act 472 1b 6th Ed 317-318 *Karsuar Pershad v. Ra. Baladur* 6 I A 8 (1880) 6 C 843 8 C L R 361. The Lordships said that they had applied these principles to the case of a manager of an infant alienations by a widow and to transactions in which a father in derogation of the rights of his son under the *Mistakshara* law has made an alienation of ancestral family estate] *Mudda Mohin v. Kantoo Lal* L R 1 I A 333 (1874) 14 B L R 187 22 W R 56 [Decree is evidence of necessity to protect a purchaser at an execution sale] *Busrung Sahay v. Mantra Chondra* 27 W R 119 (1874) *Roop Narain v. Gungadur Pershad* 9 W R 297 (1868) *Vund Coor v. Gunga Pershad* 10 W R, 94 (1868), *Leeloo*

Singh v. Rajendra Laha 8 W R 364 (1867) *Bloorun Kuar v. Sahhsadee* 6 W R 149 (1866) *Wooma Churn v. Haradaun Mojomondar* 1 W R 347 (1864) *Jigdel Nara v. Lalla Ram* 2 W R 292 (1865) *Dagdu v. Kamille* 2 Bom H C R 369 (1864) *Surub Narain v. Shew Gobind* 11 B L R (App) 29 (1873) *Runjeet Ran v. Malomed Wars*, 21 W R 49 (1874) [Digging a tank although a great convenience is not a legal necessity] *Muthooro Dass v. Keanoo Bharee* 21 W R, 287 (1874) Suit by minor to set aside alienation by guardian purchase money applied to minor's benefit refund by minor of the purchase-money less the rents and profits received], *Sikher Chund v. Dulputty Sing* 5 C 363 (1879) 5 C L R 374 [Sale by guardian under Act XL of 1858] *Rameswar Mondal v. Protabati Dabi* 19 C W N 31 (1914)

lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted or the benefit to be conferred upon it in the particular instance, is the thing to be regarded. The lender is bound to enquire into the necessities for the loan and to satisfy himself as well as he can with reference to the parties with whom he is dealing that the manager is acting in the particular instance for the benefit of the estates. If he does so enquire and act honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of the application to the applicant from any mis-
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If, therefore, the lender proves the circumstances of his own particular and proper enquiry, the transaction was efficiently discharged

the burden cast upon him. Beyond this it is not possible to lay down any general and inflexible rule as to the person on whom should be placed the burden of proving that any particular alienation was *bonâ fide*. The presumption, proper to be made, will vary with circumstances, and it must be regulated by and is dependent upon them. In Malabar law there is no presumption

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Singh v Rajendra Laka 8 W R 364 (1867) *Bhoorun Kuar v Sahhzadee*, 6 W R 149 (1866) *Wooma Churn v Haradaun Mojoondar* 1 W R 347 (1864) *Jugdel Naran v Lalla Ram* 2 W R 792 (1865) *Lagdu v Kamle* 2 Bom H C R 369 (1864), *Surub Narain v Shew Gobind* 11 B L R (App) 29 (1873) *Runjeet Rain v Mahomed Waris*, 21 W R 49 (1874) [Digging a tank although a great convenience is not a legal necessity] *Muthoora Dass v Keanoo Bharee* 21 W R 287 (1874) Suit by minor to set aside alienation by guardian purchase money applied to minor's benefit refund by minor of the purchase money less the rents and profits received], *Sikher Chund v Dulputty Sing* 5 C 363 (1879), 5 C L R, 374 [Sale by guardian under Act XL of 1858] *Rameswar Mondal v Protobati Dabi*, 19 C W N, 31 (1914)

that every debt contracted by a *karnavan* of a *taruad* is for the uses of the *taruad* and chargeable on the *taruad* estate. It is for the creditor to show that the *karnavan* had authority from the *taruad* to contract the debt (1).

In the undermentioned case (2) the estate of a Hindu family, in which, after the death of the father and his widow, a daughter held an interest for life, comprised a family trade, carried on by a manager on her account. It was held that the case of a widow or daughter under such circumstances differs from that of the manager or head of an undivided family (3). It is for the plaintiff to state and the charge. The principles laid down in 1 apply to the alienation of property by the *de facto* manager of a Hindu endowment (4). In a suit for possession of land in virtue of a *pottah* issued by the oldest members of a joint Hindu family where the other members dispute the claim on the ground that the lessor, as one of a joint family, could not give title to the whole of the land, the *onus* of proving the eldest brother's right to give such title is on the plaintiff (5).

Hindu Law
Alienation
by *Sebat*

Property devoted to religious purposes is, as a rule, inalienable, but it is competent for the *sebat* of property dedicated to the worship of an idol in his capacity as *sebat* and manager of the estate to incur debts and borrow money for the benefit of the estate, as for the proper expenses of keeping up the religious worship, repairing the temples or other possessions of the idol, defending hostile litigious attacks and other like objects. The power to incur such debts must be measured by the existing necessity for incurring them (6), for no definition of benefit of the estate applicable to all cases can be given (7). The authority of the *sebat* of an idol's estate in this respect analogous to that of the manager of an infant heir, defined in the case of *Hunooman Pershad v. Mumraj Koonaree* (8). But he has no power of alienation in the general character of his rights, and so section 31 clause 2 of the Land Acquisition Act is applicable to him (9). When there is no deed of endowment forthcoming, the rules necessary to

(1) *Kutti Mannadigar v. Payanu Mutlan* 3 M. 288 (1881). As to the evidence required where there has been a loan for family purposes see *Krishna v. Vasudev* 21 B. 808 (1896).

(2) *Shah Sindar v. Acllan Kiar* 21 A. 71 (1898).

(3) For power of alienation by managing member of a joint Hindu family see *Kalasa v. Asari v. Someskanda Eli Nidhi* 35 M. 177 (1912). *Annabala Chetty v. Murugesu Chetty* 26 M. 544 (1903). *Unni v. Kunchi Ari* 14 M. 26 (1891). *Adikesavan Nadu v. Gurunatha* F. B., 40 M. 338 (1911). *Vadivelam Pillai v. Natesan Pillai* 37 M. 435 (1914). *Gulab Singh v. Raja Seth Gokuldas* 17 C. L. J. 619 (1913).

(4) *Sheo Shankar v. Rai Sheetal* 24 C. 77 (1896).

(5) *Nwonal Doss v. Goda Kolita* 20 W. R. 342 (1873). *Murugesu Pillai v. Manikarnika* P. C. 40 M., 402 (1917).

(6) *Maynes Hindu Law* § 397. *Prosunno Kumari v. Golap Chand* 14 B. L. R. 450 458 (1875), s. c. 2 I. A. 145. *Kalee Churn v. Banshee Mohun* 15 W. R. 339 (1871). *Khushalchand v. Mahadegri* 12 Bom. H. C. 214 (1875). *Fegredo v. Mahomed* 15 W. R. 75 (1871). *Radha Bilhub v. Jaggit Chunder*

4 Sel. R. 151. *Shibessoree Debta v. Mothooranath Acharyee* 13 Moo. I. A. 270 (1869) s. c. 13 W. R. (P. C.) 13 (1869). *Juggesur Butobal v. Roodra Naran* 12 W. R. 299 (1869). *Tobhoo nissa v. Koomar Shan* 15 W. R. 23 (1871). *Arruth Musser v. Juggernath Indrasuane* 18 W. R. 439 (1872). *Mohunt Burn v. Kashee Jha* 20 W. R. 471 (1872). *Bunware Chund v. Mudden Mohun* 21 W. R. 41 (1873). *Karayan Collector v. Chintaman* 5 B. 393 (1881). *Collector of Thana v. Hari Sitaram* 6 B. 546 554 (1882). *Shunkar Bharati v. Venkata Nakk* 9 B. 422 (1885). *Joy Lal v. Gosain Bhobun* 21 W. R. 334 (1874). *Balaswamy Ayyar v. Venkataswamy* 40 M. 745 (1917).

(7) *Palanappa Chetty v. Sreenath Devasikamony* P. C. 40 M. 709 (1917).

(8) 6 Moo. I. A. 393 at p. 423 (1856). *Koonnur Doorganath v. Ram Chunder* 4 I. A. 52 61 (1876) s. c. 2 C. 341. *Kamins Devi v. Promatha Nath Mookerjee* 13 C. L. J. 597 (1911). *Ramprasananna Nandi Chowdhuri v. Secretary of State* 40 C. 895 (1913).

(9) *Kanani Debta v. Pronatha Nakh Mookerjee* 13 C. L. J. 597 (1911). *Ramprasananna Nandi Chowdhuri v. Secretary of State*, 40 C., 895 (1913).

carry out the intention of the original endower can be ascertained from inference from the practice proved to have been followed in the case (1) but such rules must be consistent with the purpose of the endowment, and since the worship of the idol and the preservation of the dedicated property must be assumed to have been intended to be perpetual a rule permitting alienation by the *sebat* would be repugnant (2) Judgments obtained against a former *sebat* in respect of debts properly incurred are binding on succeeding *sebats* (3) Where it is contended that property has been inalienably conferred upon an idol to sustain its worship, the *onus probandi* lies upon the person who sets up this case (4) The office of *sebat* is vested in the heirs of the founder if there is no evidence that he made another appointment (5) Where a man incapable of being a *sebat*, because he was not a Brahmin *panda* had acted as one, it was held by the Privy Council that such action could not give rise to an estoppel or *res judicata* (6)

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be strictly proved, and the party who claims as an adopted son must establish by evidence (a) the authority given by the husband to adopt a son to him (b) his actual adoption as the son of the husband (8) Where in a suit to recover the property of a deceased Hindu, the plaintiff, who claimed as his adopted son, was not examined on his own behalf and no attempt was made to search for or produce books of account said to contain entries of the expenditure at the adoption, the Privy Council found that he had failed to discharge the *onus* (9) The fact of adoption being admitted and its validity impugned on the ground of incapacity on the part of the adopted son, it is for the party so impugning the validity of the adoption
No estoppel arises from an invalid adoption of the party setting up estoppel has been
In a suit brought to set aside an adoption forbidden by the custom of the caste to

How is pre Hindu Law?
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(1) *Ran Parkash Das v Anand Das* P C 43 C 707 (1916) 43 I A 73

(2) *Pahaiappa Chetty v Sreenath Detasikamony* P C 40 M 709 (1917)

(3) *Prosunno Kurnari v Golab Chund* 14 B L R 450 (1875) L R 2 I A, 145

(4) *Kooit ar Doorganath v Ravi Chunder* 4 I A 52 61 (1876) s c 2 C 341

(5) *Raj Krishna Day v Bejin Behary Dey* 17 C L J 189 (1913)

(6) *Jalandhar Thakur v Jharula Das* P C 42 C 244 (1915) 41 I A 267, see *Mohan Lalji v Gordhan Lalji Maharaj* P C 17 C L J 612 (1912), 40 I A 97

(7) *Tarini Charan v Saroda Sundari* 3 B L R (A C) 145 159 (1869) s c 11 W R, 368 *Bissessur Chucker butty v Ram Joo* 2 W R, 376 (1865), *Ranprotap Misser v Abhilak Misser*, 3 C L R. (1878), and see *Hur Dyal v*

Roy Krishno 24 W R 107 (1875)

[Deals with objection that s 110 *post* might apply *Choudhry Herasutollah v Brojo Soondur* 18 W R 77 (1872)] [Factum of adoption admitted] but see also as to fraud *Gooroo Prosunno v Nil Madhub*, 21 W R 84 (1873) *Helar Das v Durga Das Mundal* 4 C L J 323

(8) *Cloudhry Pudam v Koor Oiey* 13 Moo I A 350 (1869) See *Satteraju v Venkataswami* 40 M 925 (1917), *Somasundaram Chettier v Vaidhilinga Mudaliar* 40 M 846 (1912) *Madana Mohana v Purushotama* 38 M 1105 (1918)

(9) *Mussanath Lal Kunjar v Cl rangi Lal* P C (1909) 3 I A 1

(10) *Kusum Kumari v Satya Rajan* 30 C 999 (1903), 7 C. W N 784

(11) *Vaidhilinga Mudali v Natesa Mudali*, 37 M 529 (1914)

proving such custom is on the plaintiff (1) See further section 114, *post*, *sub* *roc* "Adoption" It has been held that if a plaintiff sues as reversionary heir during the lifetime of the widow for a declaration that an adoption is invalid the *onus* is on him to prove the invalidity (2) But this view has been rejected in a case in the Madras High Court in which it was held that in such a suit the *onus* is on the adopted son to prove the validity of the adoption (3) Where a plaintiff sues to set aside certain title deeds, some evidence ought to be given by the plaintiff to impeach the deeds it is not sufficient for him to prove heirship, nor by so doing can he throw the burden of showing a better title on the defendant (4) If a plaintiff institutes a suit as collateral heir, the *onus* is on him to prove the rule of succession was not on the persons

a suit by a Hindu widow for a moiety of the ancestral property, where the defendant alleged that her deceased husband was a leper and could not succeed to the property, the *onus* lay on the defendant to prove the alleged disqualification (7) Similarly where the defendant set up a *waseelnamah* or will (8) The Government claiming lands as an escheat, which are admittedly in the possession of the party claiming as heir, must show by proof that the last proprietors died without heir They are in the same position as a plaintiff in an ordinary suit for ejectment and must prove their title (9) The natural heirs of a Hindu who has been taken as *illatam* into another family, are *prima facie* entitled to succeed to the property acquired by the deceased by virtue of his *illatam* marriage, and the *onus* of proving any special circumstances to rebut this claim lies on the persons, who raise this plea (10) There is no inconsistency between a custom of impartibility and the right of females to inherit The fact of there being a custom of impartibility in respect of family property does not take it outside the common law, and cannot cast the burden of proving the existence of any particular right, as of females to take by inheritance upon those who maintain it, for where a custom is proved to exist, it only so far supersedes the general law, which, however, still regulates all outside the custom (11) In the undermentioned case it has been held by the Privy Council that in order to establish that an estate is descendable otherwise than by the ordinary laws of Hindu inheritance, there must be proof that it is impartible either in its nature or by a special family custom (12) In this case it was held that the

(1) *Virabhai Afshahi v. Bai Hiraba* 7 C. W. N. 716 (1903)

(2) *Brojo Kishore v. Sreenath Bose* 8 W. R. 463 467 (1868) *Ashrafi Kunwar v. Rup Chand*, 30 A. 197

(3) *Rajagopala Reddy v. Sadasiva Reddy* 34 M. 329 Dissenting from *Ashrafi Kunwar v. Rup Chand* 30 A. 197

(4) *Tacoodeen Teriaree v. Hossein Khan* L. R. 1 I. A. 192 (1874), s. c. 13 B. L. R. 427, 21 W. R. 340

(5) *Kedarnath Doss v. Protap Chunder* 8 C. L. R. 238 (1880), s. c. 6 C. 626 *Kali Kishore v. Bhutan Chunder*, 18 C., 201 (1890) s. c. 17 I. A. 159

(6) *Janak Debi v. Gopal Achary* 9 C. 766 (1882) s. c. 13 C. L. R. 30 *Muttu Ramalinga v. Setupati* 1 I. A. 209 (1874) (a zemindar claiming a customary right to grant confirmation of the election of a mohunt must prove the custom), *Ramrutun Das v. Bunmalee Dass* 1 Sel. Rep.

170 (1806) *Geeda Puri v. Chit r Puri* 13 I. A. 100 (1886) s. c. 9 A. 1 (The only law to be observed is to be found in custom and practice which must be proved)

(7) *Nilhit Chunder v. Bigola Soon doree*, 21 W. R. 249 (1874)

(8) *Suloomut Bibee v. Haris Ali* 27 W. R. 400 (1874)

(9) *Gridlari Lal v. Government of Bengal* 10 W. R. 31 s. c. 1 B. L. R. (P. C.) 44 (1868)

(10) *Ramakristi v. Subbakka* 17 M. 442 (1889)

(11) *Ram Nundun v. Malorani Jant* 7 C. W. N. 57 (1902) As to Jan custom of adoption vide *Rup Chand v. Janchu Persiad* 37 I. A. 93 and as to adoption in Burma v. *Ma Tact v. Ma Me P. C.* 979 36 C. (1909)

(12) *Narasinha Appa Rao v. Perithe sarethy Appa Rao* P. C. 37 M., 199 (1914) *Baboo Gonesh Dutt Singh v.*

existence of such a family custom and the nature of an estate are questions of facts and as such subject to the rule of concurrent findings (1)

The *onus* of proving that a particular property was ancestral lies on the person who claims it as such (2). Ancestral property in which the son as the son of his father acquires an interest by birth is liable to the father's debt if, however, the debt of the father has been contracted for an immoral purpose or is of a ready-money character for which no credit is or ought to be given (3), the son would not be under any prior obligation to pay it and might object to the ancestral property being made liable for such a debt (4). As regards what are immoral or improper debts (5), it has been held that "sons are not compellable to pay sums due by their father for spirituous liquors, losses at play or for promises made without consideration or under the influence of lust or wrath, debts due for tolls or fines [being ready-money payments for which credit will have been given at the risk of him by whom they ought to have been received] (6) nor generally any debt for a cause repugnant to good morals (7). The Mithila law is the same a son cannot, under the Mithila law, set aside the sale of ancestral property by his father for the discharge of the father's debt and oust the purchaser, freedom on the part of the son, as far as regards ancestral property, from the obligation to discharge the father's debts can be successfully pleaded only by a consideration of the invalid nature of the debts incurred (8). In the above case where the share of the father in the family dwelling house had been attached by execution under a decree obtained on a bond executed by the father, it was held that the *onus probandi* lay on the son who, on coming of age, brought the suit to recover, not his share, but the whole property. Similarly in another case (9), where the plaintiff

Hindu Law
Alienation
by father

Maharajah Moheshur Singh 6 M I A, 164 (1855)

(1) *Ib* and see *Malikarjuna v Durga*, P C 13 M, 406 (1890), 17 I A, 134

(2) *Mussariat Ram Kaur v Achhin*, 35 P L R, 1918, s c, 47 I C, 17

(3) *Stra H L*, 166

(4) *Girdharce Lall v Kantoo Lall*, 1 I A, 321 (1874), followed *Innes* and *Muttusamy Ayer*, JJ dissenting in *Ponnappa Pillai v Pappu vayangar* 4 M 1 (1881), and in *Sivasankara Mudali v Puratani Aeri* 4 M, 96 (1881), see also *Nonon Babunasi v Modhun Mohun* 13 C, 21 (1885), 13 I A, 1 *Deendyal Lall v Jugdeep Narain* 4 I A, 247 (1877), *Bhugbut Pershad v Goria Koer*, 15 C, 717 (1888), *Pannappa Pillai v Pappu vayangar*, 9 M 343 (1885), 15 I A 99, *Sita Ram v Zalim Singh*, 8 A, 231 (1886), *Lal Singh v Deo Narain*, 8 A, 279 (1886), *Jamna v Nain Sukh*, 9 A, 493 (1887), *Badri Prasad v Madan Lal* 15 A 75 (1893), *Jagabhai Latubhai v Vij Bhukandas*, 11 B, 37 (1886), *Chinta manrao Mehendale v Kashinath* 14 B 320 (1889), *Babu Singh v Behari Lal*, 30 A, 156 (Mere proof of father being man of immoral and extravagant habits not enough) *Kholilul Rahman v Govind Parshad* 20 C, 328 (1892), *Baba v Timma* 7 M, 357 (1883), *Collector of Monghyr v Hurdai Narain* 5 C, 425 433 (1879), see also *contra Sadabari Prasad v Foolbhash Koer* 3 B L R (F Bn) 31 (1869), and *Deendyal Lal v Jugdeep*

Narain 4 I A, 247 (1877), see also *Suraj Buns v Sheo Prashad*, 6 I A 88 (1878), s c 5 C, 148 see also *Siva ganga v Lakshmana* 9 M 195 (1885), *Jamesetji v Kashinath* 26 B, 326 (1901)

(5) As to immoral debts see *Budree Lall v Kantee Lall* 23 W R, 260 (1875), *Luchmee Dai v Ashman Singh* 25 W R, 421 (1876), s c, 2 C, 213, *Wajed Hossein v Nanoo Singh*, 25 W R, 311 (1876), *Sita Ram v Zalim Singh*, 8 A, 231 (1886), *Mahabir Prashad v Lashdeo Singh* 6 A, 234 (1884), (a debt which was a mere money decree against the father personally and not a debt which it was the duty of the sons to pay) *Pareman Dass v Bhatiro Mahton*, 24 C, 672 (1897), *McDonnell v Ragava Cheth*, 27 M, 71 (1903)

(6) *Stra H L*, 166 see also *Mayne's Hindu Law* § 279 ib 8th Ed § 303 *Colebrooke's Digest of Hindu Law*, 304, 307 and 309

(7) *Mahabir Prasad v Basdeo Singh*, 6 A 234 (1883)

(8) *Girdharce Lall v Kantoo Lall* 1 I A, 321 (1874)

(9) *Adurmoni Devi v Choudhry* 3 C, 1 (1887), see also *Suraj Buns v Sheo Prashad*, 6 I A, 88 (1878), *Lekhraj Rai v Mahtab Chand*, 14 Moo I A, 393 (1871) 10 B L R 42 (Where fraud and collusion were alleged by plaintiff), *Hanuman Singh v Nanak Chand* 6 A, 191 (1884)

proving such custom is on the plaintiff (1) See further section 114, *post*, sub *roc* "Adoption" It has been held that if a plaintiff sues as reversionary heir during the lifetime of the widow for a declaration that an adoption is invalid, the *onus* is on him to prove the invalidity (2) But this view has been rejected in a case in the Madras High Court in which it was held that in such a suit the *onus* is on the adopted son to prove the validity of the adoption (3) Where a plaintiff sues to set aside certain ' ' ' ' ' by the plaintiff to impeach the deed, nor by so doing can he throw defendant (4) If a plaintiff institutes a suit as collateral heir, the *onus* is on him to the rule tion w

on the person claiming the property as *sebast*, to make out his claim (6) In a suit by a Hindu widow for a moiety of the ancestral property, where the defend. " " " " " as a leper and could not succeed to the prove the alleged disqualification (3) up a *waseeutnamah* or will (3) The Government claiming lands as an escheat, which are admittedly in the possession of the party claiming as heir, must show by proof that the last proprietors died without heir They are in the same position as a plaintiff in an ordinary suit for ejectment and must prove their title (9) The natural heirs of a Hindu, who has been taken as *illatam* into another family, are *pinda* *locus* entitled to succeed to the property acquired by the deceased by virtue of his *illatam* marriage, and the *onus* of proving any special circumstances to rebut this claim lies on the persons, who raise this plea (10) There is no inconsistency between a custom of impartibility and the right of females to inherit The fact of there being a custom of impartibility in respect of family property does not take it outside the common law, and cannot cast the burden of proving the existence of any particular right, as of females to take by inheritance upon those who maintain it; for where a custom is proved to exist, it only ates all outside the r the Privy Council rwise than by the

ordinary laws of Hindu inheritance, there must be proof that it is impartible either in its nature or by a special family custom (12) In this case it was held that the

(1) *Virabhai Afubhai v Bai Hiraba* 7 C W N, 716 (1903)

(2) *Brojo Kishore v Sreenath Bose* 8 W R, 463 467 (1868), *Ashrafi Kunwar v Rup Chand*, 30 A, 197

(3) *Rajagopala Reddy v Sadasiva Reddy* 34 M 329 Dissenting from *Ashrafi Kunwar v Rup Chand*, 30 A, 197

(4) *Tacoodeen Teuarez v Hossain Khan* L R, 1 I A, 192 (1874), s c. 13 B L R 427 21 W R, 340

(5) *Kedarnath Doss v Protap Chunder*, 8 C L R, 238 (1880), s c 6 C 626, *Kali Kishore v Bhuvan Chunder*, 18 C, 201 (1896), s c, 17 I A, 159

(6) *Janak Debi v Gopal Achary* 9 C 766 (1882), s c, 13 C L R, 30 *Muttu Ramalinga v Setupati*, 1 I A, 209 (1874), (a zemindar claiming a customary right to grant confirmation of the election of a mohunt must prove the custom), *Ramrutun Das v Bunmallee Dass*, 1 Sel Rep

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(7) *Nullit Chunder v Bugola Somduree*, 21 W R, 249 (1874)

(8) *Sukoomut Bibee v Wariss Ali* 2^o W R, 400 (1874)

(9) *Gridhari Lall v Government of Bengal* 10 W R 31 s c 1 B L R (P C) 44 (1868)

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(12) *Narasimha Appa Rao v Perik sarethy Appa Row P C*, 37 M, 199 (1914), *Baboo Gonesh Dutt Singh v*

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attained his majority seven or eight years before he took any steps to set this purchase aside. As regards the *onus* of proof that assets have come to the hands of the heir, it has been laid down by the Madras High Court that in a suit against an heir for debts of his ancestor, in the absence of special circumstances, the *onus* is on the plaintiff in the first instance to give such evidence as would *prima facie* afford reasonable grounds for an inference that assets had or ought to have come to the hands of the defendant, when they have done this the *onus* is then on the defendant to show that the amount of such a set is not sufficient to satisfy the plaintiff's claim or that he was not entitled to be satisfied out of them, or that there were no assets, or that they had been disposed of in satisfaction of other claims (1). The general result of these cases would seem, therefore, to be that under the Mitakshara law a son is always liable for his father's debts, and cannot set aside an alienation for these debts unless they have been contracted for an immoral and improper purpose. It is not, however, sufficient to show merely that the father was a person of extravagant or immoral habits. The *onus* is on the son to establish some connection between the debt and the father's immoralities (2). The son's liability to pay his father's debt when it is neither illegal nor immoral has been developed by judicial decisions from his pious obligation to save his father from sin as laid down in the Hindu Texts (3).

This subject was considered in the Privy Council case, *Sahu Ram Chandra v. Bhup Singh* (4) as follows. Under the Mitakshara Law the joint family property owned by all members as co-partners cannot be the subject of a gift, sale or mortgage by one co-partner, except with the consent, express or implied, of the others. Even the father is subject to the control of his sons as of other members, with regard to immovable property. But he has certain powers as manager or head of the family, analogous to the powers of the head of a religious endowment or of a guardian to an infant, and can affect or dispose of the property for purposes denominated necessary, for in a case of legal necessity the consent of the other members is implied. The son's religious obligation to pay his father's debts and to refrain from cancelling their payments does not arise while the father is alive, for he can then pay them himself or set aside personal property for that purpose. But after the father's death the son is bound to pay debts which were antecedent or not immoral. This obligation in the case of an antecedent debt should not be extended. Much of the law on this point has arisen from the necessity of protecting purchasers in good faith, but this necessity would not justify the description of money borrowed by the father on a mortgage as an antecedent debt, for as manager of the family property he has no power to obtain money on its security for his own purposes as distinguished from the benefit of the estate (5).

Where a son seeks to get rid of the effect, as against his interests in the joint family property, of a decree on a mortgage executed by his father obtained in a suit to which he was not made a party, the burden of proof lies on him to establish that the mortgagee when he brought his suit had notice of his interests in the mortgaged property (6). In the decision cited the Privy Council has rejected the doctrine that in the cases of a mortgage made by a father neither

(1) *Kottala Uppu v. Slangara Varma* 3 Mad H C 161 (1866) see also *Joo Gul Kishore v. Kalee Churn* 25 W. R. 224 (1876). *Mayne's Hindu Law* § 277, 1b 8th Ed § 305.

(2) *Hannur v. Singh v. Narah Chaud* 6 A 193 (1884). *Sita Ram v. Zalim Singh* 8 A 231 (1886). *Sadashiv v. Dinkar* 6 B 520 (1882). *Ramphul Singh v. Deg Narain* 8 C 517 (1881). *Ran Nath v. Luckman Rai* 21 A 193 194

(1899) *Kasen Singh v. Bhup Singh* 2 A 16, *Sri Narain v. Lala Ragubans Ra* 17 C W N 124 (1912).

(3) *Narasayan Chettiar v. Iyer* 40 M. 581 (1917).

(4) *Sahu Ram Chandra v. Bhup Singh* P C 39 A 437 (1917), per Lord Shaw.

(5) See *Narain Prosad v. Saran Singh* 44 I A 163 (1917).

(6) *Ra. Nath v. Pachaiya Ra* 21 A 193 (1899).

for an antecedent debt nor through legal necessity, his sons would be bound in equity to support his representation of capacity to mortgage the property and has held that such a mortgage is voidable (1) The Allahabad High Court has held in recent decisions that when the sons successfully repudiate an alienation by the father they are not bound to refund the price paid to him by the purchaser and that a son unborn but in the womb at (2) the time of an alienation can contest it (3) In cases of this kind the substance and not the mere technicalities of the transaction should be regarded (4) Where a person buys ancestral estate, or takes a mortgage of it from the father, whom he knows to have only a limited interest in it, for a sum of ready money paid down at the time of the transaction, in a suit by the son to avoid it he must establish that he made all reasonable and fair enquiry before effecting the sale or mortgage, and that he was satisfied by such enquiry, and believed in paying his money that it was required for the legal necessities of the joint family in respect of which the father as head, and managing member could deal with and bind the joint ancestral estate (5) In the case cited where the question was whether an alienance of

(1) *Nara Prasad Saria Singh* 44 I A 163 (1917) see *Lachman Prasad v Sarnam Singh* P C 39 A 500 It was said that while *Malabecr Prasad v Ranayad Singh* 12 B L R 90 (1873) may have been correct in its special circumstances it is not the general law which is stated in *Madho Prasad v Mahaban Singh* P C 18 C 157 (1890) 17 I A 194 For an earlier case see *Luchman Dass v Girdhar Choudhry* 17 B 5 C 855 (1880) which has been recently held by a Full Bench of the Calcutta High Court *Brijnandan Singh v Bida Prasad Singh* F B 42 C 1069 (1915) to be still binding on that High Court and not affected as to limitation by *Nanomi Babuam v Modhum Mohun* 13 C 21 (1885) on O XXXIV of the Civil Procedure Code

(2) *Madan Gopal v Sita Prasad* 39 A 485 (1917) following *Ran Dyal v Suraj Mal* 23 Md Ca 891 (1914) and *Chandradeo Singh v Mata Prasad* 31 A 176 (1909) dissenting from *Koer Hanmat Rai v Sundar Das* 11 C 396 (1885) on ground that price not a debt till sale set aside

(3) *Deo Narain Singh v Ga go Singh* 37 A 162 (1915) see *Nara Gopal Kul karn v Taragauda* 41 B 347 (1917) (son born after alienation)

(4) *Sripal Singh Duga* 1 edvat Kumar P C 44 C 524 (1917) 44 I A 1

(5) *Lal Singh v Deo Narain* 8 A 279 (1886) see also *Junna v Nam Sukh* 9 A 493 (1887) See also on the whole subject the following cases *Hunuman Dutt v Kishen Kishore* (1870) 8 P L R 358 *Mahabecr Persad v Ramayad Singh* 12 B L R 90 (1873) *Pursid Varan v Hanuman Sahay* 5 C 845 (1880) *Luchman Dass v Girdhar Choudhry* 5 C 855 (1880) followed by *Ganga Prasad v Anitha Pershad* 8 C 131 (1881) 9 C L R 417 *Goburdhun*

Lall v Singessur Dutt 7 C 52 (1881) *Surja Prasad v Golab Chand* 27 C 762 (1900) *Ramphul Singh v Deg Narain*, 8 C 51 (1881) (Suit by son to recover property sold by father during his minority burden of proof on plaintiff to show that debt was incurred for illegal or immoral purpose) *Anbica Prasad v Ran Sahay* 8 C 898 (1881) 10 C L R 505 see also *Sheo Prasad v Jung Bahadur* 9 C 389 (1882) *Ram Dutt v Malender Prasad* 9 C 452 (1887) s c 12 C L R 494 and similar case *Baso Koer v Hurry Dass* 9 C 495 (1882) s c 12 C L R 292 *Joidhari Lal v Raghur Pershad* 12 C L R 255 (1883) *Sitanath Koer v Land Mortgage Bank* 9 C 888 s c 12 C L R 574 (1883) *Jumona Pershad v Deg Narain* 10 C 1 (1883) *Doorga Pershad v Kesho Pershad* 11 C L R (P C) 210 (1882) (Liability of infant) *Gangulce v Ancha Bapal* 4 M 73 (1881) [Where the sale is disputed by a coparcener (not a son) ruling in *Girdharce Lal's* case is not applicable and purchaser must show that the debts existed at time of sale and that debts were such as were incumbent on the minor to discharge] *Sundaraja Jayengar v Jogananda Pillai* 4 M 111 (1881) *Gurusami Chetti v Sadasi Chetti* 5 M 37 (1881) *Vellaiyimal v Kallai Chetti* 5 M 61 (1881) (Where purchaser at sale under decree against father has not possession of the whole property son cannot recover his share without proving that debt for which decree was made was illegal or immoral) *Subramanyayyan v Subramanyayyan* 5 M 125 (1879) (Elder of two brothers during minority of younger renewed mortgage executed by father for purpose neither illegal nor immoral Suit by mortgagee against elder brother decree sale in execution Minor son not bound and entitled to recover his share of the property without paying his share of the

ancestral immovable property from a person governed by custom was bound to prove necessity or enquiry whether it was the duty of the alienee to enquire not only into the existence of the antecedent debt but also into the nature of the necessity thereof. *Held* (per Sadi Lal J) that an alienee discharging an antecedent debt is not required to make an enquiry into the nature thereof. *Per Le Rossignol, J* that the principle laid down in the Full Bench decision cited (1) is that the initial *onus* lies on the outsider alienee to show that the debts were due and when he has discharged that *onus* it is the turn of the opposite party to show that the alienee made no proper enquiry or that if he made one he must have learnt of the real nature of the debts (2). And it has been held that where money is lent to the father of a joint family on the security of the ancestral estate at a high rate of interest the *onus* is on the lender to prove not only that the father needed the money for the legal necessities of the joint family but also that he could not have obtained it without paying the high rate of interest (3). A Hindu father in order to satisfy such of his debts as would be binding on his heirs, can sell the entirety of the family property so as to pass even his sons' interest therein, but it lies on him, who seeks to bind an infant, to prove justifying circumstances (4). The Madras High Court has held in a recent case that marriage expenses reasonably incurred by a twice born male member of a Hindu joint-family are for a family necessity and therefore legally binding on the estate (5).

Insolvency

In a suit against an insolvent and the Official Assignee for the sale of mortgaged property, the *onus* is on the plaintiff to prove that title deeds in his possession after the insolvency were deposited with him as security before the adjudication (6). The burden of supporting a purchase from the insolvent of the whole of his assets just prior to insolvency falls on the person claiming that the purchase can stand (7).

Insurance

The following provisions contained in a prospectus to which a Policy was made subject "Age admitted in the Company's policy in all cases where proof

mortgage debt) *Gurusami Sastrial v Ganapathia Pulai* 5 M 337 (1879) (Suit against father for specific performance of contract to sell ancestral property proof of necessity must be required) *Muttayan Cletti v Sanghi Vira* 9 I A 128 s c 6 M 1 (1882) (Interest which son takes by heritage from father is liable as assets by descent for payment of father's debts) *Yenamandra Sitarama sami v Nidatana Sanjasi* 6 M 400 (1883) (No proof that mortgage-debt contracted by father was for necessary purpose) *Phul Chand v Man Singh* 4 A 309 (1882) where adult son was aware of mortgage by father for necessary purpose and did not protest held son could not succeed unless he could show debt was for illegal or immoral purpose *Ujjagar Singh v Pitam Singh* 8 I A, 190 (1891) *Hurdez Naran v Rooder Per kash* 11 I A 26 (1883) *Ramakrishna v Namasitaya* 7 M 275 (1884) As to family necessity see *Babaji Mahadaji v Krishnaji Detji* 2 B 666 (1878) See also *Suchman Das v Khunnu Lal* 19 A 26 (1896) (Liability of grandsons to pay interest on their grand father's debts) *Pareman Dass v Bhutlu Walton* 24 C 672 (1877) [no antecedent debt] *McC Douell v Ragata Chellu* 27 M 71 (1903)

Atar Singh v Thakor Singh (1908) 35 C 1039 and *Babu Singh v Behari Lal* 30 A 156 *Kirpal Singh v Balwanti Singh* P C 40 C 288 (1914) (*onus*) *Narayana Annaji v Ramalinga* 39 M 587 (1916) (1) *Debidutta v Sowdaasr Si* 21 65 P R 1900 (F B)

(2) *Hurdi v Niasat Khan* 1 Lahore 472 As to proof of legal necessity by mortgage see *Bhikhu Sahu v Koda Pandey* 41 A 523 s c 17 A L J 580 (3) *Na d Ram v Bupal Singh* (1911) 34 A 127

(4) *Jamsetji Tata v Kashinath* 25 B. 329 (1901) for case of son born after alienation see *Nara Gopal Kulkarni v Paraganda* 41 B 347 (1917) *Hassan Mall Babu v Abaninath Adluraya* 17 C W N 280 (1912) *Bunwari Lal v Daya Sankar*, 13 C. W N 815 (1908) *Deo Narain Singh v Ganga Singh* 37 A 167 (1915)

(5) *Gopala Krishnan v Venkatanaraya* F B 37 M 273 (1914) approval *Kameswara v Veerachariu* 34 M. 477 (1911) But such expenses cannot be anticipated in partition *Narayana Annaji v Ramalinga Annaji* 39 M 304 (1916)

(6) *Miller v Madho Das* 23 I A 105 (1896)

(7) *Re Seehase* 27 C W N 335

is given satisfactory to the directors. Proof of age can be furnished at any time, if not furnished, it will be necessary on settlement of claim —imposed on the assured or his representatives the obligation of giving proof of age before the Company can be called upon to pay. I lifetime of the assured and an admission no further proof would be needed and the thrown on the Company(1) but in the absence of such evidence and of such admission it lies upon the claimant upon the policy by reasonable proof to satisfy the Court as to the age of the assured (2) When a person sues on a policy of insurance which contains certain exceptions in the event of which the assurers are not liable it lies upon the plaintiff to prove that the loss does not fall within any of those exceptions (3)

It is for the person who claims an exclusive privilege under the Inventions Act (V of 1888) and is in possession of the facts which in his opinion entitle him to that exclusive privilege to show that those facts exist (4)

Proprietors of land in the Bengal Presidency are concerned with two *Lakhraj* classes to the 1st class which 1793 r the estate within the limits of which the lands are situate. The gift of this revenue was an act of liberality on the part of Government inasmuch as these grants had been expressly excluded from the decennial and permanent settlements. The former *lakhraj* holder was not dispossessed but was allowed to hold the land as a dependant *taluk* subject to the payment of revenue. (b) Grants made after the 1st December 1790 and whether exceeding or under one hundred *biglas*. These grants (unless made by the Governor General in Council were declared to be in all cases null and void and as they had been included within the limits of permanently settled estates the proprietors of such estates were by to dispose the rents required by law (section 11 Reg XIX of 1793) to institute suits in the Civil Courts for the recovery of the revenue made over to them by Government. With respect to the second class proprietors were formerly allowed to dispossess the alleged revenue free holders but the difficulty of doing so induced resort to the Courts in those cases also and finally this resort was made compulsory [section 28 of Act X of 1859] (5)

There is however an important difference as regards the burden of proof in each class of cases. In the first class of cases where the allegation is that the *lakhraj* tenure was created before the 1st December 1790 the *onus pro bandi* in a suit for resumption of title lies on the alleged *lakhrajdar* or person setting up the revenue free title (6). If a person claims under a *lakhraj* grant made since 1st December 1790 this will be a conclusive bar to a suit for

(1) In *Oriental Government etc Assurance Co v Narasimha Chari* 25 M 204 (1901) Bhashayam Ayyangar J was of opinion that such admission would preclude the company from producing evidence to disprove the age as admitted.

(2) *The Oriental Government etc Company v Sarat Chandra* 20 B 99 (1895) Referred to in *The Oriental Government etc Co Ltd v Narasimha Chari* 25 M 183 (1901)

(3) *Agasud v Hajee Jackaral* 2 Ind Jur N S 308 (1867)

(4) *Elg Mills Co v Mur Mills Co* 17 A 490 (1895)

(5) *Field's Evidence Act* 481 and see *Field's Regulations* 36 245—261

(6) *Ib Omesh Chunder v Dukhna Soodry* W R Sp No 95 (1863) *Padhakristo Singh v Radha Nungli* Sev Rep Aug—Dec (1863) 366 *Lalla Sheelbal v Sleikhi Glola* Marsh Rep 255 (1861) see also *Heera Lall v Baikunissa Bhee* 3 C 501 (1878) *Koylashbash v Dasce* v *Cocool noce* *Dasce* 3 C 230 (1881) s c 10 C J p 11

resumption, although the suit may be brought within twelve years (1), but the zemindars' right to revenue is still subject to the twelve years' rule of limitation (2)

In the second class of cases, where the allegation is that the *lakhiraj* tenure was created after the 1st December 1790, the *onus probandi* lies on the zemindar or proprietor to show that the land claimed as *lakhiraj* is part of his *mal* or rent-paying estate, and was assessed with the public revenue at the time of the decennial settlement (3). Where the plaintiff was the representative of an auction purchaser at a sale for arrears of Government revenue and the suit was commenced within twelve years from the date of the purchase, the *onus* of proof was on the plaintiff to show that the lands were not *lakhiraj* (4). This is generally done by showing that rent has been paid for the land in question at some time since December 1790 (5). The mere fact that lands fall within the geographical limits of an estate does not of itself show that such land is *mal* land (6). But lands situated within the limits of a zemindari are *prima facie* considered to be a part of such zemindari, and those who alleged that they are entitled to have any such lands settled as a separate *shikmi taluk* must make out this title (7). In a question of boundary between a *lakhiraj* tenure and a zemindar's *mal* land, there is no presumption one way or the other, but the *onus* is on the plaintiff to prove his case (8). If an alleged *lakhirajdar* institutes a suit for a declaration of title the burden of proof is on him to prove his title and no proof of possession (unless it be carried beyond 1790) will shift the burden to the zemindar (9). Where the zemindar had already ousted the alleged *lakhirajdar* without resorting to the Courts, and the latter instituted a suit to recover possession, it was held that as the zemindar had no right to oust the *lakhirajdar*, unless the *lakhiraj* was created subsequently to 1st December 1790 the burden was on the zemindar to prove that the *lakhiraj* was created subsequently to that date. To decide otherwise would be to allow the zemindar by his own wrongful act to shift the burden of proof (10). Under section 8 of the Land Revenue Act (XIX of 1873, N W P), any person claiming land free of revenue which is not recorded as revenue free, is bound to prove his title to hold such land free of revenue (11).

(1) Act XIV of 1859 s 1 cl 14
Sristeedhur Saccunt v Ramanath Rokhit
6 W R 58 (1866) *Sheikh Sahab v*
Lala Bissessur 1 W R 110 (1864)

(2) See Field's Evidence Act 6th Ed
323 324 see also *Forbes v Meer Mahomed*
20 W R 44 (1873) and Act XIV
of 1859 s 1 cl 14 Act IX of 1908
Art 130

(3) *Ib* *Hirryhur Mukhopadhyay v*
Madhab Chunder 14 Moo I A 152
(1871) s c 8 B L R, 566 20 W R
429 *Parbati Charan v Rajkrishna*
Mookerjee B L R Sup Vol F B
162 165 (1865), *Mahomed Akbar v*
Reilly 24 W R 445 (1875) *Sonaton*
Ghose v Abdool Turrub 2 W R 205
(1865) *Khelut Chunder v Poorna*
Chunder 2 W R 258 (1865)

(4) *Erfanoonnissa v Pearce Mohun* 25
W R 209 (1876) 1 C 378

(5) *Beharee Lall v Kal e Dost* 8 W
R 451 (1867) *Al e Mallanora*
nath 1

(6)
20 W
Milan v Mahomed Ali 10 C W R 70

(7) *Huse v Bhoobun Mojee* 10 Moo
I A 165 (1861) s c 3 W R P C
5 *Nistarinee v Kalipersad Dass* 23 W
R 431 (1875) see also *Purseedh Narain*
v Bissessur Dyal 7 W R 148 (1867)

(Suit by a zemindar for declaration that
land sold in execution as *lakhiraj* is a
mal land)

(8) *Beer Chunder v Raj Gaur* 9 W
R 20 (1867) see also *Mahabbeer Persad v*
Oomrao Singh 1 All H C 167 *Taracnet*
Persad v Kalicharan Ghosh Marsh Rep
215 (1862)

(9) *Ran Jeobun v Pershad Shar* W
R 458 (1867)

(10) *Mun Malinee v Joykiss n Mo Ier*
see W R Sp No 174 (1864) see also
Jaykrishna Mookerjee v Pearce Mol n 8
W R 160 (1867) *Sheikh Goburdhun v*
Sheikh Tofal 6 W R 190 (1866)
Wooma Soondaree v Kishoree Mohun 8
W R 238 (1867)

(11) See Field's Evidence Act 6th Ed
325 and see for further information on
Lakhiraj Tenures Field's *Pengal Revenue*
tion pp 36 345-361 See n w v
P Act III of 1901

When a public body seeks under the Land Acquisition Act to acquire any Land Ac- portion of a block of buildings which is structurally connected with the main quisation work, the *onus* is on that body to show that the portion is not "reasonably required by the full and unimpaired use of the house" (1)

When the question is whether persons are landlords and tenants, and it Landlord and tenant has been shown that they have been acting as such, the burden of proving that they do not stand or have ceased to stand in that relationship is on the person who affirms it (Section 109, *post*) As to the tenant's estoppel, see section 116, *post* and as to estoppels affecting the landlord, see section 115 *post* Where defendants admit the ownership of the land to be with the plaintiff but claim to hold possession of it as tenants, the *onus* lies upon them (2) The burden of proving that a tenure has been held at a fixed and invariable rent for a period of twelve years antecedent to the permanent settlement in suit by a zemindar for enhancement of rent lies on the defendant the tenure holder (3) But where the taluk is found to be a dependent taluk within the meaning of section 51, Reg VII of 1793 the burden rests upon the plaintiff zemindar to show that the rent is variable (4) In another case it was laid down that there is no presumption that any tenure held is not a transferable tenure and the person alleging it must prove it (5) but in a subsequent case (6) where the plaintiff sued to recover possession, as part of his *putni* estate of a ryoti holding sold in execution of decree and purchased by the defendant, the *onus* was thrown on the defendant to prove that the ryoti tenure was of a permanent and transferable nature When a ryot holds lands of considerable extent under a zemindar and alleges that one or two plots are held under a different title the burden of proving this allegation is thrown on him (7), and similarly if a ryot, who has paid rent for several years pleads that he has got possession of a portion only of the lands demised, the *onus* lies on him to prove this allegation (8) In a suit by a kabulyatdar khot to recover rent, the *onus* is on the holder of the khoti land to show that he is exempted from paying rent according to the custom of the country (9) The mere fact that a tenant some time ago gave a kabulyat for a limited period at a particular rate of rent is not sufficient in itself to throw upon the defendant the entire burden of proving what the present rent is, without any evidence on the part of the landlord that the rent specified in the kabulyat had ever been realized from him (10) The property in trees growing in a tenant's holding is, by the general law, vested in the zemindar and a tenant is not entitled in the absence of special custom the burden of proving which is on him to cut down and sell such trees (11) The decision of a survey-officer as to tenure is under the Khoti Settlement

(1) *Penkataratnam Vaidin v Collector of Godavari* 27 M 350 (1903)

(2) *Narsing Varan v Dharam Thakur* 9 C W N 144 (1904) at p 146 dist *Asaf Tarasced v Behari Lal* 9 C W N 415 (1905) [suit for declaration of Khud kasht right] See *Dina Nath Das v Ganesh Chandra Saha* 18 C L J 544 (1913) (claim to rayati interest) *Barak Kaml Sahu v Lilhu Christa v* 8 C L J 170 (1908) *Matlal Karnan v Darjeeling Municipality* 17 C L J 167 (1913) (where no proof of contract no presumption of tenancy)

(3) *Gopal Lal Thakur v Tilak Chandra* 10 Moo I A 183 (1865) s c 3 W R P C I

(4) *Basasoonferj Dassjah v Radhika Choudhrai* 13 Moo I A 248 (1869), s c 4 B L R P C 8 13 W R (P

C) 11

(5) *Doya Chait v Anand Chunder* 14 C 82 (1887)

(6) *Kripamey Dabia v Durga Gobind*, 15 C 89 (1887)

(7) *Ram Coomar v Becjoy Goind* 7 W R 535 (1867)

(8) *Beni Modhab v Sridhur Deb* 10 C L R 555 (1881)

(9) *Muhammed Yakoub v Muhammad Ismail* 9 Bom H C R 278 (1872)

(10) *Mukunda Chandra v Arpan Ali* 2 C W N 47 (1897)

(11) *Kansalia v Gulab Kaur* 21 A 297 (1899) A tenant at fixed rates having a transferable right in his holding the presumption is that the trees standing thereon are the property of the tenant *Harbans Lal v Maharajah of Benares*, 23 A 126 (1900).

Act (I of 1800, Bom C), binding until reversed or modified by decree of Court and the burden of proof in such case lies upon the party seeking to vary the decision (1). The possession by the defendant of a tenure of limited extent within the plaintiff's putni raises no presumption of title upon his seizure of a piece of land and claiming it as part of his tenure. The *onus* lies upon the defendant to prove that the land was included in his *mokurari* holding; and not upon the plaintiff to show that it was not (2). In a suit for ejectment where the defendant sets up a permanent tenancy the *onus* is upon the defendant to show this (3). A landlord who makes an increase of rent for increase of area must show the necessary circumstances justifying a decree (4). In the case cited where it was alleged that the area demised by a *labulyat* was more than was contained in the specified boundaries, it was held by the Privy Council that extraneous evidence was not admissible to vary the construction and that the *onus* was on the tenant to prove his right to a reduction of rent (5). In a later case in the Calcutta High Court, it was said that there is no valid reason why the rebuttable presumption raised by section 5, clause 5, of the Bengal Tenancy Act should not be applied to a tenancy which existed before that Act came into force, for that Act merely codified a doctrine already recognized shifting the burden of proof as to the tenure in certain cases (6).

Landlord
and tenant
Enhance-
ment of
rent

In a suit for enhancement of rent, the burden of proof is on the landlord who seeks to disturb the previously existing arrangement (7). And it has been recently held that section 91 does not preclude the landlord from proving improvements in consideration of which the enhanced rent was agreed, since the consideration did not constitute a term of the contract within that section (8). But where the tenant pleads that a portion of the land held by him and sought to be enhanced is held rent free, the *onus* is on him to prove this allegation (9). Where the defendant claimed to hold as a dependent taluk, the *onus* was held to be on the zemindar to show that the land was included in the zemindari at the time of the permanent settlement (10). In a suit to recover arrears of rent at enhanced rates, the *onus* of proving both the quantity and the rates is upon the plaintiff and not upon the defendant (11). The *onus* of proving what is the proper rate is also upon the plaintiff (12). But, where the plaintiff, who claimed a *bhaoli* rent at the rate of nine annas of the crop, proved that in the *mauzah* in question the ryots paid rent at that rate, it was held that the *onus* was on the defendants, who alleged that the rate was eight annas, to prove their allegation (13). With which as an
been changed si

(1) *Madhabrao v Deonak* 21 B 695 (1896)

(2) *Nanda Lal Goswami v Jagannath Halder* 5 C W N 100 (1901), *Dina Nath Das v Ganesh Chandra Saha* 18 C L J 544 (1913)

(3) *Ismail Khan v Aghore Nath* 7 C W N 734 (1903). As to the facts which raise a presumption of permanency see notes to s 114

(4) *Gouri Potra v Reiley* 20 C 579 (1892), *Ratan Lal v Jadu Halsana* 10 C W N 46 (1905), *Ishan Chandra Mitter v Ramratan Chuckerbutty* 2 C L J 25

(5) *Durga Prasad Singh v Rajendra Narayan Begchi* P C, 41 C. 493 (1914), 18 C W N, 66

(6) *Jagabandhu Saha v Magnamoyee Dassee* 44 C 555 (1917), see *Kripa*

Sindhu v Annada Sundari F B 35 C, 34 (1907), *Bamandas Bhattacharjee v Nilmadhab Saha* 44 C 771 (1917)

(7) *Mir a Mahomed v Radha Ram* 4 W R (Act X) 18 (1865)

(8) *Probod Chandra Gangopadhyay v Cherag Ali* (1906) 11 C W N 62

(9) *Neelaj Bundopadhyay v Kali Prasanna* 6 C 543 (1880) s c. 8 C L R, 6 *Corinda Priva v Ratan Dhup* 4 C L J 37

(10) *Asanullah v Bussarat Ali* 10 C 920 (1884)

(11) *Gulam Ali v Tagore* 1 W R 16 (1864) 9 W R 65

(12) *Sunera Klaloon v Tagore* 1 W R. 58 (1864)

(13) *Lochun Chowdhury v Annas* 8 C L R 426 (1881) See also s 109 post

the *onus* is on the defendant to prove that he has held at an uniform rent for twenty years and when he has discharged this burden of proof it lies upon the landlord to prove that the rent has varied since the permanent settlement (1) Where in a suit for arrears of rent enhanced rates were claimed for two years on the ground that the lease contained a covenant by which the rent was to be increased if the tenant on holding over claimed occupancy rights it was held that this was in the nature of a penalty and not enforceable (2)

If in a suit for arrears of rent the defendant claims an abatement on the ground that a portion of the land has been diluviated the *onus* of proving such diluvion is on him (3) So also where the defendant in a like suit alleges that there has been a remission of rent the *onus* is on him to prove it (4) In the case cited it was held by the Privy Council that where diluviated lands formed part of a permanent heritable and transferable tenure the tenant did not abandon his while they were s And in another case ion of diluviated land remains with the owner (6) Where a shareholder sues for a fractional portion of the rent and it is alleged that the entire rent is payable together the *onus* is on him to show that he is entitled to payment of the fractional portion separately (7)

is pe
eject
seek
is of
claim
claiming the rent the *onus* is on him to prove actual receipt and enjoyment (12) A person alleging that land is held by him as *sir* or proprietor's private land must prove it (13) As under the Tenancy Act a landlord has a right to eject a tenant whose holding consists entirely of *sir* land the burden of proving the existence of a special contract under which he is entitled to resist ejectment lies on the tenant (14) In a suit for arrears of rent and ejectment for non-payment where defendant challenged the rate claimed as well as plaintiff's right to sue alone it was held that the *onus* lay on the plaintiff to prove his claim to the rate of rent sued for and to show he was sole proprietor (15) A person alleging in a suit for ejectment the perpetuity of the tenure must prove it (16) If a tenant is sued for rent he can set up eviction by title paran out

(1) *Rasi once Dabee v Hurronath Roy*
1 W R C v Rul (1864) 280

(2) *Mr Abdul Aziz v Kar* 18 C L J 95 (1913)

(3) *Sat Obhoy Nath v W R*
(Act X) 28 (1865)

(4) *Bunwarry Lall v Furlong* 9 W R 238 (1888)

(5) *Arun Chandra v Kam n Kumar*
P C 41 C 683 41 I A 32 18 C W N 361 19 C L J 292 (1914) overruling *Hemnath Dutt v Aslgur Sindar* 4 C 894 (1879)

(6) *Basanta Kun ar Roy v Secretary of State* P C 44 C. 858 (1917) see *Munshi Maszhar Hasan v Behari Singh* 3 A L J 567 (1906)

(7) *Mt Jalun v Hemraj Singh* 20 W R 76 (1873)

(8) *Niratan Mandal v Ismail Khan Mahomed* 8 C W N 895 (1904) *Ana da*

Harj Basak v Secretary of State 3 C L J 316

(9) *Domun Lall v Pudenan Singh* W R (Act X) 129 (1864)

(10) *Rash Behar v Hara Mon* 15 C. 555 (1888)

(11) *Thagara v Gnaya Sas bandha*
11 M 77 (1887)

(12) *Asien Chu der Buratee Shekh*
2 W R (Act X) 36 (1865)

(13) *Har Das v Ghansha Na an* 6 A 286 (1884)

(14) *Kesico Rao v Poran Ba* 1 N L R 32

(15) *Sheskh Ashruf v Ram Ashore* 23 W R 259 (1875)

(16) *Thagaraja v Gnaya* 11 M 77 (1887)

Rangasam v Gnana 22 M. 264 (1898) *Niman Ma ra v Ma h ra Nath*
4 C W N cl x (1900)

to that of the lessor as an answer, and if evicted from part of the land an apportionment of the rent may take place but the *onus* lies on the lessor who claims an apportionment to show what is the fair rate for the lands out of which the tenant was not evicted (1) Unless a landlord has a *prima facie* right to evict he must start his case and show how such right accrued There is no presumption that every tenant in a zemindari is a tenant it will not that a tenant is not a saleable interest So where a ryot mortgaged the land in his holding and the mortgagee purchased the land in execution of a decree obtained upon his mortgage and the zemindar sued to eject the decree holder and judgment debtor it was held neither party lay upon the plaintiff and had not be

When a tenant has been in long an admitted tenure it lies upon the landlord in a suit for ejectment to prove in the first instance that the land is his *khas* property and not the tenant's (3) Where the lands granted were the lands of the zemindar and the grant was on the condition that services should be rendered and that a certain sum should be payable to the zemindar in recognition of his ownership *prima facie* the ownership should remain with the zemindar, and the burden of proving the plea that the plaintiff was not entitled to eject would lie on the person resisting ejectment (1) Where a tenant having a right of occupancy, not transferable by custom had given up to the purchaser possession of all the culturable lands of the holding but remained in possession of homestead lands only by permission of the purchaser it was held that this was sufficient to indicate that the *raiyat* had " " " was entitled to eject And where a tenure obtained against one

of the tenants after the shares of the other tenants had passed by auction sale to a stranger on the allegation that the tenant against whom it had been obtained was the sole recorded tenant of the landlord, it was held that whether this was so or not was a matter of speciality within the knowledge of the landlord and the *onus* was on him to prove it (6) In a suit in ejectment, the plaintiff must prove good title there being no *onus* on the defendant to prove title relatively good or bad at all Where the plaintiff fails to do so the fact that he was once in possession within twelve years of suit does not throw the *onus* of proving good title on the defendant (7)

Landlord
and tenant
Intermediate
tenure

A zemindar has as such a *prima facie* title to the gross collections of all the *mouzas* or villages within his zemindari and the burden of proof is on the person who seeks to defeat that right by proving that he is entitled to an intermediate tenure (8) The same principle will apply where the zemindar or assignee or lessee of his rights, demands possession of the land from a person who is unable to prove a tenancy or other right of continuing to occupy (9) As to strict proof required on the part of the plaintiff seeking to disturb a possession of very long duration see the case cited *infra* (10) Where the plaintiffs sued for declaration of their rights to possession of lands which they claimed

(1) *Gopa and Jia v. Lalla Govind* 12 W R 102 (1869) *Surendra Narain Roy Chowdhury v. Diva Nath Bose* 43 C 554 (1915)

(2) *Ajpa Pasi v. Sabbas* 13 M 60 (1887)

(3) *Nanda Lal v. Jagatwar Haldar* 5 C W N 222 (1901) As to *onus* on landlord to show right to resume see 20 Bom D R 779

(4) *Sri Rajah v. Rajah Lenkalanara* 26 M 403 (1903)

(5) *Sailaditya Debi v. Srinivas Bhutta* 11 C W N 873 (1907)

(6) *Balkunta Nath Roy v. Debend Nath Saha* 11 C W N 676 (1906)

(7) *Bapuji Narayan Chitnis v. Bhagwant Balwant Chitnis* 47 B 357 & c. 45 I C 550 And see as to *onus* to prove right to eject 46 I C 238

(8) *Sahib Perhlad v. Doorgapershal Tewarie* 12 Moo I A 331 (1869) & c. 2 B L R (P C) 134

(9) *Ram Monee v. Alcemooden* 20 W R 374 (1873), *Batas Ahir v. Bhutgoat* 11 C L R 476 (1882)

(10) *Forbes v. Meer Mahomed* 12 D L R 216 (1873)

as *khudkash* and the Record of Rights showed that the lands were so held that the *onus* was on the defendant to show that the entry was erroneous (1)

Where in a suit by a shareholder to recover a fractional portion of the rent, the defendant contends that he is only bound to pay to the person entitled to the whole rent, the *onus* is on the plaintiff to show that he is entitled to sue for a fractional portion (2)

Landlord and tenant
Fractional portion of rent

In a suit to recover arrears of rent under a *kabulyat*, the defendant, who had paid rent for upwards of four or five years, pleaded that he had obtained possession of portion only of the lands demised, and it was held that the *onus* was on the defendant (3) Where the tenant executed a *kabulyat* in favour of the landlord by which he agreed to pay additional rent at a certain rate if any land in excess of what was mentioned in the *kabulyat* were found in his possession, and the plaintiff landlord sued to recover additional rent for excess land which he alleged was in the defendant's possession held that the *onus* was not on the plaintiff to prove the inception of tenancy (4) See section 114, "Presumption relating to holding of land," post

Landlord and tenant
Plea of part possession

There is a presumption in favour of legitimacy and marriage, and therefore on any person who is interested in making out the illegitimacy of another is thrown the whole burden of proving it [Sections 112, 111, post, to the notes of which sections reference should be made (5)]

Legitimacy

The burden of proof upon the question whether a man is alive or dead is regulated by sections 107, 108, post, to the notes of which sections reference should be made

Life and death

It is a settled rule of law that it is for the plaintiff to show *prima facie* that his suit is not barred by Limitation (6) But when the plaintiff's suit or proceeding is *prima facie* within time, if the defendant alleges that the case is governed by a special clause allowing a shorter period of Limitation it is for him to satisfy the Court that the case comes under that special clause (7) If the defendant alleges that the case comes under that special clause of adverse possession the defendant to allege date earlier than that assigned in the plaint (9) And where it is uncertain when a fraud affecting Limitation was discovered *onus* is on the defendant to show that the suit is out of time (10) And if the defendant wishes the Court to believe in the existence of a particular fact operating as a bar to the suit, it is for him generally to prove those facts under the provisions of section 103 ante In a suit to recover immovable property it is for the plaintiff to prove that he has been in possession at some time within the period of Limitation and not for the

Limitation and adverse possession

(1) *Gajadhar Prasad Singh v Sheo Nandan Prasad Singh* 23 C W N 304

(2) *Mt Lohin v Hemraj Singh* 70 W R 76 (1873) see as to fractional co shares *Punchamun Banerjee v Raj Kumar* 19 C 610 (1892) *Ram Chunder v Giridhar Dutt* 19 C 755 (1891) *Jogendra Narain v Banki Singh* 22 C 658 (1895) *Bindu Bashini v Pearl Mohun* 20 C 107 (1891) *Gopal Chunder v Umesh Narain* 17 C 695 (1890)

(3) *Basu Madhub v Sridhar Deb* 10 C L R 555 (1881)

(4) *Hlyte v Bhairab Mayi* 30 C L J 121

(5) See also *Rajendra Nath v Jogen dra Nath* 14 Mon I A 67 (1871) *Bhima v Dhulappa* 7 Bom L R 95 *Sakina Khanum v Laddan Saliba* 2 C L J,

218 and *Kahan Singh v Maharajah A. W. M.* 214 (1905) and 44 I C 57

(6) *Mahomed Ibrahim v Morrison* 5 C 36 37 (1878) *Mahomed Ali v Ahaya Abdil* 9 C 744 (1883) *Mitra's Law of Limitation and Prescription* 5th Ed p 105

(7) *Mitra op cit* see *Mohansing Chavan v Henry Conder* 7 B 478 (1883) *Dan null v B I Steam Navigation Co* 12 C 477 484 (1886)

(8) *Jai Chand Bahadur v Gurjar Singh* 17 All L J 814 s c. 52 I C 366

(9) *Raja Ratan Singh v Thakur Man Singh* 1 N L R 20 and see *Tantis v Gajadhar* 2 N L R 98

(10) *Anbalaiah Kuttan v Raman Nair* 31 M 230 (1907)

to that of the lessor as an answer, and, if evicted from part of the land an apportionment of the rent may take place but the *onus* lies on the lessor who claims an apportionment to show what is the fair rate for the lands out of which the tenant was not evicted (1). Unless a landlord has a *prima facie* right to evict he must start his case and show that he is entitled to do so. There is no presumption that every

is not a saleable interest

and the mortgagee

his mortgage and the zemindar sued to eject the decree holder and judgment debtor, it was held, neither party

lay upon the plaintiff and had not b

When a tenant has been in long and admitted tenure, it lies upon the landlord in a suit for ejectment to prove in the first instance that the land is his *has* property and not the tenant's (3). Where the lands granted were the lands of the zemindar and the grant was on the con

plaintiff was not entitled to eject would lie on the person resisting ejectment (4). Where a tenant, having a right of occupancy, not transferable by custom, had given up to the purchaser possession of all the culturable lands of the holding but remained in possession of homestead lands only by permission of the purchaser it was held that this was sufficient to indicate that the *raiyat* had

And where a tenure obtained against one of the tenants after the shares of the other tenants had passed by auction-sale to a stranger on the allegation that the tenant against whom it had been obtained was the sole recorded tenant of the landlord, it was held that whether this was so or not was a matter of speciality within the knowledge of the landlord and the *onus* was on him to prove it (6). In a suit in ejectment, the plaintiff must prove good title there being no *onus* on the defendant to prove title relatively good or bad at all. Where the plaintiff fails to do so the fact that he was once in possession within twelve years of suit does not throw the *onus* of proving good title on the defendant (7).

A zemindar has as such, a *prima facie* title to the gross collections of all the *mouzahs* or villages within his zemindari, and the burden of proof is on the person who seeks to defeat that right by proving that he is entitled to an intermediate tenure (8). The same principle will apply where the zemindar or assignee or lessee of his rights, demands possession of the land from a person who is unable to prove a tenancy or other right of continuing to occupy (9). As to strict proof required on the part of the plaintiff seeking to disturb a possession of very long duration see the case cited *infra* (10). Where the plaintiffs sued for declaration of their rights to possession of lands which they claimed

Landlord and tenant intermediate tenure

(1) *Gopani Nath Jha v. Lalla Gorind* 12 W. R. 109 (1869) *Surendra Narain Roy Chowdhuri v. Dina Nath Bose* 43 C. 554 (1915)
(2) *Appa Rao v. Sabbanna* 13 M. 60 (1889)
(3) *Nanda Lal v. Jagannath Haldar* 5 C. N. 100 (1901) As to *onus* on C. N. 100 to show right to resume see 20 Grant R. 779
(4) *Born Lal v. Rajah v. Rajah Venkatanara* 4 S. N. M. 403 (1903)
(5) *Sahai v. N. 873* (1907)
(6) *Balkrishna Nath Roy v. Debend Nath Sahi* 11 C. W. N. 676 (1906)
(7) *Bapuji Narayan Chitnis v. Bhagwanji Bhatwadekar Chitnis* 42 B. 357 s. c. 45 I. C. 550 And see as to *onus* to prove right to eject 46 I. C. 238.
(8) *Sahib Perhlad v. Doorgapershad Tewari* 12 Moo. I. A. 331 (1869) s. c. 2 B. L. R. (P. C.) 134
(9) *Ram Monce v. Aleemooddeen* 20 W. R. 374 (1873), *Dattas Ahir v. Bhagwanji Koer*, 11 C. L. R. 476 (1882)
(10) *Forbes v. Meer Mahomed* 12 D. L. R. 216 (1873)

as *khudkasht* and the Record of Rights showed that the lands were so held that the *onus* was on the defendant to show that the entry was erroneous (1)

Where in a suit by a shareholder to recover a fractional portion of the rent, the defendant contends that he is only bound to pay to the person entitled to the whole rent, the *onus* is on the plaintiff to show that he is entitled to sue for a fractional portion (2)

Landlord and tenant: Fractional portion of rent

In a suit to recover arrears of rent under a *kabulyat*, the defendant, who had paid rent for upwards of four or five years, pleaded that he had obtained possession of portion only of the lands demised, and it was held that the *onus* was on the defendant (3). Where the tenant executed a *kabulyat* in favour of the landlord by which he agreed to pay additional rent at a certain rate if any land in excess of what was mentioned in the *kabulyat* were found in his possession and the plaintiff landlord sued to recover additional rent for excess land which he alleged was in the defendant's possession held that the *onus* was not on the plaintiff to prove the inception of tenancy (4). See section 114, "Presumption relating to holding of land" post

Landlord and tenant: Plea of part-possession

There is a presumption in favour of legitimacy and marriage, and therefore on any person who is interested in making out the illegitimacy of another is thrown the whole burden of proving it [Sections 112, 114, *post* to the notes of which sections reference should be made (5)]

Legitimacy

The burden of proof upon the question whether a man is alive or dead is regulated by sections 107, 108, *post*, to the notes of which sections reference should be made

Life and death

It is a settled rule of law that it is for the plaintiff to show *prima facie* that his suit is not barred by Limitation (6). But when the plaintiff's suit or proceeding is *prima facie* within time, if the defendant alleges that the case is governed by a special clause allowing a shorter period of Limitation it is for him to satisfy the Court that the case comes under that special clause (7). In a suit for recovery of the defendant's possession, the defendant to allege a date earlier than that assigned in the plaint (9). And where it is uncertain when a fraud affecting Limitation was discovered, *onus* is on the defendant to show that the suit is out of time (10). And if the defendant wishes the Court to believe in the existence of a particular fact operating as a bar to the suit, it is for him generally to prove those facts under the provisions of section 103, *ante*. In a suit to recover immovable property it is for the plaintiff to prove that he has been in possession at some time within the period of Limitation and not for the

Limitation and adverse possession

(1) *Gajadhar Prasad Singh v Sheo Nandan Prasad Singh* 23 C W N 304

(2) *Mt Lalun v Hemraj Singh* 20 W R 76 (1873) *see* as to fractional co shares *Punchanun Banerjee v Raj Kumar* 19 C 610 (1892) *Ram Chunder v Giridhar Dutt* 19 C 755 (1891) *Jogendra Narain v Banki Singh* 22 C 658 (1895) *Bindu Bashini v Pearsi Mohun* 20 C 107 (1891) *Gopal Chunder v Umesh Narain* 17 C 695 (1890)

(3) *Bani Madhub v Sridhar Deb* 10 C L R 555 (1881)

(4) *Hsyte v Bharab Maji* 30 C L I 121

(5) *See also Rajendra Nath v Jogen Nath* 14 Moo I A 67 (1871) *Bhima v Dhulappa* 7 Bom L R 95 *Sakna Khanum v Laddan Sahiba* 2 C L J,

218 and *Kahan Singh v Maharajah A. W. M.* 214 (1905) and 44 I C, 57

(6) *Maloned Ibrahim v Morrison* 5 C 36 37 (1878) *Mahomed Ali v Khaja Abdul* 9 C 744 (1883) *Mitra's Law of Limitation and Prescription* 5th Ed, p 103

(7) *Mitra op cit see Mohansingh Chaudhary v Henry Conder*, 7 B 478 (1883), *Danmull v B I Steam Navigation Co*, 12 C 477 484 (1886)

(8) *Jai Chand Bahadur v Girwar Singh* 17 All L J 814 s c 52 I C 366

(9) *Raja Rotan Singh v Thakur Man Singh* 1 N L R 20, and *see Tants v Gajadhar* 2 N L R, 98

(10) *Ambialah Kuttun v Raman Nar*, 31 M 230 (1907)

defendant to prove adverse possession for twelve years (1) And it has been held by the Madras High Court that while a party who bases his title on possession adverse to the Crown must *prima facie* show possession for sixty years the proof of such an adverse possession by him for a shorter period will shift the burden of proof on the Crown (2) Such possession may be proved by oral evidence alone (3) But the acts implying possession in one case may be wholly inadequate to prove it in another The character and value of the property the suitable and natural mode of using it the course of conduct which the proprietor might reasonably be expected to follow with a due regard to his own interests—all these things greatly varying, as they must under various conditions, are to be taken into account in determining the sufficiency of a possession (4) Where land has been shown to have been in a condition unfitted for actual enjoyment in the usual modes at such a time and under such circumstances that that state naturally would and probably did continue until twelve years before suit it may properly be presumed that it did so continue until the contrary is shown (5)

to a mouzah part of a taluk had in recent years become and proved his title but the defendant relying on adverse possession for more than twelve years before the institution of the suit, denied the plaintiff's title to the soil of the *bird* it was held that as the plaintiff had proved his title, the *onus* lay on the defendant to prove that the plaintiff had lost his title by reason of the adverse possession (6) Adverse possession by one person of a site belonging to another adjacent to the former's house as a convenient adjunct cannot be regarded as an indication of an assertion that the land so used belongs to the person so using it Such user for any length of time does not amount to adverse possession and cannot confer title by prescription (7) Where a suit was brought by the plaintiff, the mortgagee, to recover the principal

(1) *Perhlad Sein v Rajendra Kishore* 12 Moo I A 337 (1869) *Dinobundoo Sulaje v Furlong* 9 W R 155 (1868) *Nitras v Singh v Nind Lall* 8 Moo I A 199 (1860) *Koomar Ranjit v Schazne* 4 C L R 390 (1879) *Bhootnath Chatterjee v Kedar Nath* 9 C 125 (1882) *Nair Sdee v Woonesh Chunder* 2 W R 75 (1865) *Boolee Singh v Hurbins Narai* 7 W R 212 (1867) *Bronanurd Gossain v Government* 5 W R 136 (1866) *Jugodumba Choudhrai v Ram Chunder* 6 W R 327 *Gossain Dass v Seroo Koomaree* (Suit for share in joint family property) 19 W R 192 (1873) *Collector of Rungpore v Tagore* 5 W R 115 (1866) *Beer Chunder v Deputy Collector of Bhulloah* 13 W R P C. 23 (1870) *Moro Desai v Ramchandra Desai* 6 B 508 (1882) *Ramclandra Narayan v Narayan Maladev* 11 B 216 (1886) *Tulsi Pershad v Raja Visser* 14 C. 610 (1887) *Mohimig Chunder v Mohesh Chunder* 16 C. 473 (1888) *Ram Lochun v Jay Doorga* 11 W R 283 (1869) *Paranund Visser v Sahib Ali* 11 A., 438 (1889) *Gooroodass Roy v Huronath Roy* 2 W R 246 (1855) *Jafar Hussain v Mashuq Ali* 14 A 193 (1894) *Mundun Mohun v Bhuggoomunto Poddar* 8 C. 923 (1882), *Mirza Mohomed v Sura*

hutoomissa Khanum 2 W R 89 (1864) *Hemanta Kunari Debi v Jogendra Nath Roy* P C 10 C W N 630 (1906) *Bishambhar Satbhaya v Adadiar Chand* 18 C L J 601 (1913)

(2) *Sri Raja Chalkani Rama Rao v Secretary of State for India* (1908) 33 M 1 Explaining *Secretary of State for India v Lira Rajan* (1886) 9 M 15

(3) *v ante* s 39 and *post* s 110
(4) *Lord Advocate v Lord Lovat* L R 5 App Cas 288 (1880)

(5) *Mahomed Ali v Ahaja Abdul* 9 C 744 (1883) *Mohney Mohun v Krishno Kishore* 9 C 802 (1883) *Moro Mohun v Mothura Mohun* 7 C. 275 (1881) (Diluvion) from this case distinguish *Gokool Kruto v David* 23 W R. 43 (1875) See also *Mahomed Ibrahim v Morrison* 5 C 36 (1878) *Kaffey Chura v Secretary of State* 6 C. 725 735 (1891)

(6) *Radha Cobnd v Inglis* - C L R 364 (1880) (Diluvion) and as to the elements of adverse possession see *Sundarasastriah v Govinda Manjerav* 31 M 578 (1908) and *Jogendra Nath Rai v Baladeo Das* 35 C. 961 (1907)

(7) *Mussamat Gulab Deb v Mor* Ram 38 P L R 1919 s c 51 I C. 575

and interest due upon two mortgage bonds and to enforce that claim by a sale of the mortgaged property, he never having been in possession at any time, and the defendant contended that the mortgagee could not enforce his right against him, because he had been in possession adversely to the plaintiff and those under whom he claimed for a period of twelve years before suit, it was held that the suit was not brought to recover possession as upon a dispossession, and the *onus* lay on the defendant to prove an adverse possession (1) But the general rule is that, when a plaintiff claims land from which he has been dispossessed, the burden is on him to prove possession and dispossession within twelve years or that the cause of action arose within twelve years (2) In the case of *Rudha Gobind Roy v. Inglis* (3), the defendant had set up a title by twelve years' adverse possession, and neither suit was brought to recover possession as upon a dispossession. The fact that rent was not paid or that the payment was discontinued is not enough to show that a possession was adverse (4) Where a mortgagor by conditional sale afterwards surrendered his equity of redemption to the mortgagee by an unregistered agreement and the mortgagee remained in possession for many years, it was held that his possession was adverse and that the mortgagor was barred by limitation (5)

When a suit for possession is instituted between the vendee and his vendor, the *onus* is on the vendor to show that he has held adversely to the vendee for twelve years (6) And it has been held that to enable the defendant to add to the period of his own adverse possession (which was admittedly less than twelve years), the period of his vendor's possession, it must be shown that the latter's possession was also adverse, it was held also that the question of adverse possession as between tenants in common depends not on severance of the tenancy in-common by partition, but on exclusive occupation by one co-tenant amounting to ouster of the other (7) And in another case it has been held that entry and possession of land under the common title of a co-owner will not be presumed to be adverse to the others but will ordinarily be held to be for the benefit of all (8) Where in a suit to recover possession of certain property from the plaintiff's vendor, who did not substantially resist the claim a third party came in and claimed the property and was made a defendant it was held that the burden of proof against the plaintiff lay on such intervenor (9) In a case in the Calcutta High Court it was held that adverse possession affects the interest which the person entitled to immediate possession has at that time (10)

If, in execution of a decree obtained by *A* against *B* formal (though it may not be actual) possession has been given to *A*, *B* cannot afterwards, in support of a plea of limitation, rely as against *A*, upon the possession which he had before the transfer of possession by execution (11) But such possession

(1) *Rao Karan v. Baker Ali* 9 I A 99 (1882) 5 A 1

(2) *Moro Desai v. Ramchandra Desai* 6 B, 508 511 (1882), *Kally Churn v. Secretary of State* 6 C 725 733 (1881) *Gokul Chunder v. Nilnoney Mitter* 10 C 374 (1884) *Bhaddar v. Khair ud din Husain* (1906) 29 A 13

(3) 7 C L R 364 (1880) For definition of terms discontinuance discontinuance in Art 142 of Act XV of 1877 see *Gobind Lall v. Debendronath Mullik* 7 C L R 181 (1880)

(4) *Prasanna Kumar Mookerjee v. Srikantha Rout* 40 C 173 (1913)

(5) *Khedu Rai v. Sheo Parson Rai* 39 A 423 (1917)

(6) *Sayad Megamtila v. Nana Valad Faridcha* 13 B, 424 (1888), *Ram*

Prosad v. Lakhi Narain 12 C 197 (1883)

(7) *Ajrita Razji v. Shridhar Narayan* 33 B 317 (1908)

(8) *Jogindra Nath Rai v. Baladeo Das* 35 C 951 (1907)

(9) *Jugodanund Misser v. Hanid Rusool* 10 W R 52 (1868)

(10) *Priya Sakhi Devi v. Manbodh Bibi* 44 C 425 (1917) per Sanderson C J and Mookerjee J see dissenting from *Nellamallai v. Betha Nakkian* 23 M 37 (1899) and see *Nandan Singh v. Jumanan* 34 A 640 (1912) *Raj Nath v. Narain* 36 A 567 (1914) *Vijayapuri v. Sonamma* F B 39 M 811 (1915)

(11) *Juggobundoo Mukerjee v. Ro Chinder* 5 C 584 (1880) followed *Jugesh Chandra Mitter v. Purnanund* 16 C 30 (1889) L

is of no avail as against a third party (1) The principle, however, as laid down in *Juggobundhu Mukerjee v Ram Chunder Bysack* (2), was extended by the Full Bench of the Calcutta High Court to the case of a purchaser at auction in execution (3) held that had taken Where, in the landlord but claimed to hold under a valid *miras* tenure the *onus* was held to be on the defendants to prove, either that they had a valid *miras* tenure or that, by reason of their having held adversely to the plaintiff as *mirasdars* for more than twelve years, the plaintiffs were debarred from questioning their right (4) In a suit for redemption the burden of proving that the suit is within limitation lies on the plaintiffs (5) See as to possession section 110 In the undermentioned case (6) a majority of the Bench held that it was on the plaintiff relying on an acknowledgment to show that it was made before the period of limitation had expired

Malicious prosecutions

In a suit for damages for malicious prosecution, it lies on the plaintiff to prove the existence of malice and of want of reasonable and probable cause before the defendant can be called upon to show that he acted *bona fide* and upon reasonable grounds believing that the charge which he instituted was a valid one (7) The rule as to the burden of proof in suits for malicious prosecution has been extended to the case of alleged false information given to the police. If the plaintiff is convicted in the first Court and acquitted only on appeal, the *onus* cast on him is specially heavy He must show that the

v Purgun Roy 7 C 418 (1881) See also *Harjitan v Shyam* 19 B 620 (1894) *Urbica Churn v Madhub Ghosal* 4 C 870 (1879) *Gunga Gobind v Bhopal Chunder* 19 W R 101 (1873) *Mosuffer Walid v Abdus Samad* 6 C L R. 539 (1880) *Sitara Charan v Madhab Chandra* 11 C 93 (1884) *Venkataramanna v Virasa* 10 M 17 (1886)

(1) *Ranjit Singh v Bunarsi Lal* 10 C 993 (1884) *Mohinud n v Mancher shah* 6 B 650 (1882) *Dojandis Panda v Kelai Panda* 11 C L R 395 (1882) (2) 5 C 584 (1880)

(3) *Juggobundhu Mitter v Puranand Gossami* 16 C. 530 (1889) overruling *Krishna Lal v Radika Krishna* 10 C 407 (1884)

(4) *Ogra Kant v Mohesh Chunder*, 4 C L R 40 (1879)

(5) *Kalaid Lal v Faal* 51 I C 956

(6) *Amir Singh v Fatch Chand* 42 A 575

(7) *Mohunt Cour v Hazarib Das* 6 B L R. 371 (1870) s c 14 W R 425 *Not couree Chunder v Birmonoyee* 3 W R 169 (1865) *Moonee Ummah v Municipal Commissioners Madras* 8 Mad H C 151 (1875) *Doongrussee Byde v Gridharee Moll* 10 W R. 439 (1868) *Shekh Roshun v Nobin Chandra* 6 B L R 377 note (1879) s c 12 W R 402 *Kharu Kobutollah v Motee Peshkur* 13 W R 276 (1870) *Aghorenath Roy v Radika Pershad* 14 W R 339

(1870) *Kisloree Lal v Enaeth Hosse* 1 All H C A C 11 (1869) *Baboo Ram Budden v Srdar Dyal* 17 W R. 101 (1872) *Baboo Ganesh v Mugneeram Choudry* 17 W R P C 283 (1872) s c 11 B L R P C 321 *Dunne v Legge* 1 Agra H C 38 (1866) *Weather all v Dillon* 6 A W P Rep 200 (1874) *Stanis Nayudu v Subramania Mada* 2 Mad H C 158 (1864) *Vengama Natar v Raghava Charj* 2 Mad H C. 291 (1864) *Girdharla Dayaldas v Jagannath Girdharba* 10 Bom H C 182 (1873) *Hall v Venkatakrishna* 13 M 394 (1882) *Watson v Smith* 4 C W N xlviii (1899) *Nolliappa Goundan v Kalappa Goundan* 24 M 59 (1900) *Ramayya v Sarayya* 24 M 549 (1900) *Harish Chandra v Nislikanta Barerjee* 28 C 591 (1901) As to reasonable grounds see *Brojona Roy v Kishen Lal* 5 W R 287 (1866) *Mohendranath Dutt v Koylash Chunder* 6 W R 245 (1866) and prosecuted as misused for want of proof *Mujner Ram v Gonesh Dutt* 5 W R 134 (1866) and untrue charge before police *Mohendra Chunder v Surbo Kokhya* 11 W R 534 (1869) The mere absence of reasonable and probable cause does not itself justify the conclusion as a matter of law that an act is malicious It is not identical with malice but malice may having regard to the circumstances of the case be inferred from it *Bliss Sen v Sitaram* 24 A. 363 (1902)

original conviction proceeded on evidence known to the complainant to be false or due to the wilful suppression by him of material information (1)

Where a plaintiff alleges and adduces evidence to show that the standard of measurement prevalent at the time the claim is made was in use when the tenancy was created, and the defendant asserts that the standard prevalent at the creation of the tenancy was a different one, but gives no evidence of it, the Court may presume that the state of things in existence at the time of the suit existed also at the inception of the tenancy (2)

It is for the party who comes into Court and pleads minority to make out his case before the adverse party can be required to rebut it (3) Where a person alleges his minority in order to escape liability under a mortgage executed by him the burden lies upon him to prove that he was a minor at the time the transaction was entered into (4) But when the minority of a testator is pleaded as a defence in a Probate action the *onus* to prove that he was of full age is on the party setting up the Will (5) It has been held in England that in an action against an infant for necessities the *onus* is on the plaintiff to prove not only that the goods supplied were suitable to the condition in life of the infant, but also that the latter was not sufficiently supplied with goods of that class at the time of the sale and delivery (6)

On a charge of misappropriation of funds under section 409 of the Penal Code, it is not necessary for the prosecution to prove how the money in question has been employed by the accused, for when it has been proved that he has not accounted for money entrusted to him, the burden is on him to prove his innocence (7)

When a plaintiff sues to redeem and the defendant denies the mortgage, the plaintiff must in the first instance prove his title (8) In a suit to enforce the mortgage in the Sealdah Registry, on the ground that the mortgage was in the Sealdah District, the defendant there was no such property in existence in the Sealdah District, the registration of the mortgage was bad and the deed as a mortgage had no efficacy in law Held that the *onus* was on the defendant to show with every clearness that no property in the Sealdah District had been comprised in the mortgage (9) In a suit for redemption a plaintiff has to prove the existence of a subsisting mortgage which he is entitled to redeem (10) A receipt of the mortgagee which has been proved to have been given by the mortgagee to the plaintiff who was assignee of an unregistered bond of the year 1879 for Rs 99 sued to enforce the bond and claimed Rs 637 12 1 in respect of it, or in default foreclosure of an occupancy land The time fixed for payment expired in 1882 Held that under

(1) *Raghobendra v Kashinath Bhat* 19 B 717 (1894) per Jardine J According to the judgment of Ranade J this case was governed by principles regulating suits for defamation

(2) *Thimma Reddi v Chenna Reddi* 16 M L J 18 and see *Thakdi Haji v Budrudin Saib* 29 M 208

(3) *Ishan Chandra Mitter v Ramranyan Chuckerbutty*, 2 C L J, 125

(4) *Niamatulla Khan v Gajraj Singh*, 6 O L J 376 s c 53 I C 136

(5) *Pimpakishappa v Shidappa* 26 B, 109 116 (1901)

(6) *Krishnamachariar v Krishnamachariar* 38 M, 166 (1915) see *Bhagirathi Bai v Ishkianath* 7 Bom L. R., 92

(1905)

(7) *Nash v Innan* (1908), 2 K B, p 1

(8) *R v Kadir Baksh* (1910), 33 A., 249

(9) *Bala v Shua* 27 B 271 (1902), and other cases there cited

(10) *Jogini Mohan v Bhoot Nath* 31 C 146 (1901)

(11) *Musafir Rai v Musst Lagan* 2 All L. J, 62 (1904) for essentials of simple mortgage see *Mohan Lal v Indramati* F B 39 A 244 (1917) and *Dalip Singh v Bahadur Ram* 34 A, 446 (1912), and for *onus* to prove debt is outstanding see *Hasan Khan v Mandir Das*, 17 C. W N 49 (1912)

person alleging it (1) For observations on the procedure to be adopted in a suit for an account of a dissolved partnership and the burden of proof on the taking of the account, see the undermentioned case (2)

"Passing
off" case

In a "passing off" case the burden of proving that particular words have acquired a secondary signification lies on the person alleging it (3)

Payment

If in a suit for rent the defendant does not deny tenancy, but pleads payment, the *onus probandi* is on him (4) When a defendant in a suit for arrears of rent alleges remission, the *onus* lies on him in regard to the remission (5) When a defendant admits the cause of action and pleads payment, he must prove that the claim which is admitted has been discharged by payment (6) When a debtor pleads tender of payment as a ground for not being saddled with interest, the *onus* is on him to prove that he made such tender (7)

See Notes to section 110, post

Possession
Pre-emption

In a suit to enforce the right of pre-emption, in which the plaintiff impugns the price stated in the conveyance, very slight evidence is sufficient to establish a *prima facie* case in favour of the pre-emptors, and when such case is established the *onus* is on the vendor and vendee to prove by cogent evidence that the amount of the price actually paid was larger than that stated by the pre-emptor (8) If a right of pre-emption is based on custom, the *onus* is on the defendants to show that a custom proved to have once existed had come to an end (9) If a *uajib-ul-arz* clearly shows that a clause as to pre-emption embodies a new contract entered into by the co-sharer, at the time the *uajib ul arz* was prepared, it would be necessary for the plaintiff claiming pre-emption to prove that he, or some one through whom he claims, was an assenting party to the contract (10) The Allahabad High Court has held that an entry in a *uajib-ul arz* is *prima facie* a record of a custom rather than of a contract (11), and that a pre-emptive clause is not (in the absence of other evidence) enough to prove a customary right to pre-empt (12) but in a later case that High Court has held that where there is such an entry without contrary evidence the Court ought to hold, in view of the prevailing practice, that the custom exists (13) In the case cited the Privy Council has held that a *uajib-ul-arz* which merely purported to narrate traditions and give the history of devolutions in families not the narrator's was insufficient to rebut the presumption of a pre-existing custom (14) And in another case the Calcutta High Court has held that a person who seeks the help of the Court to enforce a right of pre-emption must prove that it existed at the date of the sale and of the institution

(1) *Sunder Singh v Dalt Singh* 46 I C 467

(2) *Thirukuttesarayan Chetti v Subbaraya Chetti* 20 M 313 (1895) and see also as to rendering account *Mayer v Alston* 16 M 245 (1892) and as to presumption of dissolution from final account see *Joopooday Saraya v Lakshmanaswamy* P C 36 M 185 (1913), s c 17 C W N 1006

(3) *Sindt v Reddaway* 32 C 401

(4) *Purceag Lall v Rani Jettan* 1 W R 264 (1864), *Koonjo Beharee v Roy Mothoaranauth* 1 W R 155 (1864)

(5) *Bunlary Lall v Furlong* 9 W R 239 (1868)

(6) *Bhee Mcheroonnissa v Abdul Gunee* 17 W R 509 (1872)

(7) *Rance Siyay v Collector of Mymen* sing 5 W R 69 (1866)

(8) *Bhagwan Singh v Mahabir Singh*

5 A 184 (1882), *Sheopargash Dube v Dhanraj Dube* 9 A 225 (1887) *Tarakshi Rai v Luchman Rai* 6 A 344 (1884) For account of pre-emption under Mahomedan Law see *Budhas Sardar v Sonaula Viridia* 19 C L J 601 (1914)

(9) *Birajchand Lal v Hussain Lal Kunari* 3 All L J 561

(10) *Savak Singh v Girja Pandey* 2 A L J 6 (1905) A W N 16

(11) *Returaj Dunbain v Pollan* *Blagat* F B 33 A 196 (1911)

(12) *Mawaji v Mulchand* 34 A 434 (1912)

(13) *Fazal Hussain v Muhammed Sharif* 36 A 471 (1914) distinguishing *Dhian Kumar v Dhan Singh* 8 A L J 789 (1911)

(14) *Murtia v Husain Khan v Muhammad Yasin Ali* P C 38 A 552 (1916)

of the suit and of the decree of the primary Court (1) While each instance of a sale to a stranger is material evidence each must be strictly proved (2) If a plaintiff pre emptor alleges that the price in a sale deed is fictitious it is for him to give some *prima facie* evidence that this is the case Comparatively slight evidence will suffice to shift the *onus* (3)

Presumptions of fact of various kinds other than those mentioned in the *notes* to these sections may affect the question of the burden of proof So, there being a presumption that judicial and official acts have been regularly performed the burden of proving the irregularity of such acts will ordinarily be upon the person who asserts it (See section 111, *post*, to the *notes* of which section reference should be made) Similarly, the *onus* is on the plaintiff to show that the price recited in a sale deed is excessive (1)

A recital in a deed or other instrument is in some cases conclusive, and in all cases evidence as against the parties who make it, and those who claim under them (5) and it is of more or less weight or more or less conclusive against them according to circumstances It is a statement deliberately made by those parties which like any other statement is always evidence against the persons who make it But it is no more evidence as against other persons than any other statement would be (6) The *onus* of proving that a document which a person has signed does not contain a correct statement of the facts and of the intentions of the parties is on the person who makes the allegation (7) In ordinary circumstances and apart from statutes recitals in deeds cannot by themselves be relied on for the purpose of proving the assertion of fact which they contain but they may suffice to prove a representation of a legal necessity for alienation by a Hindu widow after the death of all the witnesses (8) or her intention to dispose of an absolute interest (9) When a plaintiff sues on a receipt admitting a payment and the defendant admits execution of the receipt, it is on the defendant to prove that the statement of payment on the receipt is incorrect (10) Where an instrument recites that the defendant has received consideration, such a recital is evidence against, but not conclusive upon, the defendant the *onus*, however, is on the defendant to show that the recitals are not correct (11) The last mentioned rulings do not, however, govern

Presump-
tions of
fact

Recitals

(1) *Vurt Man v. Ambica Singh* 44 C 47 (1917)

(2) *Janki Misir v. Ranno Singh* 35 A 472 (1913)

(3) *Abdul Majid v. Aiolak* (1907) 29 A, 618

(4) See 16 All L J 533

(5) *Bihari Lal v. Mahdum Bakhsh* 35 A 194 (1913)

(6) *Brajewari Peshakar v. Budhanuddi* 6 C 268 (1880) s c 7 C L R 6 *Manahar Singh v. Sumrita Kuar* 17 A, 428 (1895) see *Imrit Chamar v. Sibdhari Panday* 17 C W N 108 (1911) (recital of boundaries in lease admissible against person not a party)

(7) *Mussamat Raideo v. Chandrabali* 4 Pat. L W 237 s c 44 I C 399

(8) *Banga Chandra Dhur Biswas v. Jagat Kishore Acharjya* P C 44 C 186 (1917) see *Brij Lal v. Inda Kumar*, P C, 36 A 187 (1914)

(9) *Vasanti Morari v. Chanda Bibi* P C 37 A, 369 (1915)

(10) *Datalata v. Ganesh Shastri* 4 B 295 (1880)

(11) *Fulli Bibi v. Banisudi Medha* 4 B L R 54 (1869) s c 12 W R, F B 25 citing *Choridhry Deby v. Choudhry Doilat* 3 Moo I A 347 (1884) [explained in *Brajeshwari Peshakar v. Budhanuddi* 6 C 268 (1880)] *Saleh Perlal v. Baboo Budhoo* 2 B L R P C 111 (1869), *Rajah Saheb v. Baboo Budhoo* 12 Moo I A 275 (1869), *Narab Syud v. Mt Amane*, 19 W R 149 (1873) *Maniklal Baboo v. Ramdas Mazumdar* 1 B L R, A C 92 (1868) s c 10 W R 132, *Juggut Chunder v. Bhuguan Chunder*, 1 Marsh Rep, 27 (1862) *Radhanath Banerjee v. Jadoonath Singh* 7 W. R 441 (1867) *Raghoonath Dass v. Luchmee Naran* 10 W R 407 (1868), *Mt Kurutool v. Mt Rajkalee* 17 W R 439 (1872) [Actual sight of the passing of the money is not the only mode of proving payment of consideration] The following cases *Mussamat Jhaloo v. Shaikh Furzund*, 5 W R 203 (1866), *Teekat Roop v. Anund Roy* 3 W R 111 (1865) are no longer law

cases to which the Dekkhan Agriculturists' Relief Act (XVII of 1879) applies (1) And it has been held that the fact that possession was withheld without protest is enough to shift the burden of proof by raising a counter presumption that the consideration was not paid (2) The defendants in a suit on a bond admitted the execution of the bond, but denied that they had received as the bond recited they had, at the time of its execution, the consideration for it, the Court of first instance instead of calling on the defendants to establish the fact that they had not received the consideration for the bond as it ought to have done under the circumstances, irregularly allowed the plaintiff to produce witnesses to prove that the consideration for the bond had been paid at the time of its execution. The evidence of these witnesses proved that the consideration of the bond had not been paid at the time of execution, and, that, if it had been paid at all, it had been paid at some subsequent time. The plaintiff did not give any further evidence to establish such payment and the Court of first instance, without calling on the defendants to establish their defence, dismissed the suit. The lower Appellate Court held that the defendants should have been required to begin under the circumstances, and reversed the decree of the Court of first instance and gave the plaintiff a decree. It was held in appeal that, although the plaintiff ought not to have begun, yet as he had done so, and his witnesses had proved that the consideration for the bond had not been paid as admitted in the bond, a new case was opened up, in which the *onus* was shifted back to the plaintiff to establish that he had, not at the time alleged in the bond, but at some subsequent time, paid the consideration for the bond (3) There is evidence contradicting not the terms of the contract itself (4)

Rent-free
land

Where the land is held by a person who is not a tenant of other land belonging to the plaintiff or when such land is occupied as a separate parcel or holding, or in any other manner so as to be distinct from any other land held by the same person as a landlord to show that the land is occupied by the zemindari which are rent paying and are not distinguishable in the manner indicated above the burden of proof is on the tenant (5) But in another case this ruling was not followed to its full extent and it was held that the burden of proof is on the other land (6) He

(1) *Maloji Santaji v. Patisu Hari* 9 B 520 (1885)

(2) *Bihari v. Ram Chandra* A C (1911) 33 A 483

(3) *Makund v. Bahori Lal* 3 A 824 (1881)

(4) *Mukhi Singh v. Kishun Singh* 51 I C 320

(5) *Akbur Ali v. Bhaya Lal* 6 C 666 (1880) s c 7 C L R 497

(6) *Budaram Gundul v. Pearj Mohun* 9 C 813 (1883), s c 12 C. L R 475

Dee Dhun Monee v. Suttoorgun 6 W R (Act X) 100 (1866) *Gu gadhur Singh* (Act X) 37
Bisola Dassee 5 W R (Act X) 37
(1866) *Sirdhar Nundi v. Braja Nath* 2 B L R (A C) 211 (1868) *Raj Kishore*
v. Hurechur Mookerjee 10 W R 117
(1868) *Mun Mohun v. Srira* Ray 14 W R 285 (1870)

(7) *Narcndra Narain v. Bislen Chandra* a 12 C 187 (1885) *Ram Coomar v. Debee Pershad* 6 W R (Act X) 87 (1866)

onus is on the landlord to prove that such land has paid rent in previous years (1) Where the *onus* of proof of the right to hold land rent free lies on the claimant it is not necessary to produce a *lakhray sanad*, the fact may be legally established by long and uninterrupted possession without payment of rent raising the presumption that the land had been held rent free from the decennial settlement or of twelve years adverse possession (2) The *lakhray* tenure must be shown to have a real existence before it can be held that any question of *lakhray* arises (3) In a suit for enhancement however, where the defendant admits that the main portion of the lands are *mal* but does not separate the rent free lands the plaintiff is not bound to prove that the lands are *mal* until the defendants point out their precise situation (4) Long possession of lands as *choukeedaree chakeran* affords ground for the presumption that the lands were set apart as such at the decennial settlement, and the *onus* of proof that the lands were the private land of the zemindar not set apart at the decennial settlement as *choukeedaree chakeran* is on the zemindar (5) The position of *Inamdars* differs materially from that of *zemindars* and the presumption that persons becoming tenants of *zemindars* after the permanent settlement become occupancy tenants does not apply to persons who become tenants under *Inamdars* (6)

When a plaintiff institutes a suit for a declaration of title, the *onus* is on Title him to prove the title which he seeks to have confirmed. It is not sufficient for him to show that he is in possession and that the defendant has proved no better title (7) But if the plaintiff fail to prove title against a defendant, who has himself no title and is a mere wrong doer the former may be declared to be entitled to be retained in possession as against the latter (8) Where the plaintiffs who are in possession of a property before the institution of the suit ask for a declaration of their title and confirmation of their possession as against a defendant who seeks to disturb the possession, it is for the latter to show that he has a

(1) See *Motee Lall v. Judooputtee* 2 W R (Act X) 44 (1865) *Bissessur Chuckerbutty v. Woon a Churn* 7 W R 44 (1867) *Sheeb Narain v. Chidan Doss* 6 W R (Act X) 45 (1866) *Juggessuree Debia v. Gudadhur Banerjee* 6 W R (Act X) 21 (1866) *Nehal Chunder v. Hurree Pershad* 8 W R 183 See also *Gooroo Pershad v. Juggobundoo Mo-oomdar* W R Sp No 15 (1862) This was a suit for a kabuliat and a Full Bench held that the tenant having admitted that plaintiff was his landlord for a portion of the land this was sufficient *pro a facie* evidence of his being plaintiff's ryot to throw on him the burden of proving his special plea of *lakhray* as to the remainder *Bacharam Mundul v. Peary Mohun* 9 C 813 (1883) see contra *Neuaj Bundopadhyay v. Kali Prasanna* 6 C 543 (1880) *Akbar Ali v. Bhajee Lal* 6 C 667 (1880)

(2) *Dhunpat Singh v. Russomoyee Clouddrain* 10 W R 461 (1868) See also *Heera Lall v. Peetumber Mundul* See Rep Aug—Dec (1863) 171 *Hurryhur Mookerjee v. Abbas Ally* See Rep Aug—Dec (1863) 1875

(3) *Synd Ahmed v. Enact Hossein* 1 W R 330 (1865) See also *Gumanee Ka ce v. Hurryhur Mookerjee* (F B) W R

Sp No 115 (1862) [Suit for enhancement of rent defence that part is *lakhray*], *Beebee Ashrufoonissa v. Umung Mohun*, 5 W R (Act X) 48 (1866) *Rajkissen Mookerjee v. Jyokissen Mookerjee* W R, 1864 (Act X) 119

(4) *Suito Ch rn v. Tarice Churn* 3 W R 178 (1865)

(5) *Mooktakessee Debia v. Collector of Moorsiedabad* 4 W R 30 (1865) *Forbes v. Meer Mahomed* 11 Moo I A 438 (1870)

(6) *Marapu Tharal v. Telukula Veela kanta Behara* (1907) 30 M 502

(7) *Joloke Snol v. Gurnar Singh* 2 W R 167 (1865) *Rassonada Rajar v. Sillarana Pillai* 2 Mad H C 171 (1864) *Royce Moolah v. Mudhoo Soodun* 9 W R 154 (1868) *Purseedh Narain v. Bissessor Dyal* 7 W R 148 (1867) *Gangara v. Secretary of State* 20 B 798 800 (1895) *Sheikh Torab v. Sheikh Mahomed*, 19 W R 1 (1872) See *Abdul Sovan v. Laclm Prasad* 50 I C 80

(8) *Gangaram v. Secretary of State* 20 B 798 (1895) *Ismael Aruff v. Mahomed Gouse* 20 I A 99 (1893) s c. 20 C. 834 Both cases discussed in *Ista Bal tant v. Secretary of State* 45 B, 782 (1921)

better title than the plaintiffs (1) If the defendant is in possession and the plaintiff produces title deeds in his own favour, the *onus* is on the defendant to disprove the title of the plaintiff (2) Where plaintiff purchased ostensibly on his own account and sold by a decree it to be purchased by a decree plaintiff to have taken out execution against the plaintiff to show that the property had been bought on his own account with his own money (3) In a suit by a temple committee appointed under Act XX of 1863, against a hereditary trustee of a Hindu temple for possession and other reliefs it was held that the *onus* lay on the plaintiffs to prove that the temple was of the class mentioned in the Act (4) Where the defendants were in possession of disputed land under an award of the Magistrate under Act X of 1872, section 530, it was held in a suit for possession and establishment of title that the *onus probandi* lay on the plaintiff (5) A person who derives his title through a purchase must prove that his vendor had a title in the property sold (6)

Tort

A party setting up a tort has the burden on him to prove such tort If the cause of action be negligence, deceit or fraud or the like, the plaintiff must prove the negligence, deceit or fraud If to a tort justification is set up by the defendant, the burden is on him to prove such justification The general rule therefore is that the burden lies on the party seeking either to make good his claim for damages arising from the tort of another, or to establish a release from such claim, supposing it to be made out against himself, by imputing tort to the plaintiff (7) In a suit for a tort, the *onus* is on the plaintiff to prove that the malfeasance, misfeasance, nonfeasance, or other event from which Limitation commences to run, took place within the prescribed period, upon the general principles which regulate the burden of proof on the point of Limitation (8) In cases of collision at sea, the masters and owners of the colliding vessel, even though compelled by law to take a pilot on board are *prima facie* liable for damage caused by their ship, and the burden of proof is on them to show that the negligence which caused such damage was that of the pilot and solely his (9) Where, on a question of negligence, the plaintiffs have adduced evidence sufficient to call upon the defendant to reply and the defendant thereupon, being under the burden of laying the material facts before the Court has refrained from doing so, the *onus* of proving negligence is discharged by the plaintiffs (10) See "*Defamation*," "*Fraud*," "*Good and bad Faith*," "*Malicious Prosecution*," ante, and post, s 114, "*Presumption of Innocence*"

Waiver

A waiver is an intentional relinquishment of a known right, or such conduct as warrants an inference of such relinquishment, and there can be no waiver

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| <p>(1) <i>Mahomed Hasan Ma v Abdul Hamid</i> 30 I C 431</p> <p>(2) <i>Suarnamajee Rayur v Srinibash Koyal</i> 6 B L R 144 (1870)</p> <p>(3) <i>Muadan Mohun v Bhurut Chunder</i> 11 W R 249 (1869)</p> <p>(4) <i>Ponduranga v Nagappa</i> 12 M 366 (1889)</p> <p>(5) <i>Huri Ran v Bhukaree Roy</i> 25 W R 20 (1876)</p> <p>(6) <i>Mussamat Gulab Devi v Monji Ram</i>, 38 P L R 1919 s c 51 I C, 575</p> <p>(7) <i>Wharton Ev</i> §§ 358-364 and cases there cited And see <i>Dekhari Tea Co v Assam Bengal Ry</i> 23 C W N</p> | <p>998 (as to proof of negligence see 22 C W N 622) <i>Madhorao v Abdul Gafur</i> 44 I C 241 <i>Boi bay Baroda Co v Ran chodlal Chhotalal</i> 43 B 769 (proof of neglect or theft of Railway servants)</p> <p>(8) <i>Mitra's Law of Limitation and Prescription v ante Limitation</i></p> <p>(9) <i>The Ship Glencoe</i> 1 Boul Rep 105 (1865), <i>Muhammad Yusuf v P & O S Aat Co</i> 6 Bom H C R (O C) 93 (1869) As to the burden of justifying duty of ship at anchor in the case of collision see <i>Mary Tug Co v B I Steam Navigation Co</i> 24 C 627 (1897)</p> <p>(10) <i>Dekhari Tea Co v Assam Bengal Ry</i> 23 C W N 998</p> |
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e waiver is claimed had full knowledge both would enable him to take effectual action for proof of such knowledge is on the person who relies on the waiver. A presumption of waiver cannot be rested on a presumption that the right alleged to have been waived was known (1). A contract can only be rescinded by another contract when the latter is valid and inconsistent with it and evidence of waiver or rescission must be as cogent as the proof of the original contract (2).

The *onus probandi* lies in every case upon the party propounding a will, and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. The *onus* is in general discharged by proof of capacity and the fact of execution (3). The canons of proof vary according as the will is in itself a reasonable and natural one or the reverse (4). A Hindu minor cannot make a will (5) and if the plea of a testator's minority is advanced in a Probate action the *onus* of proving his majority is on those who propound the will (6). The *quantum* of evidence sufficient to establish a testamentary paper must always depend upon the circumstances of each case. Three things must be proved capacity, testamentary intention and execution. The circumstances of the case may be such as to necessarily wake the vigilance of the Court and to require that the proof shall be full and satisfactory. When such circumstances occur the evidence to prove the affirmation must be stronger than in ordinary cases (7). But in this country the normal standard of proof in this matter is merely such as would be enough in ordinary circumstances to satisfy a prudent man,—the proof need not be absolute (8). The fact that the testator did know and approve of the contents of an alleged will is part of the burden of proof assumed by everyone who propounds a will. This burden is satisfied *prima facie* in the case of the will of a competent testator, but if those who oppose it succeed by cross examination or otherwise in meeting this *prima facie* case, the party propounding must satisfy the tribunal affirmatively that the testator did really know and approve of the contents of the will, that is to say, the burden of proof in propounding the will, raised (9). If a party or if any other circumstances exist which excite the suspicion of the Court, and whatever their nature

(1) *Dinukadhari Singh v Nathima Saha* (1901) 11 C W N 848

(2) *Mallira Molan Saha v Ran Kumar Saha and Chittagong District Board* 43 C 90 (1916)

(3) *Barry v Dulin* 2 Moo P C 482
Clear v Cleare L R 1 P & D 657
 cited in *Woomesh Chunder v Rasmohini Dassi* 21 C 279 290 291 (1893). *Lallo Bibi v Gopi Narain* 23 A 472 475 (1901) and see *In re Dintarini Debi* 8 C 880 882 (1882). *Bindeshwari Persad v Basbhakha Bibi* 24 C W N 674
Surendra Krishna Mandal v Ranee Dassee 33 C L J 34 (1921) s c 24 C W N 860 where a large number of previous decisions are cited as to presumption of due execution see *Hoolmer v Daly*, 1 Lahore 173

(4) *Sarojini Dasi v Hari Das Ghose* 49 C 235

(5) *Krishnaniacharar v Krishnama chariar* 38 M 166 (1915)

(6) *Ib per Tytler J* (later) See *Rhagirathi Das v Jitranath* 7 Bom L

R 92 (1905)

(7) *Jones v Godrich* 5 Moo P C 16 19—21 (1844). So fraud cannot be presumed but the circumstances may render fraud so probable that the Court will require stronger proof than in cases where all natural presumptions are in favour of the disposition and the free will of the testator is 21. As to proof in the case of inofficious wills see *Sarada Sundarce v Muddun Mohun* 24 W R 162 (1875). As to wills by Purdanashins see s 111 post *Khas Mehul v Administrator General of Bengal* 5 C W N 505 (1901)

(8) *Jarat Kumari Dassi v Bissessur Dutt* (1911) 39 C, 245

(9) *Balkrishna v Gopikabai* 7 Bom. L R 170 (1905). The *onus* may be increased by circumstances such as an unbounded confidence in drawer of the will extreme debility of the testator clandestinity and other circumstances which may increase the presumption so as to be conclusive against the instrument if

may be it is for those who propound the will to remove such suspicion and to prove affirmatively that the testator knew and approved the contents of the will and it is only where this is done that the *onus* is thrown on those who oppose the will to prove fraud or undue influence or whatever they rely on to displace the case for proving the will (1). But there is no rule of law as to the particular kind or description of evidence by which the Court must be satisfied. The degree of suspicion excited and the weight of the burden of removing it must depend largely on the nature and amount of the benefit taken and all the circumstances of the case (2).

The dictum of Lindley L J in *Tyrell v. Pouto* (3) "that whenever circumstances exist which excite the suspicion of the Court and whatever their nature may be it is for those who propound the will to remove such suspicion and to prove affirmatively that the testator knew and approved of the contents of the document" does not apply to a case where the question is simply which set of witnesses should be believed (4). Due execution of a will implies not only that the testator was in such a state of mind as to be able to authorize and to know he was authorising the execution of a document as his will but also that he knew and approved of the contents of the instrument and in cases of disputed execution the Judge should consider and express an opinion upon both these questions. In ordinary cases execution of a will by a competent testator raises the presumption (sufficient if nothing appears to the contrary to establish) that he knew and approved of the contents of the will. Also under ordinary circumstances the competency of a testator will be presumed if nothing appears to rebut the ordinary presumption ordinarily therefore proof of execution of the will is enough. But where the mental capacity of the testator is challenged by evidence which shows that it is (to say the least) very doubtful whether his state of mind was such that he could have 'duly executed' the will as he is alleged to have done the Court ought to find whether upon the evidence the testator was of sound disposing mind and did know and approve of the contents of the will. Where this had not been done the contrary held refused purpose of obtaining probate or letters of administration to produce all the evidence which the circumstances of the case indicate as proper and necessary to prove the execution of the will. It lies upon such a person to prove it by evidence as good as that which would be produced to prove any other instrument transferring the title to real property (6). *Prima facie* proof however of execution is sufficient to warrant the grant of probate when the application for such probate is unopposed (7). When the will is contested the proceeding should take as nearly as may be the form of a regular suit brought by the party propounding the will (8). The fact that a contested will bears an endorsement stating that it was acknowledged by the testator before the Registrar, does not warrant a Judge in granting probate without any other evidence in support of the will even though the caveator does not produce

(1) *Laclo Bb v. Gopi Naran* 23 A 472 (1901)

(2) *Bai G ngaba v. Bhatia das Valji* (P C) 9 C W N 769 (1905) 29 B 530

(3) L R (1894) P D 151

(4) *Shama Churn v. Khetromon Das* 4 C W N 501 (1899) s c 27 C 521

(5) *Woonesh Chander v. Rashmoh n Dass* 21 C 279 (1893)

(6) *Tara Chand v. Debnath Roy* 10 C L R 550 (1882)

(7) *In re Nobodoorga* 7 C L R 397 391 392 (1880) see *In re Shutee Churn* 23 W R 103 (1874)

(8) *Saroda Soonduree v. Muddun Mohun* 24 W R 162 (1875) *Annoda Sundari v. Jugutin on Debi* 6 C L R 176 (1880) s 83 Probate and Administration Act

any evidence to impeach the will (1) If a will shown to have been in the custody of the testator is not forthcoming at the time of his death, it is presumed to have been destroyed by him unless there is sufficient evidence to rebut the presumption. But it has been held by the Allahabad High Court that this presumption of English Law is not as strong in India as in other countries where greater care is taken of wills and that it did not arise when it was shown that persons interested in the disappearance of the will had access to the testator's house (2) Such presumption of revocation does not arise unless there is evidence to satisfy the Court that the will was not in existence at the time of the testator's death (3) A will duly executed is not to be treated as revoked, either wholly or in part by a will which is not forthcoming, unless it is proved by clear and satisfactory evidence that the will contained either words of revocation or dispositions so inconsistent with those of the earlier will that the two cannot stand together. It is not enough to show that the will, which is not forthcoming, differed from the earlier one if it cannot be shown in what the difference consisted. The burden of proof lies upon him who challenges the existing will (4) The burden of proof lies upon the person who sets up a will not upon the person who is prepared to impeach it. The defendant (widow and sister in law of a deceased taluqdar) set up a will under which they alleged they took all the property of the testator absolutely, where upon the plaintiffs the next reversioners sued for a declaration that the will was not genuine and that the alleged testator died intestate. *Held* that the *onus* was on the defendants, who set it up, to prove that the will was genuine and not on the plaintiffs who impeached it, to show that it was a forgery. The fact that the plaintiffs omitted to give any evidence that the will was forged though they asserted that "they would prove it to be spurious if necessary" raised no presumption of the genuineness of the will. Nor did the omission of the plaintiffs to cross-examine some witnesses called by the Court previously to hearing to explain the alleged loss and consequent non production of the will give rise to any presumption in favour of its validity. They were not bound to cross-examine the witnesses which they could not have done without permission of the Court but were perfectly justified in waiting until evidence in support of the will was produced at the trial (5) Nor can the Court assume that a document is proved because the opposing Counsel refuses to cross-examine on it, for he is entitled to wait till the Court has ruled as to the weight of the evidence in favour of it (6)

Where a testatrix executed a will written on two sheets of paper and tied by a string at the top of the left hand corner four or five years before her death and only one sheet of the will was found after her death which disposed by means of legacies of the bulk though not the whole of her property, and an application made for the grant of probate of that portion of the will, was opposed by the testatrix's heir. *Held* (per Maclean C J) that the presumption that the testator destroyed the second sheet of the will *animo revocandi* was a rebuttable one and that it had been rebutted in the case, "that probate could be granted of a portion of a will, and that where the contents of a lost will are not completely proved probate can be granted to the extent to which they are proved." *Held* (per Banerjee, J) that judging from the nature of the

(1) *Obhov Churn v. U. a. Churn* 1 C. L. R. 362 (1877)

(2) *Shib Sabitri Prasad v. Collector of Meerut* (1906) 29 A. 87

(3) *Anwar Hossein v. Secretary of State* 31 C. 885 (1904) s. c. 8 C. W. N. 821

(4) *Salib Mirza v. Umda Khanum* 19 C. 444 (1892) s. c. 19 I. A. 33 *Cutts*

v. Gilbert 9 Moo. P. C. 131 (1854)

Hitchins v. Basset 3 Mod. 203 *Show Par Cas* 146 *Goodright v. Harwood* Wm. Black 937

(5) *Sukh Dev v. Kedar Nath* 21 A. 405 (1901) s. c. 3 C. W. N. 275

(6) *Jarat Kunwar Dassi v. Illustrious Dutt* (1911) 39 C. 245

document as it stood when complete, as deposed to by the witnesses examined in the case, and judging from the nature and appearance of the part that had been preserved, the fact of a part being wanting raised no presumption of the destruction or mutilation of the will with intent to revoke it (1) In an English case it was held that the Court will not order the insertion in the probate of words actually missing from a torn will, but the practice to be followed in such a case, where satisfactory oral proof of the missing words is given, is to annex to the probate a document showing what the words were (2)

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after the taki
it was held t
swallowing of poison rested on the party impugning the will (3) Upon a petition, under section 231 of the Succession Act, for revocation of probate on the ground that citation had not been published and that the petitioner, being a minor under the care of the person who obtained probate had no opportunity of understanding his *malâ fides* and improper acts, and that the will was a forgery, it was held that the petitioner should be allowed an opportunity of proving that she had no knowledge of the previous proceedings and if she succeeded there should be a new trial as to the *factum* of the will which the person propounding would have to prove in the ordinary way (4) The fact that the attesting witnesses of a will were the servants or dependants of a Hindu testator raised no presumption against its execution (5) The mere fact of an attesting witness to a will repudiating his signature does not invalidate a will if it can be proved by the evidence of other witnesses of a reliable character that he has given false evidence (6) And it has been held in England that when a party is compelled to call the attesting witness to a will or codicil he may cross examine him, as the latter is not the witness of either party but of the Court (7) When a will has been proved summarily, proof in solemn form *per testes* will not as a rule be required on the application of a person who had had notice or had been aware of the previous proceedings before the grant of probate issued and had then abstained from coming forward (8) Mere omission to serve a special citation would not by itself be sufficient ground for revoking the grant, if it is shown that the person on whom the citation ought to have been served had knowledge of the application for probate *The onus* of proving that he had such knowledge rests on the party who alleges it (9) Where a deed of gift or will confers an estate upon a named person because he fills, or by reason of his filling, a certain character, he is entitled to recover the estate without affirmatively proving that he fills such character *The onus* of proving that he does not fill the character which is the reason of the gift lies upon those who dispute his claim (10) The Hindu Transfers and Bequests Act (Madras Act I of 1914) is retrospective in its operation (11)

(1) *Kedarnath Mitter v. Sreemutti Sorojini* 3 C W N 617 (1899)

(2) *Gill v. Gill* (1909) P 157

(3) *Ma-har Husen v. Bodha Babi* 21 A 91

(4) *Dintaras v. Debi v. Doibo Cl under* 8 C 880 (1882)

(5) *Jagrani Kunwar v. Durga Prasad* P C 36 A 93 (1914) 41 I A 76

See *Chotey Naran Singh v. Ratan Koer* P C 22 C 519 (1894) 22 I A 12

(6) *Nobo Kishore v. Joy Doorga* 22 W R 189 (1874) See as to attestation ss 68—72 post

(7) *Jones v. Jones* (1908) Times L R v 24 p 839

(8) *Brinda Choudhrai v. Radhika Choudhrai* 11 C 492 (1885) As to the onus of proof see *Kali Das v. Ishan Chandra* 31 C 914 (1904) The Privy Council did not however decide the point as it decided the case on the evidence

(9) *Pre v. Chand v. Surendra Nath* 9 C W N 290 (1904)

(10) *Rango Balaji v. Mudiyappa* 23 B 296 304 (1898), per Farran C. J.

(11) *Muttiswamy Ayyar v. Kaljani Ammal* 40 M 818 (1917)

105 When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances

Burden of proving that case of accused comes within exceptions

Illustrations

(a) A, accused of murder alleges that by reason of unsoundness of mind he did not know the nature of the act

The burden of proof is on A

(b) A, accused of murder alleges that by grave and sudden provocation he was deprived of the power of self control

The burden of proof is on A

(c) Section 325 of the Indian Penal Code provides that whoever except in the case provided for by section 335 voluntarily causes grievous hurt shall be subject to certain punishments.

A is charged with voluntarily causing grievous hurt under section 325

The burden of proving the circumstances bringing the case under section 335 lies on A

Principle.—See Notes *post*

s 101 (*Burden of proof*) s 3 (*Court*) s 4 ('*Shall presume.*')
Field Ev 6th Ed 337—338

COMMENTARY.

trials
charg
state

presumption The result is the same in both cases (2) This section is an application and perhaps in some cases an extension of the principle contained in section 103 *ante* This section effected an alteration in the law which required the prosecution previous to its enactment to prove the absence of

in any part of the Penal Code or in any law defining the offence (5) With

(1) *v. ante* ss 101—104 *sub voc*
Criminal Law See *Yusuf Husain v*
Emperor 40 A 284 s c 19 Cr L J
371 According to English law the prosecution must negative any exception favourable to the defendant which is engrafted in the statutory definition of the offence
R v Audley 1907 1 K B 383 *Roberts v Himplreys* L R 8 K B 483 *R v James* (1902) 1 K B 540

(2) Markby Ev 81

(3) Field Ev 6th Ed 337 338 *see*
Act XXV of 1861 ss 235 236 237

The Evidence Act expressly repealed (*see* Schedule) s 237 and the whole of the Act was subsequently repealed by Act X of 1872 (*See* s 439 of Act X of 1872

and s 221 the corresponding section of the present Code Act V of 1898)

(4) Before passing of Act X of 1882 it was doubted whether Act XVIII of 1862 ss 26 and 27 were overridden by the present section [In *re Shiba Prosad* 4 C 124 127 (1878)] The latter Act applied only to the High Court in its Original Criminal Jurisdiction *Sealy v Rannarain Bose* 4 W R Cr, 22 (1865) The doubt is however now solved as Act X of 1882 repealed so much of Act XVIII of 1862 as had not been previously repealed

(5) In *re Shiba Prosad* 4 C 124 (1878) s c 3 C. L. R., 122

reference to the words "shall presume," see fourth section. So it is for those who raise the plea of private defence to prove it. The act charged moreover cannot be denied and the plea of private defence raised as an alternative. If raised, a full account of the occurrence must be given in evidence (1). So also the burden of proving the loss of self control (2), exemption from criminal responsibility by reason of unsoundness of mind (3), good faith (4), the acceptance of risk by the person injured (5), and the like, lies upon the accused. But it is not necessary for the accused to plead the existence of circumstances bringing his case within an exception, and the burden of proof which is upon him can be discharged by the evidence of witnesses for the prosecution as well as by evidence for the defence. An accused is clearly entitled to claim an acquittal if on the evidence for the prosecution it is shown he has committed no offence (6). When evidence has been given in support of an exception the burden of proof is discharged if the evidence is believed and the jury have only to decide the question of fact on the evidence. The section is not applicable to such a case (7).

Burden of proving fact especially within knowledge

106. When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

Illustrations

(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him (8).

(b) A is charged with travelling on a Railway without a ticket.

The burden of proving that he had a ticket is on him.

Principle—The capacity of parties to give evidence may affect the burden of proof. A person will not be forced to show a thing which lies not within his knowledge (9).

s 3 ('Fact')

s 101 (Burden of proof)

Taylor, Ev §§ 376 & 377. Wharton Ev, § 367, Powell Ev 9th Ed 157. Best Ev, §§ 274—276.

COMMENTARY.

Facts especially within the knowledge of a party

As already observed (10), the first exception to the general rule that the burden of proof rests with the party who asserts the substantial affirmative is that it does not apply where there is a *prima facie* presumption one way or other. This exception is the subject matter of sections 107—114, post.

(1) In re Ja'sher Sirdar 1 C L R 62 65 (1877). In re Kali Churn 11 C L R 232 (1882). Asiruddin Ahmed v R 8 C W N 714 (1904).

(2) R v Devi Govindji 20 B 215 223 (1895). R v Sheik Choollye 4 W R Cr 35 (1865).

(3) R v Kader Nasir 23 C 604 607 (1896). R v Niaz, Ali A W N (1905) p 2.

(4) R v Balkrishna Vithal 17 B 573 577 579 (1893). R v Dhun Singh, 6 A 220 222 (1884). Ramasami v Lokananda 9 M 387 (1885). Sukaroo Kobiraj v R 14 C 566 (1887). In re Shiba Prasad 4 C 124 (1878). R v Gurja Shankar Kashirani 15 B 286 (1890). R v Slater 15 B 351 (1890) and as

to what constitutes absence in good faith within the meaning of Act XXV of 1867 section 7 see R v Phanendra Nath Mitter (1908) 35 C 945.

(5) Sukaroo Kobiraj v R 14 C 566 568 569 (1887).

(6) In re Kali Churn 11 C L R 232 (1882). Where however the plea is taken for the first time on appeal cf R v Tirumal 21 A 122 (1898).

(7) Muhammad Yunus v Emperor 50 C 318.

(8) See Deputy Legal Remembrancer v Karuna Boistobin 22 C 164 174 (1894).

(9) Best Ev § 274.

(10) s 101 Intro to Cl XII.

The second exception to the above named general rule is stated by the present section vi that where the subject matter of the allegation *lies pecu* must prove it whether
ven though there be a

So in England under the old law in an action for penalties against a person for practicing as an apothecary without a certificate⁽²⁾ as the defendant was peculiarly cognizant of the fact whether or not he had obtained a certificate about producing it the law com for the principle in question the negative for two reasons *first* as essential to his case and *secondly* to rebut the presumption of innocence and in accordance with the principle under consideration it is for him to do so and not for the plaintiff to prove its non existence⁽³⁾ In a suit against a zemindar to reverse the sale of a *patu* tenure held under Regulation VIII of 1819 on the ground of non service of notice the *onus* of proving service lies on the defendant according to the terms of this section⁽⁴⁾ Where a horse was delivered to a defendant in a sound state but when returned was found to be rounded it was held that it was for the defendant to show how the horse which was perfectly sound when taken out was foundered when returned⁽⁵⁾ Sales of consignments entrusted to commission agents and particulars of those sales are matters which lie specially within their knowledge and every contract

extent under the former but objected that one or two plots occupied by him it
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it was held that the *onus* of proving that they were not part of the assets of

(1) Taylor Ev § 367 A *Dickson v Evans* 6 T R 80 3 R R 119 R v *Thur* 2 C & K 732 but see the observations of Alderson B in *Elkin v Johnson* 3 M & W 655 14 L J Ex 20 9 Jur 353 67 266 suggesting that the use only refers to the *negligence* of the defence but that there should be some evidence to start the presumption and cast the onus on the other side These observations are referred to in *Pooln Belaree v IVaso & Co* 9 W R 197 (1868) Though there might be or to this Act I have been said to have been some doubt upon the subject see *Pooln Belaree v Watso & Co* supra *Gridhar Hari v Kal Kant* 13 B L R 161 165 (1869) the rule have been in India as now that stated in the text and in Taylor Ev § 376 A Wharton Ev § 367 Powell Ev 9th Ed 16 As to extent of this section see observations in *Mulanned Inayat v Mahamed Kara atullah* 12 A 312 (1889) The applicability of the rule and the extent to which it should be carried is a question of considerable difficulty

see Best Ev §§ 274—276

(2) Under 55 Geo 3 C 194 (The Apothecaries Act 1815) see now 21 & 22 V c C 90 § 40

(3) Taylor Ev § 376 A *Apoti Co v Bentley Ry & M* 159 1 C & P 538

(4) *Doorga Ch Synd Najunooddeen* 21 W R 397 (1874) see also *Hirro Doyal v Mahomed Gail* 19 C 699 (1891)

(5) *Collins v Bennett* 46 N Y Rep (Amer) That is a case which probably would come under s 106 of the Evidence Act per Edge C J in *Sifelds v IVlkenson* 9 A 406 (1887)

(6) *Majon Alston* 16 M 238 245 (1892) as to account sales being *prima facie* evidence see *Barlow v Chuni Lal* 28 C 209 (1900)

(7) *Da d M Bruce Mg Kjaaw Zn* 45 I C 877

(8) *Ra i Coor ar v Beejoy Gorn d W R* 53 (1867) distinguished in *Gridhar Hari v Kal Kant* 13 B L R. A. C. 161 (1869)

the zemindari who was for land which he ousted by the defendant, who had become *putndar* by purchase at a sale held 819, it was held that though, according to upon the defendant to show that the land the plaintiff by reason of his having been a special means of knowledge and was in a rent-paying lands, the burden of proof lay upon him in the first place to show that the disputed land was not within this area (2) When the sons of a living father bring a suit against a creditor to get rid of a charge on the ancestral estate created by him, on the ground of his alleged misconduct in extravagant waste of the estate, the antecedents of their father's career being more likely to be in the knowledge of the sons, members of the same family, than of a stranger, the *onus* of disproving the charge may properly be placed upon them (3) Under this section the *onus* of proving the value of "circumstances and property within the municipality," under the Bengal Municipality Act section 85, is on the municipality as a fact especially within its knowledge (4) Where goods are booked by a Railway Company by through ticket, proof that the damage occurred off the defendants' line is upon them (5)

In *Agarwal v. State of N.W.P.* (VII of 1931) by a 209, not only for the profits which the latter has actually collected, but for those which through gross negligence or misconduct he has omitted to collect, the burden of proving such negligence or misconduct rests in the first instance on the plaintiff. No general rule can be laid down as to the quantum of evidence which the plaintiff in such a case must give in order to shift the burden of proof on to the defendant. The mere production by the plaintiff of the *jama bandi* or rent roll is not sufficient to cast upon the defendant the necessity of proving that there was no negligence or misconduct in him. Section 106 of the Evidence Act does not apply to such a case (6)

This second exception also prevails in all civil or criminal proceedings instituted against parties for doing acts which they are not permitted to do unless duly qualified. It holds good, and compels the defendant to produce the necessary license or authority (as the case may be) in proceedings for selling liquors, improperly exercising a trade or profession, and the like, in actions for penalties against the proprietor of a theatre for performing dramatic pieces without the written consent of the author, in proceedings for misprision of treason, where if the treason be proved, and the knowledge of it be traced to the prisoner, he is in strictness bound to negative the averment of concealment by offering proof of a discovery on his part (7) So if, notwithstanding the act the accused was by the character it. And it being

further argued that though the facts might go to show that the intention was

(1) *Sri Raja Parthasarathy Appa Row Bahadur v. Secretary of State*, 38 M. 620 (1915), see *Secretary of State v. Kirtibas Bhupati Harichandra Mahapatra* 42 C. 710 (1915) (*onus*, right to resume).
 (2) *Nubo Kissen v. Promotionath Ghose* 5 W R. 148 (1866), distinguished in *Girdhar Hari v. Kals Kant*, 13 B L R. A. C. 161 (1869).
 (3) *Hunoomanpershad Panday v. Musamat Koonvereer*, 6 M I A. 418, 419

(1856)

(4) *Deb Narain Dutt v. Chairman Baraspore Municipality* 41 C. 168 (1914)

(5) *Mahony v. Waterford Ry.* (1900), 2 I R. 273, *Kent v. Midland Ry.*, L. R. 10 Q B. 1

(6) *Muhammed Inyat v. Muhammed Karamutullah*, 12 A. 301 (1899) See now N W P Act II of 1901

(7) *Taylor, Ev.*, § 377 and cases there cited

that the girls should be employed for the purpose of prostitution still they did not sufficiently show that the employment intended was to be before the completion of the sixteenth year by the girls, it was held that under this section it lay upon the accused to prove that she intended to put off the employment until the completion of the sixteenth year (1) Where several persons were found at 11 o'clock at night on a road just outside the city of Agra, all carrying arms (guns and swords) concealed under their clothes, and none of them could give any explanation of his presence at the spot under the particular circumstances and at that period the District of Agra was notorious as the scene of frequent and recent dacoities, it was held that the circumstances justified the inference that the burden of proving the contrary rested in a case where the question is whether the burden

or proving the truth of the character of the act inasmuch as the latter (3) An accused is always entitled to be silent but where the only alternative theory as to his guilt is a remote possibility, which if correct he is in a position to explain the absence of any explanation must be considered in determining whether the possibility should be disregarded or taken into account (4)

When an instrument on its production appears to have been altered, it is a general rule that the party offering it in evidence must explain this appearance, if he be called upon to do so by the issue raised, and if the instrument be not admitted by his opponent under notice, because as every alteration on the face of a written instrument renders it suspicious, it is only reasonable that the party claiming under it should remove the suspicion (5) It is not, however, on every occasion of a party tendering an instrument in evidence that he is bound to explain any material alteration that appears upon its face, but only

(1) *Deputy Legal Remembrancer v Karuna Bostobi* 27 C 164 175 (1894), see *R v Papar Sani* 23 M 159 (1899) See as to the application of this section in criminal cases *Balmakund Ram v Ghaisam Ram* 22 C 400 *arguendo*

(2) *R v Bholu* 23 A 124 (1900) Cf *Sellamithu Servaigaram v Pallamuthu Karuppan* 35 M 186 (1912) *R v Mulla* 37 A 395 (1912) *R v Ghaya Bhar* 38 A 517 (1916)

(3) *David Bruce v Mg Kjaw Zin* 45 I C 822

(4) *Smith v Funder* 19 Cr L J 189 s c 43 I C 605

(5) *Taylor Ev* § 1819 *Petaibar Mankjee v Mootechand Mankjee* 1 M I A 420 479 (1837) S W R, P C 53 *Muddon Mohun v Sofuna Beica Sutherland's Mofussil Small Cause Court References* 69 (1864) *Mussamat Khoob v Moodnaram Singh* 9 M I A 1 17 (1861) I W R P C 36 There may however be corroborative proof strong enough to rebut the presumption which arises against an apparent and presumable falsifier of evidence s 17 As to material alterations in instruments being fatal to their validity see *Taylor Ev*, §§ 1819—1840 The rule of English law that a material alteration of a document by a party to it after its execution without

the consent of the other party renders it void is in force in India *Atmaram v Umedram* 25 B 616 (1901) [distinguished in *Gulamali v Miyabhai* 3 Bom L R, 574 (1901) in which it was held that where a written acknowledgment has its date altered oral evidence to prove that date is inadmissible under para 2 of s 19 of the Limitation Act] See also *Gogun Chunder v Dhuronidhur Mundul* 7 C 616 (1881) s c 9 C L R 257 *Ganga Ram v Chandan Singh* 4 A 62 (1881), *Sitaram Krishna v Daji Devaji* 7 B, 418 (1883) [dissented from in *Mohesh Chunder v Karami Amari* 12 C 313 (1885)], *Oodj Chund v Bhaskar Jeggannath* 6 B, 371 (1881) *Christachari v Kasibasaaya*, 9 M 399 (1885) F B *Gobindasami v Kuppusami* 12 M 239 (1889) *Paramma v Ramachandra* 7 M 302 (1883) The rule does not apply to documents which are not the foundation of a plaintiff's claim but are merely evidence of a defendant's pre-existing liability A written acknowledgment of his liability by a debtor, which is intended merely to save the bar of limitation and not to give a right of action is not within the rule *Atmaram v Umedram* 25 B, 616 (1901), referred to and distinguished in *Sayad Gulamali v Miyabhai* 26 B, 128 (1901) An immaterial alteration does not avoid the

on those occasions when he is seeking to enforce such instrument (1). The instrument may be interest under it, but nevertheless admissible follows that a deed is not rendered inadmissible by alteration if it be produced merely as proof of some right or title created by or resulting from its having been executed (3). Nor does the rule of law which requires the party tendering in evidence an altered instrument to explain its appearance, apply to ancient documents coming from the right custody merely because they are in a mutilated or imperfect state. It is sufficient that the instrument is produced in the same state in which it was actually found. The weight, however, due to such a document may be affected (4). The addition in a mortgage of a claim for payment of compound interest is a material alteration, and the burden lies on the purchaser of the equity of redemption to prove that it was made after execution and without the consent of the executor (5). Where unattested alterations occur in a will, the presumption of law is that such alterations were made after the execution of the will and in the absence of evidence rebutting the presumption, probate will be granted of the will in the original state omitting the alterations (6).

Where a written acknowledgment bears a date which has been altered, oral evidence to prove the date is inadmissible under the nineteenth section second paragraph, of the Indian Limitation Act, 1877 (7).

107. When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.

108. [Provided that when] (8) the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is [shifted to] (9) the person who affirms it.

Principle—The presumption in favour of continuance. See Notes post.

s 101 (Burden of proof)

Taylor, Fr., §§ 196, 198—201, Best, Ev., §§ 408, 409, Wharton Ev. §§ 127a—1⁷ 7
Lawson on Presumptive Evidence, p 192, et seq

instrument *Tikamdas Javahirdas v Gunga kom Mathuradas* 11 Bom H C R 203 (1873) *Ede v Kanto Nath* 3 C 220 (1877) unless made fraudulently *Kalee Koomar v Gunga Narain* 10 W R 250 (1868) And a material alteration made after execution does not vitiate a deed if it be made with the consent of all the parties *Isac Mohammed v Bas Fatma* 10 B 487 (1886) Or in good faith to carry out the original intention of the parties *Ananda Mohan Saha v Ananda Chandra Naha* 44 C, 154 (1917) See *Gour Chandra Das v Prasanna Kumar Chandra* 33 C 812 (1906)

(1) Taylor Ev. § 1824 and cases there cited

(2) *Hutchins v Scott* 2 M & W 816
(3) Taylor Ev. § 1826 as to alterations by a stranger and without the privity of either party, see ib. §§ 1827—1829

(4) *Id* § 1838
(5) *Achhi tanand v Ram Nath* 18 C L J 354 (1913)

(6) *Surendra Krishna Maidal v Ramee Dassee* 33 C L J 34 (1921)

(7) *Sayad Gulannli v Mirabha* 16 B 128 (1901)

(8) The words in brackets in s 108 were substituted for the original word 'when' by Act XVIII of 1872 s 9

(9) The words in brackets were substituted for 'on' by s 9 of Act XVIII of 1872

Burden of proving death of person known to have been alive within thirty years

Burden of proving that person is alive who has not been heard of for seven years

COMMENTARY.

There is a presumption in favour of continuance of life (1) This section, according to its terms, does not require that the Court should hold the person dead at the expiration of the seven years therein indicated, but merely provides that the burden of proving that he is alive at the time of the suit is shifted to the person who affirms it (2)

"Various *prima facie* legal presumptions are founded on the continuance or immutability, for a longer or shorter period, of human affair, which experience tells us usually occurs. So when the existence of a person or personal relation, or a state of things is once proved, the law presumes that the person, relation or state of things continues to exist till the contrary is shown, or till a different presumption is raised from the nature of the subject" (3) So, apart from the present sections and that which follows them, the Act declares generally that the Court may presume that a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or state of things usually cease to exist, is still in existence (4)

These sections and the following section deal with certain instances of the presumption which exists in favour of continuance of immutability. It is on the principle of this presumption that a person shown to have been once living is, in the absence of proof that he has not been heard of within the last seven years presumed to be still alive (5). These sections establish a uniform rule upon their subject matter, both for Hindus and Mahomedans as well as all others. According to Hindu law twelve years must have elapsed before an absent person of whom nothing has been heard during this period can be presumed to be dead (6). In the case of Mahomedan law the old Hanafi doctrine required that ninety years should have elapsed from the date of the birth of missing person before his death could be presumed. The Maliki principle is now however, in force among the Hanafis, namely, that if a person be unheard of for four years he is to be presumed to be dead. Among the Shiah's the period is ten years, and among the Shafes seven (7). Now however, the rule contained in these sections, being a rule of evidence only, governs both Hindus (8) and Mahomedans (9). Although, however, a person who has not been heard of for seven years is presumed to be dead, there is no presumption as to the time of his death, and if any one seeks to establish the precise period at which such person died, he must do so by actual evidence. The question for which provision is made is whether a man is alive or dead at the time the question is raised (10). The rule is the same whether

(1) *Tanti v Rikhran*, 1 Lahore 554

(2) *Narayan Bhagwant v Srinivas Trimbak* 8 Bom L R 226

(3) Taylor Ev § 196 Best Pres Ev 186

(4) S 114 III (d) post

(5) Taylor Ev § 198 see s 114 III (d) post

(6) *Jamajoy Mazumdar v Keshab Lal* 2 B L R A C 134 (1868) 6 B L R App 16

(7) *Hedaya* Bk xiii N W P Rep 191 Ameer Ali's Mahomedan Law, ii 129

(8) *Dharup Nath v Gobind Saran* 8 A 614 (1886) *Dhondo Bhikaji v Ganesh Bhikaji* 11 B 433 (1886), *Balayya v Kistnaappa* 11 M 448 (1888), see also *Hari Chintaman v Moro Lakshman* 11 B, 89 (1886)

(9) *Mazhar Ali v Budh Singh* 7 A,

297

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But see observations in notes to s 112 post Evidence of Parents"

(10) *Fani Bhusan Banerji v Surjya Kanta Row Choudry* (1907), 35 C, 25; 11 C W N, 833, *Dharup Nath v Gobind Saran*, 8 A, 614 (1884), *Rango Balaji v Mudisappa* 23 B, 296 (1898), Taylor, Ev § 200 In re *Perton*, 53 L T R, 707, 710 In re *Phene's Trusts*, L R, 5 Ch App, 139, *Narki v Lal Sahu* (1909), 37 C, 103, *Murari Fatima v Abdul Wahid*, 43 A, 673 (1921), s c, 19 All L J 713, *Basharat v Najib Khan* 38 P R 1918, s c, 45 I C, 70, *Faqir Baksh v Dan Bahadur Singh*, 21 O C, 143, S

only seven years, or more than seven years, have elapsed.(1) And if a person has not been heard of for a long time, it is presumed that he is dead.

determined by the Court. But as the presumption is in favour of the continuance of life, the *onus* of proving the death lies on the party who asserts it (3). The fact of death may, however, be proved by presumptive as well as by direct evidence. So the presumption of the continuance of life ceases at the expiration of seven years from the period when the person in question was last heard of. And the burden of proving that the person was alive at any time within the seven years is upon the person asserting it (4). But a Court may find the fact of death from the lapse of a shorter period than seven years, if other circumstances concur (5). In England it has been held that the Court will in particular circumstances modify the usual form of oath, and that in Chancery there is no presumption of death without issue, for the latter point must be proved (6). In a recent case where the *onus* was on the plaintiff to show affirmatively that he had brought the suit within twelve years of a death, it was held that the *onus* was not affected by this section (7).

Burden of proof as to relation-ship in the cases of partners, landlord and tenant principal and agent

109 When the question is whether persons are partners, landlord and tenant, or principal and agent, and it has been shown that they have been acting as such, the burden of proving that they do not stand, or have ceased to stand, to each other in those relationships respectively, is on the person who affirms it.

Principle.—The presumption relating to continuance—see Notes, *post*. When a juridical relation is once established, it is enough generally for a party relying on such relation to show its establishment, and the burden is then on the opposite party to show that the relation has ceased to exist (8).

s. 101 (*Burden of proof*)

Taylor Fv., § 196, Best, Ev., § 405, Wharton, Ev., §§ 1284—1296. Lawson on Presumptive Evidence, 172, 175, *et seq*.

COMMENTARY.

Continuance of partnership, tenancy and agency

This section, which confirms the previous section, applies to three common and important relations, namely, partnership, landlord and tenant, and principal and agent—those which have been referred to in the notes to the preceding sections, based on the continuance of the relation.

C 46 I C, 808, *Rekhab v Sheoba*; 21 A L J 393.

(1) *See* *Re Sheoba*.

Settled.

(2) *See* *Re Sheoba*.

(1911) *See* *Sheoba*.

nath D.

11 C.

Akbar v. Sheoba, 11 C. 486 of 1909, and see *Veeramma v Chenna Reddi*, 37 M. 440 (1914).

(3) *Re Benjamin* (1902) 1 Ch. 723.

(4) Best Ev., §§ 408, 409, as to the presumption of survivorship *vide* § 410; and p 160 note (11), *ante*. See Wharton, Ev., §§ 1275—1277. In Lawson on Pre-

sumptive Evidence, p 192, the rule with regard to the presumption of life is thus summarised—'Love of life is presumed (therefore suicide will not be presumed) and a person proved to have been alive at a former time is presumed to be alive at the present time until his death is proved or a presumption of death arises'.

(5) *Re Walker* (1909), p 115.

(6) *In re Jackson* *Jackson v Ward* (1907), 2 Ch. 354.

(7) *Jagannath Jivanrao v Ram Chandra Narayan* 40 B. 239 (1916).

(8) Wharton Ev., § 1284. Lawson on Presumptive Evidence 172.

(9) *Rungo Lal v Abdool Guffoor* 4 C. 314 317 (1878).

human affairs in the state in which they are once shown to be. When, therefore, the existence of a relationship or state of things is once proved, the law presumes that it continues till the contrary is shown or some other presumption arises. A partnership(1), agency(2), tenancy(3), or other similar relation, once shown to exist is presumed to continue, till it is proved to have been dissolved (4). So when a partnership was admitted to exist in 1816, it was presumed to continue in 1838 (5). From the same presumption of a continuance of things once shown to exist, it follows that, after the expiration of the term limited by the articles, it is *prima facie* presumed that such of the provisions of the articles as are not inconsistent with a partnership at will continue to apply (6). This presumption has been made the subject of positive enactment by section 256 of the Contract Act (7). This presumption will be rebutted and a contrary one raised if it is shown that annual accounts between partners ceased on a certain date and a final one was thus struck, after which some of the partners carried on the business without interference from the others (8). As to agency, see sections 182—238 of the same Act, and in particular section 206, which deals with notice of revocation or renunciation and section 208, which deals with the taking effect, as to the agent and third persons, of the termination of an agent's authority (9). From the same presumption when a tenant holds over after the expiration of the term, he impliedly holds subject to all the covenants in the lease which are applicable to his new situation (10). In a case in the Calcutta High Court it was held that an agreement that a tenant shall hold over from year to year is an agreement to grant a lease from year to year and should be by a registered instrument, and that "an agreement to the contrary" in section 10 of the Transfer of Property Act means an agreement as to the terms of the holding over and may be implied (11). Where two persons set up rival claims to the tenancy of the same piece of land under the same landlord, and one of them admitted the previous tenancy of the other, who, he pleaded had relinquished the land, which was upon that lease, to himself it was held that it lay upon him to prove the relinquishment of the relationship of landlord and tenant on non payment of rent, though for many years the relationship has ceased, and a tenant who is sued for rent and contends that such relationship has ceased is bound to prove that fact by some affirmative proof and more especially is he so bound when he does not expressly deny that he still continues to hold the land in question in the suit (13). The principle upon which this section is based

(1) See *Clark v Alexander* 8 Scott N R, 161

(2) See *Smout v Ilbery* 10 M & W 1 [continuance of authority of agent]

(3) See *Picket v Packha* 1 L R 4 Ch App 190

(4) *Taylor Ev* § 196

(5) *Clark v Alexander* 8 Scott N R 161 and see *Anderson v Clay* 1 Stark. 405 and *Cooper v Dedrick* 22 Barb 516 (Amer) cited in *Lawson's Presumptive Evidence* p 175. In the last case a partner brought an action on a note. It was contended that the plaintiffs were not partners. It was proved that three years previous they were partners. It was held that the presumption was they continued to be so.

(6) *Taylor Ev* § 196 and cases there cited

(7) See also §§ 339—366 s 264 deals with notice of dissolution

(8) *Joopooddy Sarajya v Lakshmanaswamy* P C 36 M 185 (1913)

(9) For burden of proof in revocation of agency see *Dasarath Patel v Brojo Mohon* 18 C L J 621 (1913)

(10) *Taylor Ev* § 196 see Act IV of 1882 (Transfer of Property) s 116

(11) *Mati Lal Karnan v Darjeeling Municipality* 17 C L J 167 (1913)

(12) *Kissen Chunder v Hookoom Chand* W R 1864 p 47

(13) *Rungo Lall v Abdool Guffoor* 4 C 314 (1878) see also *Parbatti Dass v Ram Chand* 3 C L R 576 (1879). But when there is no proof there is no presumption of tenancy see *Mati Lal Karnan v Darjeeling Municipality* 17 C L J, 167 (1913)

only seven years, or more than seven years, have elapsed. (1) And if a person has not been heard of for more than seven years, there is in this country no presumption that he was dead at the end of the first seven years of the period. (2) There is no presumption of law relative to the continuance of life in the abstract. The death of any party once shown to have been alive is a matter of fact to be determined by the Court. But as to the continuance of life, the *onus* of proving the fact of death may, however, be in evidence. So the presumption of the continuance of life ceases at the expiration of seven years from the period when the person in question was last heard of. And the burden of proving that the person was alive at any time within the seven years is upon the person asserting it. (4) But a Court may find the fact of death from the lapse of a shorter period than seven years if other circumstances concur. (5) In England it has been held that the Court will in particular circumstances modify the usual form of oath, and that in Chancery there is no presumption of death without issue, for the latter point must be proved. (6) In a recent case where the *onus* was on the plaintiff to show affirmatively that he had brought the suit within twelve years of a death, it was held that the *onus* was not affected by this section. (7)

Burden of proof as to relationship in the cases of partners, landlord and tenant, principal and agent

109 When the question is whether persons are partner, landlord and tenant, or principal and agent, and it has been shown that they have been acting as such, the burden of proving that they do not stand, or have ceased to stand, to each other in those relationships respectively, is on the person who affirms it.

Principle.—The presumption relating to continuance see Notes p. 109. When a juridical relation is once established, it is enough generally for a party relying on such relation to show its establishment, and the burden is then on the opposite party to show that the relation has ceased to exist. (8)

s 101 (Burden of proof)

Taylor Fr., § 196, Best, Fr., § 405, Wharton, Ev., §§ 1234—1296. Lawton v. Presumptive Evidence 172 175, et seq.

COMMENTARY.

Continuance of partnership tenancy and agency

This section, which confirms the previous law upon the subject, (9) merely applies to three common and important relationships—partnership, landlord and tenant, and principal and agent—the general presumption already adverted to in the notes to the preceding sections, based on the continuance of

C 46 I C 808 *Rekhab v. Sheobai* 21 A L J 393

(1) *Nepean v. Doe* 2 Sm L C *Green's Settlements* (in re) L R, 1 Eq 288

(2) *Muhammed Sharif v. Bande Ali* (1911) 34 A 36 (followed in *Rekhab v. Sheobai* 21 A L J 393) following *Srinath Das v. Probodh Chandra Das* (1910) 11 C L J 580 dissenting from *Mushtakbar-un-nissa v. Syed Bashir Ali* S A No 486 of 1909 and see *Veeramma v. Chenna Reddi* 37 M 440 (1914)

(3) *Re Benjamin* (1902) 1 Ch 723

(4) Best Ev. §§ 408 409 as to the presumption of survivorship v. ib., § 410, and p 160 note (11) ante. See Wharton, Ev. §§ 1275—1277. In Lawson on Pre-

sumptive Evidence p 192 the rule will regard to the presumption of life is thus summarised—Love of life is presumed (therefore suicide will not be presumed) and a person proved to have been alive at a former time is presumed to be alive at the present time until his death is proved or a presumption of death arises.

(5) *Re Walker* (1909) p 115

(6) In re *Jackson* *Jackson v. Her* (1907) 2 Ch 354

(7) *Jayant Jivanrao v. Rai Chandi Narayan* 40 B 239 (1916)

(8) Wharton Ev. § 1284. Lawton v. Presumptive Evidence 172

(9) *Rungo Lal v. Abdool Guffoor* 4 C 314 317 (1878)

human affairs in the state in which they are once shown to be. When there fore the existence of a relationship or state of things is once proved the law presumes that it continues till the contrary is shown or some other presumption arises. A partnership(1) agency(2) tenancy(3) or other similar relation once shown to exist is presumed to continue till it is proved to have been dissolved(4). So when a partnership was admitted to exist in 1816 it was presumed to continue in 1838 (5). From the same presumption of a continuance of things once shown to exist it follows that after the expiration of the term limited by the articles it is *prima facie* presumed that such of the provisions of the articles as are not inconsistent with a partnership at will continue to apply (6). This presumption has been made the subject of positive enactment by section 256 of the Contract Act (7). This presumption will be rebutted and a contrary one raised if it is shown that annual accounts between partners ceased on a certain date and a final one was thus struck after which some of the partners carried on the business without interference from the others (8). As to agency see sections 182—238 of the same Act and in particular section 206 which deals with notice of revocation or renunciation and section 208.

of the term to the agent and third persons
when a tenancy from the same presumption
subject to all the covenants in the lease which are applicable to his new situa-
tion (10). In a case in the Calcutta High Court it was held that an agreement
that a tenant shall hold over from year to year is an agreement to grant a
lease from year to year and should be by a registered instrument and that
an agreement to the contrary in section 10 of the Transfer of Property Act
means an agreement as to the terms of the holding over and may be implied (11).
Where two persons set up rival claims to the tenancy of the same piece of
land under the same landlord and one of them admitted the previous tenancy
of the other who he pleaded had relinquished the land which was upon
that lease to himself it was held that it lay upon him to prove the relinquish-
ment which he thus alleged (12). When the relationship of landlord and tenant
has once been proved to exist the mere non payment of rent though for many
years is not sufficient to show that the relationship has ceased and a tenant
who is sued for rent and contends that such relationship has ceased is bound
to prove that fact by some affirmative proof and more especially is he so
bound when he does not expressly deny that he still continues to hold the
land in question in the suit (13). The principle upon which this section is based

(1) See *Clark v Alexander* 8 Scott N R 161

(2) See *Smout v Ilbery* 10 M & W 1 [continuance of authority of agent]

(3) See *Pickett v Puckha* L R 4 Cl App 190

(4) Taylor Ev § 196

(5) *Clark v Alexander* 8 Scott N R 161 and see *Anderson v Clay* 1 Stark 405 and *Cooper v Dedrick* 29 Barb 516 (Amer) cited in Lawson's Presumptive Evidence p 175. In the last case a partner brought an action on a note. It was contended that the plaintiffs were not partners. It was proved that three years previous they were partners. It was held that the presumption was they continued to be so.

(6) Taylor Ev § 196 and cases there cited

(7) See also §§ 339—366 s 264 deals with notice of dissolution

(8) *Joopooddy Sarayya v Lakshma* as cited in P C 36 M 185 (1913)

(9) For burden of proof in revocation of agency see *Dasaiah Patel v Brojo Moho* 18 C L J 621 (1913)

(10) Taylor Ev § 196 see Act IV of 1887 (Transfer of Property) s 116

(11) *Maiti Lal Karnan v Darjeeling Municipality* 17 C L J 167 (1913)

(12) *Kissen Chunder v Hookoon Chand* W R 1864 p 47

(13) *Rango Lal v Abdool Guffoor* 4 C. 314 (1878) see also *Parbati Dassi v Ra Chand* 3 C. L R 576 (1879) But when there is no proof there is no presumption of tenancy see *Maiti Lal Karnan v Darjeeling Municipality* 17 C. L J. 167 (1913)

invalidate his decision on the point of possession, provided that there was evidence before him as to who was in possession. *Sembla*—In the absence of any other evidence of possession a Magistrate would be justified in finding possession to be with a person to whom symbolical possession has been shown to have been given in execution of a decree although possibly slight evidence would be sufficient to rebut such evidence of possession (1). It has been held that section 145 of the Criminal Procedure Code deals only with rights to absolute continuous possession and thus does not give jurisdiction when a party only claims the right to worship on one day of the year and prepare for the *pūja* (2). In this case it was said that constructive conditional possession is a right in the nature of an easement and not of possession and it was also held that jurisdiction is not given by that section when "the public is a party to proceedings for this includes both parties and the possession is joint. Under sub section 4 of that section (145) the Magistrate should on the day fixed take all the evidence produced and (unless he considers further evidence necessary) give his decision (3). A declaration made by a Magistrate on insufficient evidence when other evidence was available is without jurisdiction (4).

When a plaintiff sues for declaration of title to property of which the defendant is in possession but of which the plaintiff produces the title deeds in his favour and the defendant admits them the *onus* is on the latter to disprove the plaintiff's title (5).

When a plaintiff sued to recover possession of certain lands alleging that they had been granted by his ancestor to one *PR* to be held in *jajheer* tenure by *PR* and his lineal descendants, that *PR*'s lineal descendants had failed and therefore plaintiff was entitled to resume possession, it was held that it lay upon the plaintiff to prove the grant to *PR* in the first instance and that until he had done this he had no standing in Court at all (6).

The ordinary presumption is that possession goes with the title that presumption cannot, of course be of any avail in the presence of clear evidence to the contrary, but where there is strong evidence of possession on the part of one side opposed by evidence apparently strong also on the part of the other in such cases in estimating the weight due to the evidence on both sides the presumption may when the circumstances of the particular case require it be regarded (7). A presumption however cannot contradict facts or overcome facts proved (8). Thus as it is a recognized fact that permission to occupy land in Cantonments is often given such occupation or possession raises no presumption of ownership and the burden of proof of it would be on the claimant (9). In the absence of evidence to the contrary the presumption is that the Government and not the *mirashidars* are owners of house-sites in a *mirasi* village (10). Where under old customary law and section 37 of the Bombay Land Revenue Code the presumption arose that the title

(1) *Raja Babu v. Mudun Molan* 14 C 169 (1886). See Woodroffe's Criminal Procedure in India commentary to S 145 of that Code.

(2) *Manick Chandra Chakrabarty v. Preonath Kuar* 17 C L J 397 (1913).

(3) *Haripada Mundle v. Sanjay Charan Biswas* 17 C L J 610 (1913).

(4) *Juthan Singh v. Rannarayan Singh* 18 C W N 700 (1914).

(5) *Suarnamayi Raur v. Srinibash Koyal* 6 B L R 149 (1870).

(6) *Maharajah Juggernath v. Ahlad Kuar* 19 W R 140 (1873).

(7) *Ranjeet Ran v. Goburdhon Ram* 20 W R 25 30 (1873). *Dharm Singh v.*

Hur Pershad 12 C 35 (1885). *Mahomed Bassir v. Kureem Baksh* 11 W R 268 (1869). *Rajkumar Ray v. Gobind Chander* 19 C 660 673 (1891).

(8) Lawson Presumptive Evidence 576. Presumptions stand only till they are over come by facts. *Whitaker v. Morrison* 44 Am Dec 627 (Amer). They have no place for consideration when the evidence is disclosed or the averment is made. *Galpin v. Page* 18 Wall 364 (Amer) cited in Lawson loc cit.

(9) *Kaikhusru Aderji v. Secretary of State* P C 36 B 1 (1912).

(10) *Selachala Cletty v. Chinnasami* F B 40 M 410 (1917).

to a village site was vested in the government it was held that the plaintiff in order to oust the government had to prove either that his title was better than that of the Secretary of State or that he had obtained a title by adverse possession of sixty years (1). A rebuttable presumption of law being contested by proof of facts showing otherwise, which are denied the presumption loses its value, unless the evidence is equal on both sides, in which case it should turn the scale (2). It is, therefore, only when there is no evidence of possession either way, or when the evidence of possession is strong on both sides and apparently equally balanced, that the presumption that possession goes with title should prevail. The principle does not apply where the evidence of possession is equally unworthy of reliance on both sides (3). When it is not shown that defendant's possession began as a tenant, and it is not proved that the plaintiff received any rent from the defendant during twelve years

Ordinarily in the case of property held in common the possession of a co-sharer is the possession of all. In a case in which co sharers set up a title adverse to a co sharer, it lies upon them to show at what time their possession became adverse or that there was clear and definite abandonment with intention (5). Possession by one co sharer will not be adverse to others till they have notice of the hostile claim (6). When one co sharer has been in possession of land for a long time and has erected buildings on it the presumption is that he is in possession with the consent of the others (7). When the defendant to a suit for possession of land pleads adverse possession, it lies in the first instance upon the plaintiff to prove that he was in possession at some time within twelve years of the suit (8). But the *onus* is then on the defendant to show at what time his adverse possession began (9).

In the case of the owner of land seeking to recover possession on the allegation that the party in possession has no right to continue in it, and showing a *prima facie* title to possession, he can claim a decree, unless the party in possession has a tenure entitling him to retain possession (10). Thus in a suit to recover possession, the plaintiff, who was admittedly the *amundar*, alleged but failed to prove, that the land was her *zeerat*. The defendants, who claimed to have acquired rights of occupancy, failed to prove that they had acquired such rights or that they were tenants of the plaintiff. It was under such circumstances held that the plaintiff being admittedly the *zeimindar* was

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(1) *Vasta Balaant v Secretary of State* 45 B 789 (1921)

(2) *Lawson op cit* 756

(3) *Thakur Singh v Bhogeraj Singh*, 27 C 25 (1899) the last sentence (which is taken from the head note) is not expressly stated in but appears to be implied by the judgment. Apparently the evidence given negated the presumption otherwise the case put is similar to that where there is no evidence

(4) *Ram Monce v Alcemoodcen* 20 W R 374 (1873), see also *Raj Kishen v Pearce Mohun* 20 W R 421 (1873)

(5) *Behari v Sadho Mal* 73 P L R (1856), as to adverse possession by co

heirs see *Mangal Singh v Mussamat Shankari* 50 I C, 746

(6) *Velayuthan Pillai v Subbaraja Pillai* A C 39 M, 879 (1916)

(7) *Laksho Kuar v Mahabir Ticiari* 37 A 412 (1915)

(8) *Haji v Gohna* 39 P L R (1906)

(9) *Mashar Hasan v Behari Singh* (1905) A W N 234

(10) *Gunpat Rao v Gunpat Rao*, 2 N L R 32

(11) *Batai Ahir v Bhuggobutty Koor*, 11 C L R 476 (1882), and see *Varsing Narain v Dharam Thakur*, 9 C W N, 144 (1904)

entitled to an interest in the tenure (1) And in the undermentioned case it is held by the Privy Council that while it is for the plaintiff in ejectment to prove possession prior to alleged dispossession at the same time on this question of evidence the material fact of his title comes to his aid with greater or less force according to the circumstances established in evidence (2) In a suit for a declaration that the bed of a navigable river formed part of a permanently settled estate the *onus* was laid on the plaintiffs to show that lands the bed of the river receding from the bed were included in their permanently settled estate and that at the date of the Permanent Settlement they were narrow channels (3)

Orders for possession under Act XXV of 1861 section 318 Act V of 1872 section 530 and V of 1882 section 145 relating to disputes as to immovable property are merely police orders made to prevent breaches of the peace and decide no question of title Such orders are admissible in evidence on general principles as well as under the Evidence Act (I of 1872) section 13 to show the fact that such orders were made This necessarily makes them evidence of the following facts appearing on the orders themselves 12, who the parties to the dispute were what the land in dispute was and who was declared entitled to retain possession For this purpose and to this extent such orders are admissible in evidence for and against any one when the fact of possession at the date of the order has to be ascertained If the lands referred to in such an order are described by metes and bounds or by reference to objects or marks physically existing these must necessarily be ascertained by extrinsic evidence i.e. the testimony of persons who know the locality If the order refers to a map the map must be admissible and the reports accompanying the orders or maps and not referred to in the orders may be admissible as hearsay evidence of reputed possession but they are not otherwise admissible

land Where however she had done so and had obtained a decree in her favour the *onus* is on the defendant (who is the appellant) to show that the decision of the High Court was wrong and where it was wrong To induce the Judicial Committee to reverse the judgment appealed from the appellant must do something more than show that the plaintiff's title is not free from doubt and must have led to the circumstances which were laid down in *Raj Kumar R.* the plaintiff alleges his prior possession and subsequent dispossession by the defendant the burden is primarily upon him to establish that he was in possession within the statutory period But in the determination of this question of possession the nature of the land must first be considered to inundation by the water of a river been in possession of the submerged was covered by water no matter who was in possession at the date of the

(1) *Rajah Sahib v. Doorgapershad*
Tirumala 12 M I A 331 (1869) 1 C
 2 B L R (P C) 134
 (2) *Rani Hanantia Kuari v. Jagadish*
Rao (P C) 10 C W N 610 3

11 I J 363 8 Bom L R 400
 (3) *Prafulla Nath Tagore v. Secretary*
of State 24 C W N 639 and 813
 (4) (1897) 19 C 660 L R 19 4
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submergence (1) In the case cited the plaintiffs sued for declaration of title and possession of certain lands lying on the boundary between their *mouza* and that of the defendants. It appeared that the defendants were in possession for some years previous to the suit by virtue of an order of the Criminal Court

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disputed line of

division runs between waste lands which have not been the subject of definite possession, must yield to the circumstances of the present case and the *onus* was on the plaintiff to show that the persons in possession under the order of the Magistrate had no right to possession (2) In the next case the plaintiffs purchased a *putni* in execution of a decree for arrears of rent and duly annulled a *darputni* which was in existence by notice under section 167 Bengal Tenancy Act. Within twelve years of this purchase they sued for *khas* possession of the lands or two *jamas*, originally held by one *R*, and subsequently purchased by the defendant seven years after the creation of the *darputni*. Held that it was for the plaintiffs to show that the zemindar was in possession of these lands before the creation of the *putni* and that the possession of the defendants commenced after the *putni* came into existence or that such possession was not adverse (3)

In a case of disputed boundaries to prove a map a witness was called who had assisted as an Amin in preparing it with another Amin, who was dead, the witness had little or no knowledge of surveying but the Amin with whom it was prepared was a skilled surveyor and the Collector (who was also dead) had tested the accuracy of the measurements. Held, that the map was sufficiently proved to be admissible in evidence (4)

Possession is a question which from its nature would seem to be very easily determinable, but in practice it is found to be one of the most difficult issues to decide in this country (5) The fact of possession, as every other fact (excluding the contents of documents), may be proved by oral evidence (6) A statement by a witness that a party is in possession, is, in point of law, admissible evidence of the fact that such party was in possession (7) General and vague statements are, however, of but little value. The Court in the undermentioned case (8) observed upon this point as follows — 'Then, coming to the oral evidence the testimony of all the witnesses is general in the extreme. They speak of the disputed land. They say that they saw plaintiffs 'in possession. They say they saw them collecting rents'. All these statements are general. And to persons who have had any experience in the Mofussil, and will number of witnesses into Court who nature the absolute worthlessness of su " When the question relates to the occupation of comparatively waste or waste land the smallest indication of occupation must be taken hold of and used as evidence in the determination of any matter of dispute with regard to it between the contending parties (9) In

Evidence
and nature
of possession

(1) *Khedon Lal v. Rajendra Narain Singh* 29 C L J 259 s c 51 I C 70

(2) *Manindra Chandra Nandi v. Saradindu Ray* 23 C W N 593

(3) *Monnathiasath Mitter v. Anathabaidhu Pal* 25 C W N 106

(4) *Dinomoni Choudhary v. Brojo Lal* 29 C 187 (1902)

(5) See remarks of White J. in *Jibunt Nath v. Shib Nath* 8 C 819 (1882), at p. 824

(6) See p. 484 ante and cases cited in note (6) ib

(7) *Maniran Deb v. Debi Charan* 4 B L R (F B) 97 (1869) *Vithu Govinda v. Kamji Jossji* 8 Bom L R 19, contra *Ishan Chander v. Rai Lochun* 9 W R 79 (1868)

(8) *Joytara Dass v. Mahomed Mobarack* 8 C 975 983 984 (1882) per Field J. see also *Allyat Chinaman v. Juggut Chunder* 5 W R 243 243 (1866)

(9) *Mussamat Vallukhee v. Choudhry Chittaman* 20 W R 24, 249 (1875) per Pheer J. *Mohima Chunder v. Hurro Lal* 3 C 769 (188) s c 2 C L R., 364

a suit for possession of jungle lands, where there is no proof of acts of ownership having been exercised on either side, possession must be presumed to have continued with the person to whom they rightfully belong (1) Lands which have never been occupied for cultivation and which are of such a nature and description as that no one can be said to be in possession, may be presumed rightfully to belong to the parties with whom the title rests (2) "If there are two persons in a field each asserting that the field is his, and each doing some act in the assertion of the right of possession, and if the question is, which of these two is in actual possession, I answer the person who has the title is in actual possession, and the other person is a trespasser" (3) Possession is not necessarily the same thing as actual user. The nature of the possession to be looked for and the evidence of its continuance must depend upon the character and condition of the land in dispute. Where land is permanently or temporarily incapable of actual enjoyment in any of the customary modes, all that can be required is that the plaintiff should show such acts of ownership as are natural under the existing condition of the land and in such cases when he has done this his possession is presumed to continue so long as the state of the land remains unchanged, unless he is shown to have been dispossessed (4) Where the District Judge held that the land in dispute was not enclosed and that the "plaintiff had not been in actual occupation of any definite portion" of the land, it was held to be not necessary that a person should use any definite portion of an unenclosed land in assertion of his ownership. Evidence may be given of acts done in other parts provided that there is a common character of locality as would raise an inference that the place in dispute belonged to the plaintiff if the other part did (5) Where it was pleaded that the plaintiffs had not actually occupied the land in suit, it was held that the Courts should be very careful before holding that title has been lost merely by non possession (6) Evidence of possession of certain specific property has been treated as evidence of possession as regards an appendage to such property though no definite acts of possession were proved as regards the appendage (7) The possession

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management of the property of the family is, by reason of the seclusion of the female members, ordinarily left in the hands of the male members. In the case of such families, slight evidence of enjoyment of income arising from the property is sufficient *prima facie* proof of possession (9) Where the plaintiffs alleged forcible dispossession, from which, if made out, it would have been probably inferred that their possession up to date of that forcible act had been consistent with the title which they alleged, but failed to prove the dispossession alleged, the Privy Council held that they had to deal with a possession on the part of the defendants which was not shown to have commenced in wrong and that the plaintiffs could only disturb that by proving distinctly a superior

(1) *Leelanund v Mussamat Basheero-
nissa* 16 W R 102 (1871)

(2) *Woochce Ran v Bissambhur Roy*
24 W R 410 (1875)

(3) *Per Lord Selbourne in Lous v
Telford* (1876), 1 A C, 423 cited in
Vithaldas v Secretary of State for India
26 B, 416 (1901)

(4) *Mahomed Ali v Abdul Gunny* 9 C
744 (1883), s c, 12 C L R 257, refer-
red to in *Thakur Singh v Bhogeraj Singh*
27 C 25 28 (1899)

(5) *Vithaldas v Secretary of State* 26

B 410 416, 417 (1901)

(6) *Prosonno Chunder v Land Mortgage
Bank* 5 W R 453 (1876)

(7) *Iqbal Husen v Nand Kishore* 24
A 294 (1902)

(8) *Chunder Kant v Bungshee Deb* 6
W R 61 (1866), B below on Estoppel
545 See cases cited in *Mitra on Limita-
tion* 4th Ed p 169 and his notes to s
10 of the Limitation Act

(9) *Inayat Husen v Ali Husen* 20 A.
182 (1897)

title (1) Dispossession within the meaning of the Bengal Tenancy Act (Schedule III, article 3) must be by the landlord and not merely favoured by him (2) Under the Mahomedan Law, according to both the Shia and Sunni doctrine, possession taken under a gift of *musha*, transfers the property, even when such gift is invalid, and such gift is valid if there is a clear intention to make it and yield the property although the donor has not actually vacated possession (3) With regard to possession obtained by force, see next paragraph

The ordinary rule is that force does not interrupt possession. He whose possession has been interrupted by an act of violence without any form of law or justice, is nevertheless considered as a possessor because he has the right to enter into possession again (4) When a party is dispossessed by *vis major* (e.g., a flood) the constructive possession of the land (e.g., while it is submerged) remains in its true owner (5) It has been held in a case by the Privy Council that his possession of the diluviated land constructively continues till he is dispossessed, and constructively revives if the dispossession ceases before the statutory period has elapsed (6) A man cannot be allowed to take advantage of his own wrong as where possession has been obtained by illegal means such as force or fraud, in order to shift the burden of proof to his opponent. It was therefore formerly held that where the plaintiff proved that he was in possession and was ousted by the defendant otherwise than by due course of law, the burden of proving a title in the first instance was shifted upon the defendant and in the event only of the latter establishing his title would the plaintiff be required to prove his (7)

The Specific Relief Act, however, gives a special remedy to the party
 suit to be brought
 out the question of
 Act
 suit of a possessory

suit under this Act is to restore to possession the party ousted by force and to leave the question of title wholly untouched and open to litigation in a regular suit (9) And when a regular suit has been brought to establish title and to recover the land from the party so restored to possession, the whole burden of proof is upon the plaintiff in such regular suit, and until he can show title to the property the Court will not look into the defendant's title or disturb his possession (10) Evidence of the plaintiff's possession prior to the summary order under which he was dispossessed may be good evidence of his title and must be considered (11) If the defendant pleads Limitation, the plaintiff in the regular suit cannot by way of answer set up the possession which, having

(1) *Irunigan Chetty v. Perriyannan* S. 25 W. R. 81 (1876)

(2) *Basanto Kumar v. Nanda Ram Kaibarto Das* 18 C. L. J. 86 (1913)
Chandra Narain Maht v. Natobar Jana 18 C. L. J. 83 (1913) per Jenkins C. J.

(3) *Danoo Darjee v. Momatajoddi Bhuiya* 17 C. L. J. 85 (1913)

(4) *Domits Civil Law* 1889 cited in *Khaja Enaetoollah v. Kissen Soonder*, 8 W. R. 386 389 (1867)

(5) *Munshi Masahar Hasan v. Behari Singh* (1906) A. W. N. 234, 3 A. L. J., 567

(6) *Basanto Kumar Roy v. Secretary of State*, 44 C., 858 (1917)

(7) See *Jadunath v. Ram Soondur*, 7 W. P. 174 (1867) *Radha Bullub v. Aishen Gobind* 9 W. R. 71 (1863) *Gour Paroz v. Hooma Soonduree* 12 W. R. 472 (1869)

[It is however for the plaintiff to prove the alleged ouster. *Mahesh Chunder v. Srimati Baroda* 2 B. L. R. 274 (1869), *Muhammad Bux v. Abdul Kureem* 20 W. R., 458 (1873), *Dattar Mohanti v. Jugo Bundhoo*, 23 W. R. 293 (1875) and see *Munshi Masahar Hasan v. Behari Singh* 1906 A. W. N. 234 and *Ganpat Rao v. Ganpat Rao*, 2 N. L. R. 32 *supra* p. 748

(8) Act I of 1877, s. 9 which takes the place of the repealed s. 15 of Act XIV of 1859

(9) Field E., 6th Ed., 348

(10) *Moul. v. Macnoodden v. Greesh Chunder* 7 W. R. 230 (1867)

(11) *Bullubee Kant v. Doorjodhun Shikdar*, 7 W. R. 89 (1867) *Ram Chandra v. Brajanath Sarma* 3 B. L. R., App. 109 (1869)

obtained it otherwise than in due course of law, he held before the possessor's suit (1)

The question of the effect of this provision in the Specific Relief Act upon the general power of the Courts to give relief against unlawful interference has been the subject of conflicting decisions. It has been questioned whether when a person ousted otherwise than by due course of law fails to avail himself within six months of the summary remedy provided by the Specific Relief Act, but afterwards brings a regular suit to recover possession, the burden of proof ought to be laid upon him or upon the defendant, whether in fact the plaintiff's previous possession in such cases is not *prima facie* evidence of title and, whether the Specific Relief Act, while providing a special and summary remedy in a particular case, has in others interfered with the general rule above adverted to, that a man cannot be permitted to take advantage of his own wrongful act to shift the burden of proof upon his opponent. Most of the earlier decisions of the Calcutta High Court were based upon the view that possession is *prima facie* evidence of title, and favoured the plaintiff's right to succeed in such a suit on proof merely of previous peaceable possession and illegal dispossession unless the defendant could show a better title (2). But the later decisions of that Court are to a contrary effect, and it has been held that mere previous possession for any period short of the statutory period of twelve years will not entitle a plaintiff to a decree for the recovery of possession, even though the defendant cannot establish title, except in a suit under the ninth section of the Specific Relief Act, which must be brought within six months from the date of dispossession (3). Where, however, the plaintiff had received possession

(1) *Golam Nubee v. Bissonath Kur* 12 W R 9 (1869) *Prem Chand v. Hurree Dass* 22 W R 259 (1874) *Tara Banu v. Abdul Gaffur* 12 C 1 R 486 (1882)

(2) Cases cited in *note* (2) p 630 ante and see *Ahajah Enactoolah v. Kishen Soonder*, 8 W R 386 (1867) [The Civil Courts are competent s. 15 Act XIV of 1859 notwithstanding to give a decree for immovable property on the bare ground of illegal dispossession in a suit brought after six months from the date of such dispossession in which suit the defendant has failed to prove his own title to the land *Dabjee Sahoo v. Shaikh Turice Roaddeen* 10 W R 102 (1868) *Ayesha Beebee v. Kanhy Mollal* 12 W R 146 (1869) *Slana Soodree v. Collector of Malda* 12 W R 164 (1869) *Trilochini Ghose v. Koylash Nath* 12 W R 175 (1869) *Nagore Mon c. Smit* 23 W R 291 (1875) *Kaca Manji v. Khousa Nussiot* 5 C L R 278 (1879) [per Prinsep J dissent. Proof of prior possession and of illegal dispossession are in themselves no evidence of title except in a possessory suit under Act I of 1877 S 110 of the Evidence Act applies only to actual and present possession and does not declare generally that possession shall always be *prima facie* evidence of title *Molabeer Pershad v. Mohabeer Singh* 7 C 591 (1881) s c 9 C L R 164 *Brojo Sundar v. Koylas Chunder* 11 C L R 133 (1882) *Contra Amcer Bibee v. Tukroonissa Begum* 7 W R 332 (1867) and on review 8 W R 370

(1867) (See also *Luckee Koer v. Ran Dutt* 11 W R 447 (1869) *Nund Kishore v. Shoo Dial* 11 W R 168 (1869) *Rani Molun v. Jhappoo Dass* 14 W R 41 (1870)

(3) *D bi Churn v. Issur Chunder* 9 C 3 (1887) s c, 11 C L R 342 *Ertana Hossain v. Baney Mistry* 9 C 130 (1882) s c 11 C L R 393 citing *Wur v. Aniruddha Khatun* 7 I A 73 *Purneshwar Choudry v. Bijoy Lall* 17 C 256 (1889) *Shai Churn v. Abdul Kabeer* 3 C W N 158 (1898) *Nisa Chand v. Kanchnan Bagani* 3 C W N 568 (1899) s c 26 C 579, *Fa lar Rahman v. Raj Chunder* 5 C W N 234 (1900) For a discussion on these and other cases see 6 C W N 119 Possessory title and its summary and substantive remedies and 3 C W N 102 xxxiii cccxii cccxiii It has been however also held that though in a suit for possession on proof of title it will not be sufficient for the plaintiff merely to prove possession at the date of the disturbance the previous possession of the plaintiff may be proved to have been so long and continuous that a good title may be reasonably presumed from it *Kanan Manji v. Khousa Nussiot* 5 C L R 282 (18 9) and see *Lachot Har Sahai* 12 A 46 (1887) cited post Possession is evidence of title more or less strong according to its duration and a Court may well be justified in allowing a plaintiff to recover on such evidence only But if he be allowed so, to recover it is on the ground that he has produced sufficient proof of

possession less than the Limitation Law requires is insufficient except in a possessory suit, and mere wrongful possession is insufficient to shift the burden of proof. The position here adopted is not clear. As already observed the case was not one of dispossession. The plaintiff was in possession and sought confirmation thereof. Jenkins C J, (with whose judgment Ranade, J. appeared to desire to concur) held that the section obviously does not require possession according to title, otherwise it is meaningless (1). It was therefore sufficient for the plaintiff to show possession to recover against the defendant unless the latter could show title. The question was whether he had shown it. If, however, the plaintiff had been forcibly dispossessed more than six months before suit the question would then have arisen whether proof of previous possession was sufficient. The Calcutta High Court answers the question in the negative because it holds that there has been an interruption of possession and the substantive right of possession has been lost by failure to seek the special remedy. According to the Calcutta High Court, and failure to

deprive a party of his right to rely upon his mere previous possession which force does not interrupt. In this view in no case should it be necessary to show title in the absence of any title shown by the defendant. And so it has been held by the Madras High Court (2) that possession in law is a substantive right or interest which exists and has legal incidents and advantages apart from the true owner's title, that the Specific Relief Act cannot possibly be held to take away any remedy available with reference to this well recognised doctrine on possession, that it is an undoubted rule of law that a person who has been ousted by another who has no better right is, with reference to the person so ousting, entitled to recover by virtue of the possession he had held before the ouster even though that possession was without any title. Where however a plaintiff in possession without any title seeks to recover possession of which he has been forcibly deprived by a defendant *having a good title*, he can only do so under the provisions of the ninth section of the Specific Relief Act and not otherwise.

The question has been raised in the Allahabad High Court it being held that usually it is for the plaintiff who seeks ejectment to prove his title but that, when possession for 30 or 10 years is proved to have been peaceably enjoyed the person who has recently dispossessed such plaintiff has to meet the presumption of law that the plaintiff's long possession indicates his ownership of the property (3).

Limitation

In a suit for possession of immovable property, it is for the plaintiff to show by some *prima facie* evidence that he has a subsisting title not extinguished by the operation of Limitation before the defendant can be called upon to substantiate a plea of adverse possession (4). Where the plaintiff has established his title to land the burden of proving that the plaintiff has lost that title by reason of the adverse possession of the defendant is upon the latter (5). If the property sued for was originally joint, the burden of proving

(1) *Hanu antrao v Secretary of State* 25 B 290 ref to in *Vasta Balwant v Secretary of State* 45 B 789 which follows *Secretary of State v Chellikani* 39 M 617.

(2) *Mustapha Saheb v Santha Pillai* 23 M 179 (1899). But see *Rassonada Rayar v Sitharama Pillai* 2 Mad H C R A C J 171 (1864). *Tsrnun alasa ni Reddi v Ramasa ni Redd* 6 Mad H C R A C

J 470 (1871).

(3) *Lacloo v Har Sahai* 17 A 46 (1897).

(4) *Inayat Hussien v Ali Hussien* 29 A 182 (189) the possession of an usufructuary mortgagee is the possession of all persons having the right of redemption on

(5) *Padma Gobind v Inglis* 7 C. L. R. 364 (1890).

exclusive adverse possession by one of the original joint holders is on him (1) To prove title to land by twelve years adverse possession it is not sufficient to show that some acts of possession have been done. Where adverse possession is relied on it must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor (2) It must be a complete possession exclusive of the possession of any other person and is displaced by evidence of partial possession by the party against whom the title by adverse possession is claimed (3) When Limitation is set up in answer to a suit for possession it does not lie upon the defendant to disprove plaintiff's possession but it is the duty of the plaintiff to show that he has been in possession within twelve years before the commencement of the suit (4) The circumstance that the defendant has in his answer set up a defence merely of Limitation in a suit for the possession of land does not constitute an admission of the title of the plaintiff so as to entitle the plaintiff to prove the plaintiff held that the *onus* was on him to show when the alleged adverse possession under article 144 commenced or under article 139 when the tenancy terminated (6) Mere non-payment of rent is not in itself enough to prove that possession is adverse (7) In a case in the Allahabad High Court where after a mortgage by conditional sale in 1869 the mortgagor surrendered his equity of redemption in the following year and though the agreement was not registered both parties acted on it for forty years it was held in a suit for redemption that the mortgagee's possession had been adverse and that the suit was barred by limitation (8) Acts at different times by a fluctuating body of persons do not amount to adverse possession to constitute which the possession must be adequate in continuity, publicity and extent. Occupation by a wrong doer of a portion only of land cannot be held to constitute constructive possession of the whole so as to enable him to obtain a title by Limitation (9) It is of the essence of the title by adverse possession that it must relate to some property which is recognised by law (10) It affects the interest which the person entitled to possession had at that time and thus possession adverse to a simple mortgagor is not *per se* adverse to a simple mortgagee (11) There is no constructive possession in favour of a wrong doer (12) And see cases cited *ante* in the Votes to ss 101-104

111 Where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good

Proof of good faith in transactions where one party is in relation of active confidence

(1) *Jagjia das Ba 4 ba 25 B 362 (1900)* s c 3 Bom L R 47 and see *Haji v Goh a 39 P L R (1906)*

(2) *Radha on Debi v Collector of Khulna 27 C 943 (1900)* s c 4 C W N 597 *Jagjandas v Ba Anba 25 B 362 (1900)* *Hal Al ned v Tota Meah 31 C 397 (1903)*

(3) *Luthaldas v Secretary of State 26 B 416 (1901)*

(4) *Kal e Nara An nd Moye 21 W R 9 (18 4)* See *I asi Ihu v Upakaritudayan 3 C W N eccxxix (1899)* *V nsh Ma lar Hasan v Beha Singh 3 A L J 567 A W N (1906)* 234 *Dharan Kanta Lah ri v Gabar Al Khan 1 C L J 2 7 (1913)*

(5) *Soo at n Sala v Ra joy Saha Marsl all s Rep 549 (18 3)*

(6) *Talsi blai v Ranchod 26 B 442 (1907)* *Ganput Rao v Ganput Rao 2 N L R 32*

(7) *Prasanna Kimar Mookerjee v Srika Ha Rout 40 C 173 (1913)*

(8) *Kledu Rai v Sheo Parson Rai 39 A 423 (1917)*

(9) *Wali Ahmed v Tota Meah 31 C. 397 (1903)*

(10) *Jethabhai v Nathabhai 28 B 399 (1904)*

(11) *Priya Sakti Debi v Manboddh B's 44 C 425 (1917)* per Sanderson C. J. see *Iyafu v Sona ma F B 39 M 811 (1915)* 29 M L J 645 *Raj Nath v Nara n 36 A 507 (1914)*

(12) *Secretary of State v Krishna nani Gupta 29 C 518 (1907)* at p 535 s c. 29 I A 104

faith of the transaction is on the party who is in a position of active confidence

Illustrations

(a) The good faith of a sale by a client to an attorney is in question in a suit brought by the client

The burden of proving the good faith of the transaction is on the attorney

(b) The good faith of a sale by a son just come of age to a father is in question in a suit brought by the son

The burden of proving the good faith of the transaction is on the father

Principle—The reason why there is an exception to the general rule, so the transaction could rarely be having been entirely in the hands of the defendant, would be destitute of the means of proving affirmatively the *malâ fides* of the transaction, whilst the defendant in such a transaction may fairly be subjected to the duty not only of dealing honestly but of preserving clear evidence that he has done so (1)

s 101 (Burden of proof)

Steph. Dig. Art 97A Taylor Ev §§ 151—153 Wharton Ev §§ 1248 308 30
366, Story, Eq Jur, §§ 309—372A, Powell Ev, 9th Ed 162, Pollock's Law of Fraud
in British India 63—80 Leading cases in Equity, Notes to *Huguenin v Basil*

COMMENTARY.

Good faith

Good faith in a contracting party has been frequently declared to be a rebuttable presumption of law, being regarded, in the same way as the presumption of innocence as an assumption of the law made for the determination of the burden of proof and not for the adjudication of the merits. A person who is sued is charged with bad faith and the burden is upon the plaintiff to prove the charge, or the defendant sets up bad faith in the plaintiff and the burden is on the defendant to make this defence good (2). So it is an elementary principle that a party setting up a tort has the burden on him to prove such tort (3). But when the actor in either of the relations above quoted establishes a *prima facie* case, and this is met by evidence sustaining good faith on the other side, then the case must be decided upon the merits (4). Therefore so far as good faith and legality are assumed as belonging to ordinary business transactions, a party assailing such transaction by charging his duty as a pleader, the Court ought to presume good faith and not hold him criminally liable unless there is satisfactory evidence of actual malice and unless there is

(1) Markby Ev 86 In such cases it is seldom if ever possible to prove specific acts of bad faith. Yet the risk of abuse is obviously great. The law therefore reverses its usual rule of evidence in dealing between man and man. Commonly nothing is presumed contrary to good faith. But this is the rule between equals. When one party habitually looks up to the other and is guided by him he can no longer be supposed capable without special precaution of exercising that independent judgment which is requisite for his consent to be free. Pollock's Law of Fraud in British India 63 64 See Contract

Act s 16

(2) Wharton Ev § 1248 as to proof of good and bad faith see Phipson Ev, 5th Ed 134. So upon the principle that the law will not impute bad faith in ambiguous instruments are to be construed in a sense consistent with good faith. Best Ev § 347 *Muir v Glasgow Bank* 4 L R H L 337, Wharton Ev § 1249

(3) *Ib* §§ 357 358 v ante s 101

(4) *Ib* § 1248

(5) *Ib* § 366 *Leuis v Levy* E B & E 557

cogent proof that unfair advantage was taken of his position as a pleader for in indirect purpose (1) And in the case cited it has also been held that mere evidence of the fiduciary relation between client and attorney will not suffice to enable the client to have a settled account between them reopened, but that the burden is on him to make out a *prima facie* case that the attorney's bill of costs was incorrect (2)

So while in all cases where it has been proved that a mere stranger, connected with the other party by no peculiar or fiduciary relation from which undue influence can be inferred has either by fraud surprise or undue influence obtained from him a benefit a Court of Equity will at once set it aside In such cases, however the proof of fraud surprise or undue influence is completely upon the other party or person deriving title from him for *prima facie* the transaction is valid (3) The present section however enacts an important exception to the general rule reversing the burden of proof where one of the parties stands in a relation of active confidence towards the other The rule laid down by it is in accordance with a principle of equity long acknowledged and administered both in England and in this country (4) namely that he who bargains in a matter of advantage with a person who places confidence in him, is bound to show that a proper and reasonable use has been made of that confidence The transaction is not necessarily void *ipso facto* nor is it necessary for those who impeach it to establish that there has been fraud or imposition, but the burden of establishing its perfect fairness adequacy and equity is cast upon the person in whom the confidence has been reposed, and the party seeking restitution is not called upon to prove that the transaction was unrighteous and his consent not free

The rule further applies equally to all persons standing in confidential relations with each other (5) So if a deed conferring a benefit on a father is executed by a child who is not emancipated from the father's control, and the deed is subsequently impeached by the child the *onus* is on the father to show that the child had competent and independent advice, and that he executed the deed with full knowledge of its contents and with a free intention of giving the father the benefit conferred by it If this *onus* be not discharged the deed will be set aside This *onus* extends to a volunteer claiming through the father, and to any person taking with notice of the circumstances which raise the equity but not further (6) The *Illustrations* to the section afford two instances of the relations to which the rule of proof applies viz, those of legal adviser and client (7) and of father and child (8) but there are many others such as those of medical practitioner and patient spiritual director and penitent (9) trustee

(1) *Upendra Nath Bagchi v. R.* (1909) 36 C. 375 following *In re Nagaji Trakany* (1894) 19 B. 340 and *R. v. Purshotadas Ranchoddas* (1907) 9 Bom. L. R. 128

(2) *Shamaldon Dutt v. Lakshman Deb* (1908) 36 C. 493 following *Rahim bhoj Habibbhoj v. Turner* 18 I. A. 6 and dissenting from *Coker v. Luddha v. Morarji* 9 B. 183

(3) Field F. (6th Ed. 351 353) citing *Huguenin v. Basely* 2 Leading Cases in Equity and see *Boo Jinaiboo v. Sha Nagar* 11 B. 78 (1886) [It is only in cases where one person stands in a fiduciary relation to another that the law requires the former to exercise extreme good faith in all his dealings with the latter and scrutinizes those dealings with more than ordinary care and caution In the absence of

any special confidence reposed by one person in another it lies on him who alleges fraud to prove it]

(4) See *Moonslee Baidoor v. Shamsoorissa Begum* 11 Moo. I. A. 551 (1867), and cases cited *post passim*

(5) See Story Eq. Jur. § 309 327A *Huguenin v. Basely* 2 L. C. in Equity, Pollocks Law of Fraud in British India 64 65

(6) *Bainbridge v. Brown* L. R. 18 Ch. D. 183

(7) See also *Pushong v. Munia Halwani* 1 B. L. R. A. C. 95 (1868) *Ram Pershad v. Kance Phulpittee* 7 W. R. 99 (1867), *Kamari Swndori v. Kali Prasanna* 12 C. 275 (1885)

(8) *Bainbridge v. Brown* *supra*

(9) *Mannu Singh v. Umadut Pande* 12 A. 523 (1889)

and *cestui que trust*(1), husband and wife(2), guardian and ward, agent and principal(3), and the like(4) In fact, the relief granted stands upon a general principle applying to all the variety of relations in which dominion may be exercised by one person over another(5) But the mere relation of daughter to mother in itself suggests nothing in the way of special influence or control(6)

The words "*active confidence*" in the section indicates that the relation ship between the parties must be such that one is bound to protect the interests of the other(7) The section has been spoken of as an exception to the general rule relating to the burden of proof because the allegation of bad faith is one which the plaintiff, according to section 101, *ante*, is bound to prove and to require the defendant to prove good faith is in contradiction to the terms of that section The reason why the exception is made and this duty is imposed on the defendant has been adverted to above in the *Note* giving the principle upon which the section is founded(8), in contradistinction to the case of a transaction with a mere stranger, where a relation of active confidence between the parties is proved, then the burden of proof is on the party receiving the benefit or on those claiming through him(9) (The validity of the instrument as to require proof to circumstances) of the absence of any over reaching undue influence or unconscion

(1) *Gray v Warner* 1 R 16 Eq 577
Raghunath v Moolchand v Varjaidas
Madanje 8 Bom L R 525

(2) *Moonshee Buloor v Shu isoonissa Begum* 11 Moo I A 551 (1867) *see as to recovery of property held by the husband* *Abdool Ali v Kurrunissa* 9 W R 153 (1868) And *see Hakim Muhamad v Najeeb* 20 A 447 (1898)

(3) *Taccordeen Tenary v Natab Syed* 1 Ind App 192 (1874) s c 13 B L R 427 21 W R 340 *Kanas Lal v Kanin Deb* 1 B L R O C 31 (1867) *Wajid Khan v Euaz Ali* 18 C 545 (1891) s c 18 Ind App 144 as to agent not standing in fiduciary relation *see* *Boo Inatboo v Sha Nagar* 11 B 78 (1886) as to confidential manager *see* *Mahadeti v Neelamani* 20 M 273 (1896)

(4) *Taylor Ev* §§ 151 152 Story *Eq Jur* §§ 309—377A and cases there cited The courts also regard with suspicion all dealings with heirs as regards their expectancies and relieve against unconscionable bargains with poor and ignorant persons *See Chun Aiar v Rup Singh* 11 A 57 (1888) *Taylor Ev* § 153 But these cases do not as a rule come within the scope of the section Pollock's Law of Fraud in British India 75—80

(5) *Sital Prasad v Parbhu Lal* 10 A 535 (1888) *see* remarks upon the facts of this case in Pollock's Law of Fraud 68 69

(6) *Ismail Mussajee v Hafu* Boo P C (1906) 33 Cal 773 10 C W N 570 and for tests of undue influence *see* *Ganesh v Vishnu* (1907) 32 B 37 and *Chattring*

Moolchand v Hitchchurch (1907) 37 B 208

(7) *Markby Ev* 86 So far as they go (i.e. the words of the section) they give effect to the general law of all Courts in which the principles of English Equity prevail But I venture to think that they do not go quite far enough to be an adequate expression of the law unless the words active confidence are to receive a larger meaning than they would naturally convey to any reader whether a layman or a lawyer not familiar with this class of cases Pollock's Law of Fraud in British India p 65 In *Thakur Das v Jairaj Singh* 26 A 130 (1903) the Privy Council held that the plaintiff was not in a position of active confidence towards the defendants within the meaning of this section

(8) *v ante* p 635 note (2)

(9) It has further been said (L C. in *Equity* 635) that where a person gains a great advantage over another by a voluntary instrument burden of proof is thrown upon the person receiving the benefit and he is under the necessity of showing that the transaction is fair and honest for although the Courts never prevent one person from being the voluntary object of the bounty of another yet it must be shown that the bounty was purely voluntary and not produced by any undue influence or misrepresentation The Evidence Act does not provide specially for this last case though it may possibly fall within the purview of s 114 *post* Field *Ev* 6th Ed 352 But *see also* Pollock's Law of Fraud 67

benefited will have thrown upon him the burthen of establishing beyond all reasonable doubt the perfect fairness and honesty of the entire transaction (1)

In judging of the validity of transactions between persons standing in a confidential relation to each other it is very material to see whether the person conferring a benefit on the other had competent and independent advice(2), and the age or capacity of the person conferring the benefit and the nature of the benefit are also of very great importance in such cases (3)

In this country where the position of *pardanashin* or secluded women is to Purda-nashin a large extent one of isolation and subseivency, it has been held that they are entitled to receive that protection which the Court of Chancery always extends to the weak ignorant and infirm and to those who for any other reasons are specially likely to be imposed upon by the exertion of undue influence over them. This influence is presumed to have been exerted unless the contrary be shown. It is therefore in all dealings with those persons who are so situated, always incumbent on the person who is interested in upholding the transaction to show that its terms are fair and equitable (4). Protection is given in these instances apart from the provisions of this section, which strictly apply only to the case of those *pardanashin* women who have dealings with others in confidential relations with them. It has in numerous cases been laid down that strict proof of good faith is required where *pardanashin* women are concerned and that it is incumbent on the Court when dealing with the disposition of her property by a *pardanashin* woman whether Mahomedan(5) or Hindu to be satisfied that the transaction was explained to her and that she knew what she was doing (6). Thus in the case cited in the Privy Council a

(1) Taylor Ex § 151. In fact in such cases undue influence is presumed to have been exerted until the contrary is proved. *Pushong v Muna Halican* 1 B L R A C 95 (1868).

(2) The advice need not necessarily and in all cases be legal though in a large number of cases the only competent advice must be of that character. *Allcard v Skinner* 36 Ch D 145 153 158 159.

(3) Field Fv 6th Ed 352 see for a consideration of some circumstances constituting undue influence *Chedambara Chetty v Renja Krishna* 13 B L R 509 528 (1874) and other cases cited in Pollock's Law of Fraud pp 77—79.

(4) *Karai Lal v Kani Deb* 1 B L R O C J 31 (1867) per Phear J [referred to in *Nistari Dassi v Nindo Lal* 26 C 918 (1899) *Koop Narain v Ganga dhar Pershad* 9 W R 297 (1868) *Bibee Rukhun v Shaikh Ahmed* 22 W R 443 (1874) and see cases cited *post* *Badiatan nassa Bibee v Ambika Charan Ghose* 18 C W N., 1133 (1914).

(5) See remarks in *Moonslee Buzloor v Shumsoonnissa Begum* 11 Moo I A 551 (1867). [In India the Mussalman woman of rank like the Hindu is shut up in the zenana and has no communication except from behind the *pardah* or screen with any male save a few privileged relatives or dependants. The culture of the one is not generally speaking higher than that of the other and they may be taken to be equally liable to pressure and influ

ence.] *Khas Mehal v Administrator General of Bengal* 5 C W N 505 (1901).

(6) *Ashgar Ali v Delros Banoo* 3 C 324 (1877), s c before the High Court 15 B L R 167, 23 W R 433. *Sudhist Lal v Sheobarat Koer* 7 C 245, followed in *Shambat Koer v Jago Bibee*, 29 C 749 (1902) *Moonslee Buzloor v Shumsoonnissa Begum* 11 Moo I A 551 (1867) *Koop Narain v Gungadhar Pershad* 9 W R 297 (1868), *Tacoorden Tencary v Nasab Syed* 11 A 192, s c 13 B L R 427 21 W R 340, *Panna Lal v Srimati Ramasundari* 6 B L R 737 174 (1871), *Ram Persad v Ranee Ploolputee* 7 W R 99 (1867), *Mussunnat Azeemunnissa v Baqur Khan* 10 B L R 205 (1872). [A plaintiff who seeks to make a *pardanashin* liable on a document alleged to have been executed by her agent must give strict proof of such agency.] *Asmutoonnissa Bibee v Alla Hafiz* [admission by *Purdanashin*] 8 W R 468 (1867) *Bibee Rukhun v Shaikh Ahmed* 22 W R 443 (1874) *Syed Faizul v Anjid Ali* [Registration mutation of names] 17 W R 573 (1872) *Dolce Chand v Musst Oorida Khanum* [Registration] 18 W R 238 (1872) *Greesh Chunder v Bhuggobutty Debis* 13 Moo I A 419 (1870) 14 W R P C 7, *Behari Lal v Habiba Bibi* 8 A 267 (1886), *Deo Awar v Man Awar* 17 A, 1 (1894), s c 21 Ind App 148, *Bad Bibi v Sami Pillai* 18 M., 257 (1902) distinguishing *Ashgar Ali v Delros Banoo*

purdanashin, unable to read or write and separated from her husband had executed an endowment of nearly all her property. It was held that the onus was on the trustees to show that the nature and effect of the transaction had been fully explained to her and understood by her at the time (1). And thus where admissions of an adoption were contained in recitals in documents signed by an illiterate *purdanashin* woman it was held that these recitals could not be relied upon in the absence of proof that they had been specifically brought to her knowledge and explained to her (2). But the burden of proof will be discharged by evidence given of circumstances inconsistent with or contrary to those upon which the presumption is raised (3).

The presumptions as to the knowledge of the executant of the contents of the document she is executing do not equally apply in the case of a *purdanashin* as in the case of other persons (4).

In *Kali Baksh Singh v. Ram Gopal Singh* the Privy Council considered the question whether proof must be given that a *purdanashin* had independent advice, and it was held that while the Law protects a *purdanashin* by placing the burden of proof on those who rely on a deed executed by her this legal protection should not be transformed to a legal disability, and that where it was proved that a *purdanashin* had business capacity and strength of will and that in the circumstances the conveyance was a natural disposition of her property and it could be assumed that independent advice would have made no difference, there was no need to prove that it had been given. In this case it was held that the fact of the whole circumstance being comprehended and deliberately and of her own free will carried out the transaction (5).

In a case in the Privy Council (6) a person was described as a *quasi purdanashin*. Their Lordships taking the term to mean a woman who not being of

supra *Achhan Kuar v. Thakurdas* 17 A. 125 (1895) *Mohadevi v. Neelan* 20 M. 273 (1896), *Hafim Muhammad v. Najib* 20 A. 447 (1898) *Annoda Mohini v. Bhudan Mohini* 5 C. W. N. 489 (1901) s. c. 28 C. 546, *Khas Mehal v. Administrator General of Bengal* 5 C. W. N. 505 (1901) *Annada Mohini v. Bhudan Mohini* 28 C. 546 (1901). [Their Lordships cannot act on the speculation that she must have known that of which it is not shown that any direct information was conveyed to her.] *Sumsuddin v. Abul Husain* (1906) 31 B. 165.

(1) *Sajjad Hussain v. Waqar Ali Khan* P. C. 34 A. 455 (1912).

(2) *Kislori Lal v. Chuni Lal* (1908) 36 I. A. 9.

(3) See *Tamarasi Devi Sivithri v. Marat Vasudevan* 3 M. 215 (1881) *Mohamed Buksh v. Hosseini*, 15 C. 684 (1888) s. c. 15 Ind. App. 81 in which the Privy Council point out the facts which a Court should consider in an issue of undue influence rightly raised.

(4) *Khas Mehal v. Administrator General of Bengal* 5 C. W. N. 505 (1901).

(5) *Kali Baksh Singh v. Ram Gopal Singh* P. C. 36 A. 81 (1914) 41 I. A. 25 see *Sajjad Hussain v. Waqar Ali Khan*

P. C. 34 A. 455 (1912)—39 I. A. 156 *Mahomed Buksh Khan v. Hosseini* B. 1 P. C. 15 C. 684 (1886) 15 I. A. 81 *Wahabur Prosad v. Tay Begam* 19 C. W. N. 162 (1914) *Bluban Mohini Dasi v. Gayalakshini Devi* 19 C. W. N. 1330 (1915), *Azima Bibi v. Shamalanand P.* C. 40 C. 378 (1914).

(6) *Hodges v. London & Delhi Bank* 5 C. W. N. 1 (1900), s. c. 23 A. 137 [Where a surety alleged that he signed a bond without reading it and that he was not given to understand that he was contracting himself out of the ordinary rule exonerating him from liability if time be given to the principal debtor, held that people who induce others to advance money on the faith of their undertakings cannot escape from their plain effect on such plea and that it requires a clear case of misapprehension leading to succeed on such a plea.] See also to the plea that a party signing a document did not know what it was *Kirby v. Great Western Ry. Co.* 18 L. T. 655 *Great Western Ry. Co. v. McCarty* L. R. 12 App. Cas. 218, 227, 234, *Richardson v. Rountree* L. R. App. Cas. (1894) 217 *Parker v. South Eastern Railway Co.* 2 C. P. D. 416 422 *Harris v. Great Western Ry. Co.* 1 Q. B. D. 515 530 *Walker v.*

the *purdanashin* class is yet so close to them in kinship and habits and so secluded from ordinary social intercourse that a like amount of incapacity must be ascribed to her and the same amount of protection which the law gives to *purdanashins* must be extended to her. *held* the contention to be a novel one and that outside the class of regular *purdanashin* it must depend in each case on the character and position of the individual woman whether those who deal with her are or are not bound to take special precautions that her action shall be intelligent and voluntary and to prove that it was so in case of dispute. And in a later case the Privy Council did not treat as a *purdanashin* a lady who had no objection to communicate when necessary, in matters of business with men other than members of her own family who was able to go to Court to give evidence and to attend at the Registrar's Office in person (1).

It has been held in England that the rules of Courts of Equity in relation to gifts *inter vivos* are not applicable to the making of wills, and that though natural influence exerted by one who possesses it to obtain a benefit for himself is undue *inter vivos* so that gifts and contracts *inter vivos* between certain parties will be set aside unless the party benefited can show affirmatively that

able in this country, though here, as in England a will is void only when caused by fraud or coercion, or by such importunity as takes away the free agency of the testator (3). For though as observed in the case cited below, while it may be reasonable to presume that a person has availed himself of the natural influence his position gave him, it is a very different thing to presume without any evidence, that a person has abused his position by the exercise of dominion or the assertion of adverse control (4), yet, on the other hand, it has been said that there is no sound reason why the presumption of undue influence should not be applicable to wills in the same manner as to deeds (5).

112 The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten

Birth during marriage conclusive proof of legitimacy

Principle.—See Notes, *post*

* 3 ('Fact')

* 4 ('Conclusive proof')

Steph Dig Art 98 Best Presumptive Evidence 70 71 Wharton, Ev. §§ 1295, 1296 608, Lawson's Presumptive Evidence 104—119, Taylor, Ev. §§ 16, 106, 950 951 Phipson, Ev. 5th Ed., 184 185 186, Best Ev. § 596, Roscoe, N P Ev. 18th Ed., 1047 Phillips and Arnold, 471—473, Wills Ev. 2nd Ed., 56 202 207, 215 216, 286, Powell Ev. 9th Ed., 139 160 161, 200 201, 244 245 Stewart Rapalje's Treatise on the Law of Witnesses § 158

v Ryall 10 Q B D 178 188 Smith v Hughes L R 6 Q B 597 607 cited in Ramsall v River Steam Navigation Co Ltd 752 of 1894 CIL H Ct 28th July 1896 Cor Sale J

(1) Ismail Mussaj v Hafiz Hoo P C 34 C 733 (1906), 10 C. W. N 570

(2) Parfitt v Laless I R 2 P A D 467

(3) Act V of 1865 (Succession Act) s 48, Act XXI of 1870 (Hindu Wills) See Sayid Muhammad v Fatteh Muham mad 22 Ind App. 4 10 (1894) in which the distinction between undue influence and incapacity is pointed out.

(4) Parfitt v Laless *supra* 470

(5) 2 Leading Cases Notes to Huguenin v Basely See Burr Jones Ev. 1 § 189

COMMENTARY.

Legitimacy

The section assumes the existence of a valid marriage. The legal presumption of paternity raised by it is applicable only to the offspring of a married couple. A person claiming as an illegitimate child must establish his alleged paternity like any other disputed question of relationship. So where a person alleged that he was the illegitimate son of one C C the *onus* of establishing that fact was held to be clearly upon him and he could not, by simply proving that his mother was C C's concubine, shift the *onus* on to the other side to disprove his paternity (1). When a party admits the paternity of the other party but pleads that he is of illegitimate descent the legal presumption being in favour of legitimacy the *onus* lies on the party alleging illegitimacy to prove it (2). Where the father and mother were or are married it is a presumption of law, which is binding until rebutted (3) that a person born in a civilised nation is legitimate. But this presumption may be rebutted as where a married woman had admittedly lived for years with a man other than her husband and they both had admitted that he was the father of her children born during that time (4). In the Roman law according to the well known maxim *pater est quem nuptiæ demonstrant* (he is the father whom the marriage indicates) (5) the presumption of legitimacy is this that a child born of a married woman is deemed to be legitimate, and it throws on any person who is interested in making out the illegitimacy the whole burden of proving it. The law presumes both that a marriage ceremony is valid (6) and that every person is legitimate. Marriage or filiation (parentage) may be presumed the law is general presuming against vice and immorality (7).

As has been said 'the legal presumption that he is the father whom the nuptials show to be so is the foundation of every man's birth and status. It is a plain and sensible maxim which is the corner stone the very foundation on which rests the whole fabric of society, and if you allow it once to be shaken there is no saying what consequences may follow' (8). So strict upon this head was the ancient Common Law that if the husband was within the four seas, at any time during the pregnancy of the wife the presumption was conclusive that her children were legitimate (9). But this rule at length was in account of its absolute nonsense exploded (10). The law has been summed up concisely by Leach

"The ancient policy of the law of England remains unaltered. A child born of a married woman is to be presumed to be the child of the husband unless there is evidence which excludes all doubt that the husband could not

(1) *Gopalasami Chetti v Aruna Kellan Chetty* 27 M. 37 (1903)

(2) *Dularey Singh v Suraj Dars Singh* 43 I. C. 48

(3) Wharton Ev., § 1298 Best, Pres Ev., 70 71 *Morris v Davies* 5 Cl & F 163, *Banbury Peerage Case* 1 Sim & St 153, *Head v Head* 1 Sim & St 150 *Cope v Cope* 1 M & Rob 269 266 As to failure to prove parentage see *Rao v Singh v Betti Maha* 44 A 470 (1922)

(4) *Bahadur Singh v Iru* 28 P. R., (1906)

(5) See the maxim applied in the case of Muhammadans in *Jaswant Singhee v Jet Singhee* 3 Moo I A 245 (1844) *Nicholas v Ascher* 24 C 277 (1896)

(6) *Harrod v Harrod* 1 K. & J. 4 *Fleming v Fleming* 4 Bing., 766 *Cichel*

v Lambert 15 C B N S 787 *Harrison v Mayor DeG M & Co.* 153 L. R. 100 Presumptive Evidence 106 107 see s. 114 post

() *Lawson's Presumptive Ev* 104-105

(8) *Routledge v Carruthers* 10 C. 15 Adult Bast 161 The basis of the rule seems to be a notion that it is unreasonable to inquire into the paternity of a child whose parents have access to each other Markby Fr 87

(9) *R v Murray* 1 Salt 177 F v *Alerton* 1 Ld Raym 127 see *Lawson's Presumptive Ev* 109

(10) *R v Luffe* 8 East 208

(11) *Head v Head* 1 Sim & St 150 (1843)

be the father. But in modern times the rule of evidence has varied. Formerly it was considered that all doubt could not be excluded unless the husband were *extra quatuor maria*. But as it is obvious that all doubt may be excluded from other circumstances although the husband be within the four seas the modern practice permits the introduction of every species of legal evidence tending to the same conclusion. But still the evidence must be of a character to exclude all doubt and when the Judges in the *Banbury Case* spoke of satisfactory evidence upon this subject they must be understood to have meant such evidence as would be satisfactory having regard to the special nature of the subject.

The rule here referred to and declared by the House of Lords in the *Bailury Peerage Case*(1) was— In every case where a child is born in lawful wedlock the husband not being separated from his wife by sentence of divorce sexual intercourse is presumed to have taken place between the husband and wife until that presumption is encountered by such evidence as proves to the satisfaction of those who are to decide the question that such sexual intercourse did not take place at any time when by such intercourse the husband could, according to the laws of nature be the father of such child. This is the law both in this country (2) and in England and America at the present time.

The section says that birth during marriage is *conclusive* proof(3) of legitimacy unless it can be shown that there was non access. This section differs from those which direct that the Court shall presume 'in the circumstance that in the latter case the presumption may be rebutted by any fact or facts but the presumption enacted by the present section can be rebutted only by proof of the particular fact indicated as that by which it may be rebutted. In order to displace the conclusive presumption it must be shown that no access, or opportunity of sexual intercourse occurred down to a point of time so near to the birth (as for instance six months) as to render paternity impossible.

In this rule access and non access mean the existence or non Access existence of opportunities for sexual intercourse (4). If sexual intercourse is proved between the husband and wife at the time of the child being conceived, the law will not permit an enquiry whether the husband or some other man was more likely to be the father of the child (5). Non access may be proved by means of such legal evidence as is admissible in every other case in which it is necessary to prove a physical fact (6).

As a child born of a married woman is in the first instance presumed to be legitimate such presumption is not to be rebutted by circumstances which only create doubt and suspicion but it may be wholly removed by proper and sufficient evidence showing that the husband was (a) incompetent(7) (b) entirely absent so as to have no intercourse or communication of any kind with the mother (c) entirely absent at the period during which the child must in the

(1) 1 Sim & St 153

(2) As to Muhammadan Law v *post* and s 114 *post*

(3) See s 4 *ante*

(4) *Banbury Peerage Case* 1 Sim & St 159 5 Cl & F 250 *Cope v Cope* 1 M & Rob 275 *Bury v Plipot* 2 My & K 349 in *Hargrave v Hargrave* 9 Beav 552 556 Lord Langdale calls it generating access

(5) *Morris v Davis* 5 Cl & F 243 *Cope v Cope* 1 M & Rob 275

(6) *Roario v Ingles* 18 Bom 468 47 (1893)

(7) In *Field Ev* 6th Ed 355 356 it is suggested that the section scarcely makes provision for this case but access does not in this connection simply mean being in the same place or house (*Banbury Peerage Case* 1 Sim & St 159) but access viewed with reference to the result of the procreation of children. There can therefore be as little access when the husband is impotent though present, as when he is capable though absent. It is clear that there was no intention to depart from the English rule on the point which is also a rule of obvious good sense

course of nature, have been begotten, or (d) only present under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse

Such evidence as this puts an end to the question and establishes the illegitimacy of the child of a married woman (1) All these similar facts are receivable in evidence in proof of non access So also Lord Ellenborough in *R v Luffe* (2) laid it down that the illegitimacy of the child might be shown when the legitimacy was impossible and the impossibility arose from (a) the husband being under the age of puberty (b) the husband labouring under a disability occasioned by natural infirmity, (c) the length of time elapsed since the death of the husband, (d) the absence of the husband, or (e) where the impossibility was based on the laws of nature

In this last connection it will be unnecessary to prove facts which may certainly be known from the invariable course of nature, such as that a man is not the father of a child where non access is already proved until within six months of the woman's delivery (3)

So far as concerns descent from particular parents a child born during wedlock is presumed according to English law, to be the legitimate issue of such parents, no matter how soon the birth be after the marriage (4) When a man marries a woman whom he knows to be with child, he may be considered to have intercourse with her And it has been held that a child born in wedlock, and that if the husband could from the circumstances of time place and health have had nuptial intercourse with his wife and there be no evidence that he did not have such intercourse he must be considered the father of her child (6) The present section following the English law adopts the period of birth, as distinguished from conception as the turning point of legitimacy It is a peculiarity of that law that it does not concern itself with the conception but considers a child legitimate who is born of parents married before the time of his birth though they though a child is presumed to be born in marriage, this presumption may

(1) *Hargrave v Hargrave* 9 Beav 552
555 per Lord Langdale

(2) 8 East 207

(3) Taylor Ex § 16 and cases there cited and cf *Husterlo's case* cited in Lawson Pres Ex 110 where it was attempted to charge a black man as the father of a white child born of a Mulatto woman So also expert evidence has been admitted to show that by the laws of nature a white man and woman could not be the parents of a Mulatto child Wharton Ex § 1298

(4) Wharton Ex § 1298 As to the Mahomedan Law see Syed Ameer Ali's Mahomedan Law Vol I pp 199—201

(5) *R v Luff* 8 East 210 per Lawrence J and see ib 207 with respect to the case where the parents have married so recently before the birth of the child that it could not have been begotten in wedlock it stands upon its own peculiar ground The marriage of the parties is the criterion adopted by the law in the cases of anti-

nuptial generation for ascertaining the actual parentage of the child For this purpose it will not examine when the gestation began looking only to the recognition of it by the husband in the subsequent act of marriage Per Lord Ellenborough (C) *Gordon v Gordon and Grant* 11 Corden (1903) P 141

Hindu Law it is not necessary in order to render a child legitimate that the procreation as well as the birth should take place after marriage *Oolagappa Chetty v Collector of Trichinopoly* 14 B L R 116 (1873) see s 114 post As to the position of bastards in Hindu Law see *Pandaya Telatar v Puli Telatar* 1 Mal H C R 478 (1863)

was incapable on grounds either of impotence, or absence, of being the father of the child (1)

Where evidence of access is given, it requires the strongest evidence of non intercourse or other proof beyond reasonable doubt to justify a judgment of illegitimacy (2) Adultery on the wife's part, however clearly proved will not have this effect, if the husband had access to the wife at the beginning of the period of the gestation, unless there is positive proof of non intercourse (3) From evidence of "access"—as this word is used in this connection—the presumption of sexual intercourse is very strong (4) But evidence of access is not conclusive It being only proved that the opportunity for sexual intercourse had existed—as that the parties lived in the same house—and the fact itself not being proved evidence is admissible to disprove the presumption that it did take place The parties may be followed within these four walls and the fact of sexual intercourse not only disproved by direct testimony but by circumstantial evidence raising a strong presumption against the fact In other words the proof of sexual intercourse being conclusive the presumption cannot be attacked, but the evidence by which such fact is to be established may be contradicted (5) To rebut the presumption under this section it is for those who dispute the paternity of the child to prove non access Where a wife came to her husband's house a few days before he died and remained there up to the time of his death and it was shown that a child alleged to be that of her husband, was the child of the wife and that it was born within the time necessary to give rise to the presumption under this section the Privy Council in the absence of any evidence to show that the husband could not have been with him, held that this section must be construed within which the

child must have been begotten suffering from a serious illness which terminated fatally shortly afterwards was held under the circumstances not sufficient to rebut the presumption (6) This presumption still exists where the parties are living apart from each other by mutual consent though the presumption is rebuttable by proof of non access But it is otherwise where they are separated by a decree of Court for in such cases the presumption is that they obey the decree (7) Moreover by the terms of the section there must be a "continuance of a valid marriage" But a child born within 280 days from the dissolution of a valid marriage will be presumed legitimate So in the case of widowhood though cohabitation is possible the law will presume in favour

(1) *Morris v Davis* 5 Cl & F 161
R v Mansfield 1 Q B 444 *Hitch v Sprigg* 33 L J Ch 145 *Wharton* § 1298

(2) *Wharton* L. § 1298 i. 310 r 1
 § 106 *Head v Head* supra *Cope v Cope* supra, *Morris v Davis* supra *Wright v Holdgate* 3 C & K 158 *Legge v Edmonds* 25 L J Ch 125 *Banbury Peerage Case* supra *R v Luff* supra as to the competency of the parents to prove non access v. post

(3) *Bury v Philpot* 2 M & K 349
Head v Head supra *Lawson's Pres* L. 113 114 *Wharton* Ex § 1298 *The Barony of Sale* 1 H L Cas 507 *Gurney v Gurney* 32 L J Ch 456

(4) *Lawson* 114 see *Plow v Berry* 3 L J Ch 680 *I v Inhabitants of Mansfield* 1 Q B 144 *Cope v Cope* supra that husband and wife slept together affords strong and irresistible inference of

sexual intercourse *Legge v Edmonds* supra

(5) *Lawson* 115 116 *R v Mansfield* supra *Cope v Cope* supra on this point the conduct of the parties is relevant as that the wife concealed the birth of the child from the husband *Morris v Davis* 5 Cl & F 163 *Cope v Cope* supra *Banbury Peerage Case* supra *Pandaya Telcar v Puli Telcar*, 1 Mad H C R. 478 485 (1873)

(6) *Narendra Nath v Ram Chandra* L. C. 11 (1901) s. c. 4 P. M. 113
Dist. in Rao Narasingh v Set 25 A. A. 470 (1922) where it was held that the failure of the defendant to prove the case affirmatively did not entitle the plaintiff to the benefit of the presumption under this section

(7) *Taylor* L. § 116 s. 4 *Lawson* 114 cited

after the death
last period at
was set up as
was perhaps
evidence that

the mother had been married to her husband for ten years without having had any children by him and also evidence which pointed strongly to the conclusion of immorality on the part of the mother, the only reasonable finding was against the legitimacy of the child (2) In a later case where non access for eleven months was proved the child was found illegitimate (3) Where the question in issue was whether the plaintiff was the legitimate son of a man to whom his mother had admittedly been at one time married but by whom (according to the defendant) she had been abandoned or divorced it was held that mere abandonment would not dissolve the tie of marriage, and that in such a case the presumption of legitimacy would prevail, unless it could be shown that the parties to the marriage had no access to each other at a time when the plaintiff could have been begotten, and it was held also that the burden of proof as to this and as to the alleged divorce having taken place at a time which would debar him from relying on this section lay on the defendant (4) In Buddhist law there is no such thing as judicial separation but an order under section 488 of the Criminal Procedure Code until it is rescinded is for all practical purposes the same thing as an order for judicial separation, and if while the order is in force a child is born to the wife the onus is shifted on to her of proving access. The rule laid down in this section is inapplicable to such a case inasmuch as the order under the Criminal Procedure Code practically puts an end to the continuance of a valid marriage (5)

It may be a question of difficulty to determine how far the provisions of Muhammedan law of marriage departments of law under other rule of decision by the Courts

in British India (6)

Evidence of
parents

According to English (7) and American (8) law the parents are incompetent to prove non access when the legitimacy of a child is in question, which

(1) See *Trilok Nath v Lachai Kunuari* 7 C W N 617 (1903) when the child was born 223 days after the husband's death s c 25 A 403

(2) *Tilim Singh v Dhai Kumar* 24 A 445 (1902)

(3) *Jol v Hove v Charlotte Hove* 38 M 466 (1915)

(4) *Blava v Dillappa* 7 Bom L R 15

(5) *Ma Mja v Ma Sinc Ba* 46 I C 670

(6) *Milad Allalad v Muha* 10 A 289-339 (1888) per Mahmood J in Field Ev 514 it is stated that It may be supposed that the provisions of this section will supersede certain rather absurd rules of Muhammedan Law by which a child born six months after marriage or within two years after divorce or the death of the husband is presumed to be his legitimate offspring See the Hedaya Ch VIII and Macnaghten's Hindu Law Ch VIII § 31 It is to be noted that according to the modern view the period is ten months

after divorce or the death of the husband. Further the determination of this point is not touched by considerations as to the rational character of the rules to be adopted but is simply dependent on an accurate distinction between the substantive rules of Muhammedan Law and the rules of evidence (10 A 320 supra) If the point for decision be one of evidence only the case will be governed by this Act (b, *Ma har Ali v Budh Singh* 7 A, 297, see ss 107 108 ante)

(7) Taylor Ev § 950 951 Phoon Ev 5th Ed 184-186 Best Ev § 586 Roscoe N P Ev 1038 18th Ed. 1047 Steph Dg Art. 98 Powell Ev. 9th Ed 139 200 201 The rule has recently been affirmed in the Russell Case the official report of the Court of final appeal not being to hand as this note was being printed

(8) Stewart Rapalje's Treatise on the Law of Witnesses § 158 Lawson's Presumptive Evidence 118 Wharton Ev. § 608

latter fact must be established by circumstantial evidence only. The rule in England has been stated (1) to be that—(a) Neither the mother nor the husband is a competent witness as to the fact of their having or not having had sexual intercourse with each other (2), nor are any declarations by them upon that subject deemed to be relevant facts when the legitimacy of the woman's child is in question, whether the mother or her husband can be called as a witness or not, (b) provided that in applications for affiliation orders *when proof has been given* (by independent evidence) *of the non access* of the husband at any time when his wife's child could have been begotten, the wife may give evidence as to the person by whom it was begotten (3).

It has further been held by the House of Lords that a husband may be asked whether he had intercourse before marriage with the woman who afterwards became his wife (4).

The grounds of the rule have been stated to be "decency, morality and policy." The proviso relating to affiliation orders is founded on necessity, since the fact to which the woman is permitted to testify is probably within her own knowledge and that of the adulterer alone (5). It has been held in America that the rule thus established is not affected by the Statutes removing disability from interest (6). The rule excludes not only all direct questions respecting access but all questions which have a tendency to prove or disprove that fact, unless they are put with a view to some different point in the cause (7). No such rule is, however, to be found in, or implied from, this Act and it has accordingly been held that in this country a wife can be examined as to non access of the husband during her married life *without* independent evidence being first offered to prove the illegitimacy of her children (8). And in the undermentioned case in the Madras High Court this ruling has been followed and it was held that both the parties in a proceeding for divorce are competent under sections 118 and 120 of this Act to give evidence as to non access and the consequent illegitimacy of a child (9).

113 A notification in the *Gazette of India* that any portion of British territory has been ceded to any Native State, Prince or Ruler (10), shall be conclusive proof that a valid cession of such territory took place at the date mentioned in such notification

Proof of
cession of
territory

Principle.—See Note, *post*

s 37 (Relevancy of Notifications in Official Gazettes)

s 57, CL. (10) (Judicial notice of British territories)

s 4 ('Conclusive proof')

Markby, Ev Act 87, Field, Ev, 6th Ed., 356, 357. Cunningham, Ev, 298, 299, Whitley Stokes An to Indian Codes 835

(1) Steph Dig Art 98

Ed, 202, 287

(2) Unless the proceedings in the course of which the question arises are proceedings instituted in consequence of adultery 32 & 33 Vic. c 68 s 3

(4) *Foulle Peerage Case* L R, A C, 395 (1903)

(3) Steph Dig Art 98 citing *R v Luffe* supra *Cope v Cope*, supra 272 274 *Legge v Edmonds* 25 L J, Eq, 125 135 *R v Mansfield* 1 Q B 444 *Morris v Davies* 3 C & P 215, *Hates v Drager* L R 23 Ch D 173, *Aylesford Peerage case* 11 Q B D 1 Letters written by the mother may as part of the *res gestæ* be admissible evidence to show illegitimacy though the mother could not be called as a witness to prove the statements contained in such letters, *Aylesford Peerage Case* supra *Burnaby v Bailie*, 42 Ch D 282 290 291 Wills Ev, 2nd

(5) Taylor Ev §§ 950 951, see the grounds given in the judgment cited in Wharton Ev 608 note (2)

(6) Lawson Pres Ev 118 Wharton, Ev, § 608

(7) Taylor Ev § 930 and case there cited

(8) *Rorario v Inglis* 18 B 468 (1893) In England independent evidence of non-access would be required in the first instance, *v supra*.

(9) *John Howe v Charlotte Howe*, 38 M, 466 (1915)

(10) See for example *Gazette of India*, 1873 Part I, p 2

COMMENTARY.

Cession of
territory

This section was an attempt for political reasons to exclude inquiry by Courts of Justice into the validity of the Acts of the Government. But it has been decided by the Privy Council (1) that the Indian legislature had no power to do this, and the section is therefore a dead letter (2). The British Crown has the power without the intervention of the Imperial Parliament to make a cession of territory within British India to a foreign prince or feudatory (3). But the Governor General in Council being precluded by the Acts 24 and 25 Vic., Cap. 67, section 22, from legislating directly as to the sovereignty or dominion of the Crown over any part of its territories in India, or as to the allegiance of British subjects,—could not, by any legislative Act purporting to make a notification in a Government Gazette conclusive evidence of a cession of territory, exclude inquiry as to the nature and lawfulness of that cession (4). The Court must take judicial notice of the territories under the dominion of the British Crown (5). See also in connection with this section (6) the seventh clause of the third section, Bengal Regulation XIV of 1820 which enacts that, for the purposes of that Regulation (*viz.*, the inquiry into the validity of *lakhray* grants), the following shall be held to be the periods at which the several provinces subordinate to the Bengal Presidency were acquired by the British Government, namely, for Bengal, Behar and Orissa (excepting Cuttack) the 12th August 1765, for Benares, the 1st July 1775, for the provinces ceded by the Nawab Vizier, the 1st January 1801, for the provinces ceded by Daulat Rao Scindia and the Peshwah, the 1st January 1803, for the provinces of Cuttack, Puttaspore and its dependencies, the 14th October 1803, for the pergunnah of Khandah and the other territory ceded by Nana Govind Rao the 1st November 1817.

Court may
presume
existence
of certain
facts

114 The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business (7), in their relation to the facts of the particular case.

Illustrations

The Court may presume—

(a) that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession,

(b) that an accomplice is unworthy of credit unless he is corroborated in material particulars,

(c) that a bill of exchange accepted or endorsed was accepted or endorsed for good consideration,

(d) that a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or states of things usually cease to exist, is still in existence,

(1) *Damodar Gordhan v Deoram Kanji* 1 B 367 (1876) s c L R 31 A 102 same case in Bombay High Court reported in 10 Bom. H C. R. 37 (1873) in which cases the effect of this section and the power of the Indian Legislature to enact it were discussed. As to the power of legislation of the Governor General in Council see *Alter Cauffman v Government of Bombay* 18 B 636 (1894) and cases there cited.

(2) *Markby Ev Act* 87

(3) *Lachmi Narayan v Raja Paras* 2 A, 1 (1878) following opinion expressed by the Privy Council in *Damodar Gordhan v Deoram Kanji* 1 B 367 (1876) *supra*.

(4) *Damodar Gordhan v Deoram Kanji* 1 B 367 (1876) *supra*.

(5) S 57 Cl 10

(6) *Field Ev* 6th Ed. 357

(7) As to the meaning of "common course of public and private business" see *Ningaua v Bharmappa* 23 B 66 (1893)

- (e) that judicial and official acts have been regularly performed,
- (f) that the common course of business has been followed in particular cases(1),
- (g) that evidence which could be, and is not, produced would, if produced, be unfavourable to the person who withholds it,
- (h) that if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him,
- (i) that, when a document creating an obligation is in the hands of the obligor the obligation has been discharged

But the Court shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before it —

as to illustration (a)—a shopkeeper has in his till a marked rupee soon after it was stolen and cannot account for its possession specifically, but is continually receiving rupees in the course of his business

as to illustration (b)—A a person of the highest character, is tried for causing a man's death by an act of negligence in arranging certain machinery B, a person of equally good character, who also took part in the arrangement, describes precisely what was done, and admits and explains the common carelessness of A and himself

as to illustration (b)—a crime is committed by several persons A, B and C, three of the criminals, are captured on the spot and kept apart from each other Each gives an account of the crime implicating D, and the accounts corroborate each other in such a manner as to render previous concert highly improbable

as to illustration (c)—A, the drawer of a bill of exchange, was a man of business (2) B, the acceptor, was a young and ignorant person, completely under A's influence

as to illustration (d)—it is proved that a river ran in a certain course five years ago, but it is known that there have been floods since that time which might change its course

as to illustration (e)—a judicial act, the regularity of which is in question, was performed under exceptional circumstances

as to illustration (f)—the question is, whether a letter was received. It is shown to have been posted, but the usual course of post was interrupted by disturbances

as to illustration (g)—a man refuses to produce a document which would bear on a contract of small importance on which he is sued, but which might also injure the feelings and reputation of his family

as to illustration (h)—a man refuses to answer a question which he is not compelled by law to answer but the answer to it might cause loss to him in matters unconnected with the matter in relation to which it is asked

as to illustration (i)—a bond is in possession of the obligor, but the circumstances of the case are such that he may have stolen it.

Principle.—See Notes, *post* Introduction, *ante*

s. 3 (Court)

s. 4 (" May presume ")

s. 3 (Fact)

ss. 79—99, 107—118 (Other presumptions)

Steph. Dig., Arts. 85—89 98—101, Taylor, Ev., §§ 70—216, Greenleaf, Ev., §§ 14—48 and Index Wharton, Ev., §§ 1226—1363, Burr Jones, Ev., §§ 8—103, Wood's Practice, Ev., §§ 53—82 Wharton Cr. Ev., §§ 707—851, Lawson on Presumptive Evidence, *passim*; Best on Presumptive Evidence, *passim*, Wills, Circumstantial Evidence, *passim*, Phillips and Arnold Ev. 467—493, Best, Ev., 273—401

(2) See *Ningala v. Bharmappa* 23 B. 66 (1898)

(3) Man of business in its well known

popular sense must mean a man habitually engaged in mercantile transactions or trade, *ib*

COMMENTARY

Scope of
the section

The subject of presumptions, considered generally, will be found to have been shortly discussed in the notes to s 4 *ante*. Certain particular presumptions were by the Evidence Act Bill, and have been by the Act itself, made the subject of special enactment. Objection having, however, been taken to the Evidence Act Bill on the score of its insufficient treatment of the subject of presumptions, the present general clause was inserted with a view of providing for all instances not covered by the provisions of the preceding sections. The present section coupled with the general repealing clause at the beginning of the Act makes it clear "that Courts of Justice are to use their own common sense and experience in judging of the effect of particular facts, and that they are to be subject to no technical rules whatever on the subject" (1). The illustrations given are for the most part cases of what in English law are called presumptions of law, artificial rules as to the effect of evidence by which the Court is bound to guide its decision, subject, however, to certain limitations which it is difficult either to understand or to apply, but which will be swept away by the section in question" (2). A presumption of law is an inference which derives from the law some arbitrary or artificial effect and is obligatory upon Judges and juries. The inference in such case is independent of any belief based upon what is more or less probable because the law declares the uniform effect of a certain state and condition of circumstances. The history of jurisprudence illustrates the fact that among Judges as among Legislators there is a constant struggle, however ineffectual it may be, to approach uniformity in the law. Although every Judge understands that each case should be determined according to its own facts, he often finds different cases so nearly analogous in the facts presented that similar instructions to the jury or directions to himself are appropriate in each. Judges thus find themselves not only applying to different cases the same substantive rules of law, but they derive aid from precedents even in reaching conclusions as to the facts of a given case. This is well illustrated by the growth of presumptions of law. Out of the attempts of many Judges to deduce rules for determining the probative effect of certain facts or groups of facts often recurring, have developed in England many rules called presumptions but which widely differ in importance and intensity. English and American Courts are, however, now inclined to abandon the arbitrary rules of evidence which formerly forbade inquiry into the real facts, and but few of the numerous presumptions formerly called conclusive can now be so classified (3). This Act is a strongly marked instance of this tendency. 'The terms of this section are such as to reduce to their proper position of mere maxims which are to be applied to facts by the Courts in their discretion, a large number of presumptions to which English law gives, to a greater or less extent, an artificial value. Nine of the most important of them are given by way of illustration' (4). But though artificial and technical rules find no place in this Act, the Courts being free to use their own common sense and experience in judging of the effect of particular facts, it will be of assistance to form an inference from those facts to take notice of those principles in the English Courts in dealing to this or indeed any other country, as also to record those decisions of the Indian Courts which touch questions peculiar to this country. These presumptions will be found dealt

(1) When events occur in the far past it often becomes absolutely necessary for the purposes of justice and equity that presumptions should be made. *Ram Chund v Jugesh Chunder* 19 W R 353 354 (1873)

(2) Proceedings of the Legislative

Council Gazette of India Supplement, 30.3. March 1872 pp 234 235, per Sir J F Stephen.

(3) Burr Jones Lx I 88 8 10

(4) Steph Introd p 175, see Field Ex 6th Ed 363—367

with in alphabetical order following the *notes* which are given to the *Illustrations* of this section. Some of those which have been laid down by Indian Courts as applicable to certain circumstances peculiar to this country, indicate the fact that the process abovementioned, which evolved the ancient law of presumptions, is still, and will always perhaps to some extent remain, in operation.

The *Illustrations* to this section are examples taken from the important presumptions relating to innocence(1), regularity(2) and continuity which are commented upon in the following *notes* (3).

If possession is proved(4) the Court may presume that the man who is in possession is either the thief, or has received the stolen goods, and can account for his possession(5) alone justify fixing a person with

more than knowledge that the goods were obtained by dacoity(6). Possession is presumptive evidence of property(7), but when it is proved or may be reasonably presumed that the property in question is stolen property, the burden of proof is shifted, and the possessor is bound to show that he came by it honestly, and if he fail to do so, the presumption is that he is the thief or the receiver according to the circumstances(8). The mere fact of recent possession of stolen property is, in general, evidence of theft, not of receipt of stolen goods with guilty knowledge. The effect to be given to such possession is, however, a question not of law but of fact(9). The property must be shown to have been stolen by the true owner swearing to its identity and loss, or the circumstances must be such as to lead in themselves to the conclusion that the property was not honestly come by. So persons employed in carrying sugar and other articles from ships and wharves, have been convicted of theft upon evidence that they were detected with property of the same kind upon them, recently upon coming from such places, although the identity of the property as belonging to such and such persons could not otherwise be proved(10). If the property be proved to have been stolen(11), or may fairly be presumed to have been so, then the question arises, whether or not the prisoner is to be called

(1) See *Illustrations* (a), (b) (g), (h).

(2) See *Illustrations* (c), (e), (f), (i).

(3) See *Illustration* (d).

(4) *R v Hari Maniram* 6 Bom L R, 887, 893 (1904).

(5) S 114 Ill (a) see Taylor Ev, §§ 127A—127C. *Ina Sheikh v R* 11 C 160 (1885), *R v Shuruffooddeen*, 13 W R, Cr, 26 (1870), *Ishan Chandra v R*, 21 C, 328, 336 (1893), *R v Poromeshur Aheer*, 23 W R Cr 16 (1875), *R v Motee Jolaha*, 5 W R Cr 66 (1866), *In re Ramjoy Kurmohar* 25 W R, C, 10 (1876). In *R v Ali Husain* 23 A, 306 (1901) the Court appears to have been of opinion that the evidence was not sufficient to connect the prisoners with the possession of the stolen articles.

(6) *Amimuddin Sardar v King Emp*, 32 C L J, 89.

(7) *ante*, s 110 and *notes* thereto.

(8) Roscoe, Cr Ev, 13th Ed, 18, 736, for a case in which the circumstances led to the second of these presumptions, see *R v Langmead*, L & C 427 (When the prisoner was found in the recent possession of some stolen sheep, of which he could give no satisfactory account, and

it might reasonably be inferred from the circumstances that he did not steal them himself, it was held that there was evidence for the jury that he received them knowing them to have been stolen). In *Ishan Muchi v R* 15 C 511 (1888) it was held that in a case of receiving there must be some proof that some person other than the accused had possession of the property before the accused got possession of it. See *R v Poromeshur Aheer*, 23 W R, Cr, 16 (1875), *R v T Burke*, 6 A, 234 (1884). It has been thought that there should be some evidence of some other person having committed the theft, see *R v Denley*, 6 C & P, 399, *R v Woolford*, 1 M & Rob, 384.

(9) Mayne's Criminal Law of India §§ 528, 499, Taylor, Ev, § 127 B. See *Amrita Lal Hazra v Emperor*, 42 C, 957 (1915) (possession, to be punishable must be with assent).

(10) Roscoe Cr Ev, 18 citing 2 East, P C, 656; see *R v Burton*, Dears, C, C, 282.

(11) See *R v Burke*, 6 A, 234 (1884); *R v Bajo Hari*, 19 W R, Cr, 37 (1873).

upon to account for the possession of it. If he fails to do so, a presumption will arise if taking into consideration the nature of the goods in question, there can be said to have been recently stolen. It has been said that to raise the presumption legitimately the possession should be exclusive as well as recent (1). But where stolen property was found in the house of a joint Hindu family, and the circumstances were such that it was very improbable that such property

convivance of some or all of the managing member was rightly convicted been established against him, he was

to have been in possession of such stolen property (2)

can be put upon his defence to account for such possession (3). The test of a

to account for property

manner, but the undermentic

subject (5). The Evidence Act is merely illustrative of the manner in which inferences can be drawn from the common course of events, human conduct and the like. In a prosecution for receipt of stolen goods lapse of time after the theft is usually an important factor in determining the guilt of the accused, but the importance to be attached to it must vary with the circumstances of the individual case and depends on the frequency with which the property is likely to have changed hands. No maximum period is suggested as that beyond which no inference of guilt can be drawn (6). And in another more recent case it was held that no presumption was raised under this section

"an ordinary

in an indictment of arson, proof that property was in the possession of the prisoner at the time it was burnt, was soon after found in the possession of the prisoner raises a probable presumption that he was present and concerned in burning the house, and, under similar circumstances, a like inference arises in the case of murder accompanied by robbery or house breaking and of the possession of a quantity of counterfeit money (8). So in cases in which murder and robbery have been shown to form parts of one transaction, the recent and unexplained possession of the stolen property, while it would be presumptive

(1) *R v Malhar* 6 B 733 (1882) citing *Best Ev*. The finding of stolen property in the house of the accused, provided there were other inmates capable of committing the larceny is of itself insufficient to prove his possession though if coupled with proof of other suspicious circumstances it may fully warrant the conviction of the accused *Taylor Ev*, § 127 A and cases there cited and observations in *R v Hari* 6 Bom. L. R. 887 892 (1904).

(2) *R v Budh Lal* (1907) 29 A 598

(3) *R v Hari*, 6 Bom L R 887, per Aston J contra per Battay J

(4) *In re Meer Yar* 13 W R Cr, 70 71 (1870)

(5) *Roscoe Cr Ev* 19 *Ina Sheikh v R* 11 C, 160 (1885) citing and following *R v Adam* 3 C & P 600 *R v Cooper*, 3 C & R., 318 *R v Partridge*, 7

C & P 551 See *Roscoe Cr Ev loc cit* where these and other cases are cited *R v Poromeshur Aheer*, 23 W R Cr 1, 6 (1875), *R v Burke* 6 A 224 227 (1884). The question what amounts to recent possession sufficient to justify the presumption in any particular case varies according as the stolen article is or is not calculated to pass readily from hand to hand *Taylor Ev* § 127A. *In Re Jannullahdeen*, 53 I C 81 held that thirteen months was not soon after and in 27 C W N 597 three months was held to raise no presumption.

(6) *Smith v Emperor* 19 Cr L J 189, s c, 43 I C 605

(7) *R v Suglar Singh* (1907) 29 A. 138, following *Ina Sheikh v R* and *R v Burke* supra

(8) *Taylor Ev* § 127 C and cases there cited.

evidence against a prisoner on a charge of robbery, would similarly be evidence against him on a charge of murder (1) The Court must in all cases consider whether under the circumstances the maxim does or does not apply to the particular case before it (2)

Illustration
(b)

The Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars (3) The grounds upon which this presumption is based and the rules which relate to the admission of accomplice evidence, will be found discussed in the notes to section 133 *post*

Forced was Illustration
consider (c)
ills of ex
They are
to secure
sideration

may reasonably be inferred from the solemnity of the instruments themselves and the deliberate mode in which they are executed (4) Thus and other presumptions relating to negotiable instruments have been made the subject of special enactments in the Negotiable Instruments Act (5) Professional money lenders sued a young man recently come of age to recover certain loans of money alleged to have been advanced by them to him on promissory notes The defendant who under the will of his father was entitled to a large property but had not yet come into possession of it was of an extravagant and reckless character He pleaded as to part of the consideration for the notes that he did not receive it and as to a further part that the consideration was immoral In dealing with the case the Court laid down the following propositions not as rules of law but as guides in considering the evidence in such a case —

1 That upon the above facts the ordinary presumption that a negotiable instrument has been executed for value received was so much weakened that the defendant's allegation that he had not received full consideration was sufficient to shift the burden of proof and to throw upon the money lenders (the plaintiffs) the obligation of satisfying the Court that they had paid the consideration in full That is the practical effect of Illustration (c) to section 114 of this Act

2 Where the plaintiff in answer to such a defence affirmed that he had paid the consideration in full and was corroborated by his books and witness the onus of proof again shifted over upon the defendant

3 The burden of proof thus thrown upon the defendant could only be met by a perfectly truthful and harmonious statement which the Court felt able to rely upon with confidence In the absence of this the ordinary presumption laid down in the Negotiable Instruments Act must prevail viz, until the contrary is proved the presumption should be made that every negotiable instrument was made for consideration (6) The mere fact that the drawer

(1) *R v Jami* 13 M 426 432 (1890)

(2) See s 114 observations in text of this section relating to this Illustration on p 770

(3) S 114 ill (b) but see also observations in the text of this section relating to this Illustration on p 770 See *Emperor v Gangappa Kardeppa* 38 B 156 (1914) *R v Khondia bin Pandu* 15 B, 66 (1890) *Emperor v Anant Kumar Banerji* 32 C. L. J 204

(4) Taylor Ev § 148 Story on Bills

§§ 16 1/8 *Jones v Gordon* 2 App Cas, 627 H L Lawson Pres Ev 77—81

(5) See the Act (XXVI of 1881 Amended V of 1914 rep in part VI of 1901) edited by M D Chalmers (1887) pp 110—114 and see *Gaya Din v Sri Ram* 39 A., 364 (1917) (on s of proving that no damage ensued from failure to present) and *Madho Prasad v Dirga Prasad* 7 Bom L. R., 891 (1900)

(6) *Moti Golabchand v Mahomed Medhi* 70 B 367 (1895) See note (5) ante

and acceptor of a bill are partners, does not give rise to the presumption that they are partners in respect of the drawing of the bill or that the bill was drawn by one of them on behalf of both (1)

Illustration
(d)

The Court may presume that a thing or state of things which has been shown to be in existence within a period shorter than that within which such thing or state of things usually cease to exist, is still in existence. The ordinary legal presumption is that the existence of a personal relation is once established by proof, as before until the contrary is proved or until a different presumption is raised from the nature of the subject in question. But the presumption is not *retrospective*. It cannot be permitted to operate retrospectively so as to infer the prior existence of marriage or other like relationship from proof of its present existence. It may well be that in the example given the parties contracted the relationship within a few days before the trial (3). And though a present continuance may be, a *future continuance* is never presumed. The law presumes that a fact continuous in its nature still continues to exist until a change is shown, and so a state of things proved to exist three years ago is presumed in law to be still existing unless the contrary be shown, but the law indulges no presumption that it will continue three years longer. It is not unreasonable to presume the continuance of an existing fact at the time of the trial for the other party can overthrow it by proof if it be not so, but when a future continuance is presumed, the party has no ability to unfold the future and give an answer by his proof (4). In case of conflicting presumptions, the presumption of the continuance of things is weaker than the presumption of innocence. Thus a bankrupt in 1837 makes a scheduled return of his property. It is afterwards discovered that in 1835 he owned certain property which was not included in the schedule. There is no presumption that he owned this property in 1837, for the presumption is that he did not commit a fraud (5). In the case cited it was held that a previous *ex-parte* rent-decree between the same parties is conclusive as to the relation between them at that time, and that its value

(1) *Jambu Ramaswamy v Sundararaya Chetti* 26 M 239 (1902) which case also deals with the question of *onus* in the case of damage suffered by drawer by omission to give notice of dishonour.

(2) *Mussamat Jauntool Batool v Hoseinee Begum* 11 Moo I A 194 209 (1867) *Obhoy Churn v Hurs Nath* 8 C 72 79 (1881) See *Phipson Ev* 3rd Ed 86 [States of persons mind or things at a given time may in some cases be proved by showing their previous existence in the same state there being a probability weakened with remoteness of time that certain conditions and relationships continue e.g. human life marriage sanity opinions title partnership official character domicile *Taylor Ev* §§ 196—205 *Best Pres Ev* 186—202 *Burr Jones sec 152 et seq Best Ev*, §§ 405—410 *Wharton Ev* §§ 1284—1289 This rule must of course be clearly distinguished from that which declares that specific acts done in other cases do not raise the inference that a similar act was done in another case *Hollingham v Head* 4 C

B N S 388 *v post*

(3) *Lawson Pres Ev* 190 191 citing *Murdock v State* 68 Ala. 567 (Amer) *Bareli v Lytle* 4 La Ann 557 (Amer) It cannot be presumed from the fact that a person was qualified to act as a Justice at a particular date that he was qualified so to act at a period anterior to that date *Taylor v Creswell* 45 Ind 423 (Amer) [A made a contract in 1860. In 1864 he was insane. There is no presumption that he was insane in 1860.]

(4) *Covert v Gray* 34 How Pr 460 (Amer) cited in *Lawson Pres Ev*, 188

(5) *Lawson Pres Ev* 191 citing *Pouell v Knox* 1 Ala 634 (Amer) But see *Best Ev* 186 citing *R v Badd* 5 Esp 230 *Turton v Turton* 3 Hagg N C 350 in which it is said that there are several instances to be found in the books where this presumption has been held stronger than that of innocence or those derived from the course of nature

is the more apparent since this Illustration allows the Court to make a presumption as to the continuance of the state of things shown by it (1)

Sections 107—109, *ante*, deal with particular applications of the principle of which the present illustration is the general expression. Other common instances are here shortly adverted to. Possession or ownership of property once proved to exist is presumed to continue until the contrary is shown. Thus if it be proved that at a given time *B* was possessed of certain land, the presumption is that such possession continues, and the burden is on him who alleges a dispossession (2). There is a presumption of the continuance of possession with the person in whom there is title. So in a suit for the possession of jungle lands where there is no proof of facts of ownership having been exercised on either side, possession must be presumed to have continued with the person to whom they rightfully belong (3). Possession is not necessarily the same thing as actual user. When land has been shown to have been in a condition unfitting it for actual enjoyment in the usual modes, at such a time and under such circumstances that that state naturally would and probably did continue till within twelve years before suit, it may properly be presumed that it did so continue, and that the previous possession continued also, until the contrary is proved. Such a presumption is in no sense a conclusive one. Its bearing upon each particular case must depend upon the circumstances of that case (4). Constructive possession will not, however, be presumed in favour of a wrongdoer (5). Similarly non-possession or loss (6), debt (7), and other conditions of property or things (8), once proved to exist are presumed to continue until the contrary is shown (9). So when a private arrangement by way of partition was admitted to have existed and to have been acted upon for forty years, it was held that that fact raised a presumption that it was of a permanent character; throwing upon the plaintiffs who sought to disturb the existing state of things, the *onus* of showing that it had been legally determined (10). So also domicile,

(1) *Hiranmoy Kumar Saha v Ramjan Ali Dewan* 43 C 170 (1916)

(2) *Best Pres Ev* 186, *Lawson, Pres Ev*, 163 & 164, and cases there cited, *Best Ev*, 405

(3) *Leelanund v Mussumat Bashee roonissa* 16 W R 102 (1871), *Mitterjeet Singh v Radha Pershad* 21 W R, 368 (1875), *Ram Bandhu v Kusu Bhattu*, 5 C L R, 481 (1879) *Watson & Co v The Government*, 3 W R 73 (1865), *Mohiny Mohun v Krishna Kishore*, 9 C, 802 (1883), s c, 12 C L R, 337, *Probhakar Tinari v Raja Baidya* 1 C W N, cxix (1897), and see cases cited in notes to s 100, *ante*

(4) *Mahomed Ali v Khaja Abdul*, 9 C, 744 (1883), F B s c, 12 C L R, 257, cf *Raycoomar Roy v Gobind Chunder*, 19 Ind App 140 (1891), as to the possession of land formed by the gradual drying up of lakes or water channels see *Radha Gobind v Inglis*, 7 C L R 364 (1880), *Sunnud Ali v Mussumat Korimoonissa* 9 W R, 124 (1868), *Mohiny Mohun v Krishna Kishore*, 9 C, 802 (1883), s c, 12 C L R 337. As to possession in the case of *chur* land and land diluviated and then reformed by the gradual action of a river see *Gokool Kristo v David* 23 W R 443 (1875), *Kally Churn v Secretary of State*, 6 C, 725

(1881) s c 8 C L R 90 *Manomohun v Mathura Mohun* 7 C 225, s c 8 C L R 126

(5) *Secretary of State v Krishnamoni Gupta* 29 C 518 (1902) at pp 534 535

(6) Thus where the question was as to the admissibility of secondary evidence of a document and it was proved that two years ago diligent search was made but it could not be found the presumption was held to be that it was still lost and secondary evidence was admissible *Poe v Darrah*, 20 Ala, 289 (Amer)

(7) *Jackson v Irvin*, 2 Camp 48 [To prove debt against a bankrupt an entry in his books some months before the bankruptcy showing that he was indebted to the claimant in a certain sum is proved. The presumption is that the debt still continues], *Best, Pres Ev*, 187—189, *Best Ev*, § 406, *Taylor, Ev* § 197

(8) *Scales v Key* 11 A & E, 819 [The question is whether a certain custom existed in the year 1840. The jury finds that the custom existed in 1869 without more. The presumption is that the custom existed in 1840, and see *Obhoy Churn v Hari Nath*, 8 C 72 (1881), cited *post*

(9) *Lawson Pres Ev* 163—172

(10) *Obhoy Churn v Hari Nath*, 8 C, 72 79 (1881)

to be so, and on the contrary, nothing shall be intended to be within the jurisdiction of an inferior Court, but that which is so expressly alleged (1) When under an Act certain things are required to be done before any liability attaches to any person in respect of any right or obligation, it is for the person who alleges that that liability has been incurred to prove that the things prescribed in the Act have been actually done. No presumption should be made under this *Illustration* in favour of the condition precedent having been observed (2) But where a defendant in answer to a claim for arrears of taxes by Bombay District Municipality alleged that the taxes were illegal (a) because no notice had been given him under section 57 (Bombay Act II of 1834), (b) because no notice had been issued by the Municipality to the Commissioners under the 11th section of Bombay Act VI of 1873 it was held that he must prove the defence and in the absence of such proof the Court would presume that the Municipality had used the regular procedure, and that the common course of business had been followed in the particular cases (3) Before the deposition of a medical witness taken by a Committing Magistrate can under section 509 of the Code of Criminal Procedure, be given in evidence at the trial before the Court of Session, it must either appear from the Magistrate's record or be proved by the evidence of witnesses, to have been taken and attested by the Magistrate in the presence of the accused. The Court ought not if it do not so appear, or if it be not so proved, presume either under section 80 or section 114, *Illustration* (c) of this Act, that the deposition was so taken and

of the date on which it was pronounced according to law (6) But in the *unnot* mentioned case it was held that the presumption of regularity under this section supplied any omissions either as to the communicating of the order to the prosecuting officer or in the order sheet of the Magistrate (7) In the case noted it was held that when a mortgagee has purchased the equity of redemption in contravention of the provisions of section 99 of the Transfer of Property Act, it should not be presumed under this section in the absence of evidence that the Court granted leave to bid (8)

Illustration
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The Court may presume that the common course of business has been followed in particular cases. When there is a question whether a particular act was done the existence of any course of business according to which it naturally would have been done, is a relevant fact (9) When the common course of

(1) *R v Nabadwip Goswami* 1 B L R O C 15 29 30 35 (1868) s c 15 W R Cr 71 77

(2) *Ashanullah Khan v Trilochun Bagchi* 13 C 197 199 (1886) referred to in *Sheoruttun Singh v Net Lal* 30 C 1 11 (1902) but see also *Municipality of Sholapur v The Sholapur Spinning Co* 20 B 732 (1895) cited post As to notices under the Road Cess Act (IX of 1888 B C) see *Rash Behary v Pitambori Chodhrani* 15 C 237 (1888) and before sale of a *Matni taluk* see *Hurro Dozal v Mahomed Gazi* 19 C, 699 (1892) referred to in *Sheoruttun Singh v Net Lal* 30 C 1 11 (1902), followed in *Sheik Mohanied v Jadunandan Jha* 10 C W N 13, (1905) at p 147, which distinguishes the case of a sale for arrears of Government Revenue

(3) *Municipality of Sholapur v The*

Sholapur Spinning Co 20 B 732 (1895) followed in *R v Ram Chandra* 19 A 493 (1897) but see *Ashanullah Khan v Trilochun Bagchi*, 13 C 197 199 (1886) cited ante

(4) *Kachah Hari v R* 18 C 179 (1890), *R v Riding* 9 A 720 (1887) *R v Poph Singh* 10 A 174 177 13 (1887)

(5) *R v Sayed Ali ad* 33 A 575 (1913)

(6) *Gopal v Krishna* 3 Bom L R 470 (1901) *Mahipat v Lakshman* 24 B 406 s c 2 Bom L R 228

(7) *Apurba Krishna Bose v R* (1907) 35 C 141

(8) *Uttam Chandra Das v Raj Krishna Dalal* 21 C W N. 279 s. c. 31 C L J, 98

(9) S 16 ante, v pp 211-214 ante

business has been proved, the Court may under this Illustration presume that it has been followed in the particular case. There are various *prima facie* presumptions which are founded upon the experience of human conduct in the ordinary course of business (1). Several presumptions are made from the regular course of business in public offices, of which the Post office affords a large number of examples (2). Similar presumptions are drawn from the usual course of man's private offices and business, where the primary evidence of the fact is wanting (3). But though this section and Illustration leave it to the Court's discretion to presume that the course of business has been followed, it is not bound to presume it (4). It will consider all the circumstances of the case, especially if they be in any manner unusual. So, if the question is whether a letter was received and it is shown to have been posted, the Court will, in dealing with the presumption consider such a fact as that the usual course of the post was interrupted by disturbances (5). The effect to be given to the word "refused" on a registered cover as proof of tender of the packet to the addressee is one of fact. Each case must be decided under this section according to its circumstances (6). In the case cited a notice to quit was given by registered post but the letter containing the notice was returned by the post office, the addressee having refused to accept it. Held that under this section the Court was entitled to presume that the letter containing the notice reached the defendant, and that the fact that the letter was returned by the post office as not accepted by the addressee, did not affect the presumption (7). Where upon the evidence a presumption of fact under this section, illustration (f), is drawn by an Appellate Court such presumption is binding upon a Court of second Appeal (8).

The Court may presume that evidence which could be, and is not, produced would, if produced, be unfavourable to the person who withholds it. This Illustration deals with the presumptions which arise from withholding evidence and from the spoliation or fabrication or suppression of evidence. The subject of spoliation is dealt with further on and, as will be there seen, the fact, if established, raises most powerful presumptions. But the mere withholding or failing to produce evidence, which under the circumstances would be expected to be

presumption against the party spoliation. Such a presumption vessel were to omit, without reasonable explanation, to call the seaman who had charge of the light at the he evidence may produced, would of the defendants

were said to have been burnt, but this fact was not proved, it was held that the non production of the documents subjected the defendants to have raised against them the presumption recognised by this Illustration (9). And in a

(1) See Taylor Ev. §§ 176—178, and cases there cited.

(2) See Taylor Ev §§ 179—180A and cases there cited *ante* pp 212—214 and *Municipality of Sholapur v The Sholapur Spinning Co.*, 20 B. 732 (1895), cited *supra*.

(3) Taylor Ev §§ 181, 182 and cases there cited, and see *ante*, pp 211—214.

(4) *Ram Das v Official Liquidator*, 9 A. 366 376 (1887).

(5) See s 114.

(6) *Gopal v Krishna*, 3 Bom. L. R., 420 (1901).

(7) *Grish Chandra Ghose v Kishore Mohan Das* 23 C. W. N., 319, s. c. 54

I C., 5.

(8) *Ram Chandra Kaniram Marwari v Larman*, 53 I C., 62.

(9) *Ram Prasad v Raghunandan Prasad* 7 A., 738 (1885), and see *Hutzler v Sharpe*, 15 A., 270 289, 290 (1893); *Hem Chandra v Kali Prasanna* 30 C., 1033 (1903), 8 C. W. N. 1 [non production of collection papers by tenants] See *Burr Jones Ev* § 17, and cases there cited. The evidence of course must be available there is no presumption if it is not within the control of the party failing to produce it nor from the failure to call a witness one whom the other party had the same opportunity of calling, nor

to be so, and on the contrary, nothing shall be intended to be within the jurisdiction of an inferior Court, but that which is so expressly alleged (1) When under an Act certain things are required to be done before any liability attaches to any person in respect of any right or obligation it is for the person who alleges that that liability has been incurred to prove that the things prescribed in the Act have been actually done. No presumption should be made under this *Illustration* in favour of the condition precedent having been observed (2) But where a defendant in answer to a claim for arrears of taxes by Bombay District Municipality alleged that the taxes were illegal (a) because no notice had been given him under section 57 (Bombay Act II of 1834) (b) because no notice had been issued by the Municipality to the Commissioners under the 11th section of Bombay Act VI of 1873, it was held that he must prove the defence and in the absence of such proof the Court would presume that the Municipality had used the regular procedure, and that the common course of business had been followed in the particular cases (3) Before the deposition of a medical witness taken by a Committing Magistrate can under section 509 of the Code of Criminal Procedure, be given in evidence at the trial before the Court of Session it must either appear from the Magistrate's record or be proved by the evidence of witnesses to have been taken and attested by the Magistrate in the presence of the accused. The Court ought not if it do not so appear, or if it be not so proved, presume either under section 89 or section 114, *Illustration* (c) of this Act that the deposition was so taken and attested (4) But it is a reasonable presumption that an oath was administered no record of the fact (5) giving such irregularity is not conclusive evidence of the date on which it was pronounced according to law (6) But in the under mentioned case it was held that, the presumption of regularity under this section supplied any omissions either as to the communicating of the order to the prosecuting officer or in the order sheet of the Magistrate (7) In the case noted it was held that when a mortgagee has purchased the equity of redemption in contravention of the provisions of section 99 of the Transfer of Property Act it should not be presumed under this section in the absence of evidence that the Court granted leave to bid (8)

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(9) *S 16 ante* v pp 211-214

case where a cypher list shown outside the Court by the Police to a witness called to prove the handwriting on certain postcards, was not shown to him while he was giving evidence, it was held that counsel for the defence was entitled to make the comment that this was because the witness had failed to recognize the writing of the cypher list (1) In a suit for accounts the non production of the account books by the party who has custody of them justifies the presumption under section 114G that they have been withheld, because if produced they would have been unfavourable to his case (2) Where certain material witnesses named in the first information and also in the evidence were available but not examined at the trial and the judge did not tell the jury that they could draw an inference unfavourable to the prosecution, and in summing up the evidence the judge omitted to draw the attention of the jury to discrepancies in the evidence for the prosecution, held that such omission constituted a material misdirection to the jury (3) The non production of deeds or papers after notice, has, in general, only the effect of admitting the other party to prove their contents by parol, and as against the party refusing to produce them, to raise a *prima facie* presumption that they have been properly stamped (4) Nevertheless such conduct is, in the absence of excuse, calculated to produce a very prejudicial effect in the minds of the jury against the person having recourse to it, and if the production of his papers would establish the guilt or innocence of a person charged with fraud or misconduct, the jury will be amply justified in presuming him guilty from the unexplained fact of their non production Indeed, jurors will always do well to regard with suspicion the conduct of a party, who, having it in his power to produce cogent evidence in support of his case, offers testimony of a weaker and less satisfactory character" (5) But it is not necessary that a Judge should direct a jury in so many words that the omission of the prosecution to call certain witnesses raised a presumption under this illustration that their evidence would have been unfavourable to the Crown, if he has pointed out that the jury might properly draw any inference they pleased from such omission (6) It has been held that the rule under the Illustration applies when a person who should have been called as a witness is employed as an advocate and offers no testimony (7)

Presumptions are necessarily made against persons who will not subject themselves to examination when a *prima facie* case is made against them, and when by their own evidence they might have answered it (8) Everything is

one whose testimony would be simply cumulative *ib* § 18 See 30 C L J 417 (non production of accounts) and non citation *Venkamma v Venkataramma* 24 C W N 961

(1) *Ajrita Lal Ha-ra v Emperor* 42 C. 957 (1915)

(2) *Debendra Naran Sinha v Naren dra Naran Sinha* 24 C. W N., 110

(3) *Tenaram Mandul v King Emp* 25 C W N 142

(4) *S 89 ante Crisp v Anderson* 1 Stark 35 and attested *s 89 ante* Further a party refusing to produce a document cannot generally afterwards use the document as evidence *s 164 post*

(5) Taylor *Ev* § 117

(6) *Panidra Nath Banerjee v R* (1908) 36 C 281 and see *Dasarath Mandal v R* (1907) 34 C 325 and *Aswaran Chandra Roy v R* (1907) 11 C. W N 1085

(7) *Weston v Peary Mohun Das* 40

C 898 (1913)

(8) *Nawab Syed v Ama ee Begum* 19 W R. 149 151 (1873) In this case the Privy Council observed — It is not unimportant to observe that the Nawab who is a gentleman of rank went into the witness box on this occasion and of course offered himself for cross-examination Their Lordships have often said that it would be very desirable if native gentlemen would do that more frequently because presumptions are necessarily made against them, if when parties in a Court of Justice and facts are in dispute the knowledge of which must rest with them, they will not present themselves to the Court to state their own evidence and knowledge of those facts See also Circular of Bombay High Court cited in *Sabbaji v Shidappa*, 26 B 392 (1901) which case also refers to the question as to how far adverse inference can affect the place of positive proof

to be presumed against a party keeping his adversary out of possession of evidence and taking means to retain that evidence in his own custody (1) Where a plaintiff cited witnesses, and when they appeared, declined to have them examined, it was held that the inference to be drawn from this conduct was that those witnesses on examination and cross-examination would have deposed to a party's answer (2) Where a party the Court may presume that its Privy Council have held that a litigant can refrain from producing documents which he considers irrelevant, and that if in that case his opponent does not seek to obtain production and inspection, neither the opponent nor the Court at his suggestion is entitled to draw any inference as to the character of the documents (4) In another case in the Privy Council it was said that in Indian procedure a practice has grown up by which parties in possession of important documents lie by, trusting to the doctrine of the *onus* of proof, and accordingly fail to furnish to the Court the best material for its decision, and that while this may be right in the case of third parties, it is on the suing parties to the suit an inversion of sound practice, and that the Privy Council feels free to conclude that if such documents had been confirmatory of the view of the party holding them they would have been produced (5) Recently the Judicial Committee have held that no inference should be drawn against a party for not producing a material witness where the question of the absence of such witness was not raised at the trial (6)

It has been held that in a Criminal trial there is no misdirection in a Judge pointing out to the jury the contrast between the evidence for the prosecution, and the course followed by the prisoner (namely, a simple denial of the charge coupled with a refusal to examine the witnesses in attendance), so long as the Judge leaves it to the jury to decide between the opposing statements, and to credit whichever they think most worthy of belief (7) It has also been held that bearing not pro-

yet that there is no corresponding duty on an accused person, who is at liberty to offer evidence or not, as he thinks proper, and no corresponding inference unfavourable to him can be drawn because he takes one course rather than another (8) But it has been held that there is a misdirection sufficient to justify setting aside the conviction when a Judge in his charge to the jury omits to mention the fact that all the original witnesses named in the first information have been abandoned by the prosecution and that two of them gave evidence for the defence (9), and it has been held that the withholding of important witnesses

(1) *Sooriah Row v. Colagherey Boochiah* 2 Moo I A 113 123 (1838) in which case observations were also made on the appellant not calling witnesses within his reach who were acquainted with the subject matter of the suit

(2) *Rajah Asimoney v. Ramanoograh* 7 W R 29 30 (1867)

(3) *Raghunath v. Holi Lal* 1 All L J 121 (1904) *Moharans Beni v. Goben dhan Kauri* 6 C W N 823 824 (1902)

(4) *Bilas Kunwar v. Desraj Ranjit Singh* P C 37 A, 557 (1915), 42 I A, 202

(5) *Murugasam Pillai v. Manickotaseka Desika* P C 40 M 402 (1917), *Ram Singh v. Must Tursa Kunwar*, 17 C W N 1086 (1912) *Lal Kunwar v. Chiranj*

Lal 14 C W N, 285 (1909), 37 I A, 1.

(6) *Banarsi Lal v. Mohesh*, 45 I C, 284 s c 21 O C, 228

(7) *R v. Seetanath Ghosal*, 2 W R, 60 (1865) and see *R v. Madhub Chunder*, 21 W R Cr 13 16 (1874) where upon another point Markby J also remarked

It seems to me a most extraordinary doctrine that because an infamous charge is made against a man it is useless to call him to deny it

(8) *In re Dhunno Kari* 8 C, 121 (1881), *Hurry Churn v. R* 10 C, 140 (1883) s c, 13 C L R, 358.

(9) *Dasarath Vandal v. R.*, 34 C. 325; and see *Fanindra Nath Banerjee v. R* (1908), 36 C, 335

intimately connected with the transaction gives rise to the irresistible inference that they would not have corroborated the prosecution (1)

It must be borne in mind that the rule mentioned in this *Illustration* (like most of the other rules of evidence contained in this Act) applies equally to criminal and civil cases, nor does the case law in reality tend to any other conclusion. The effect of this section and of the preceding cases (cited in the last note) which must be considered with reference to their own particular circumstances, may be summarised and explained as follows—It lies upon the prosecution affirmatively and with reasonable certainty to establish their case. One of the duties of the prosecution in this regard is the production of all available

evidence. If the prosecution fail to completely establish their case after having produced all the evidence in their power, without further action on his part, the Court may grant him his acquittal (2). If the prosecution does not discharge its duty of producing all its available evidence it is no answer to say that the accused who has no such duty cast upon him might have produced that evidence (3). No inference unfavourable to the accused can be drawn in such a case against him. When, however, the prosecution has called all its available evidence and has made out a complete case against the accused and that case discloses that there is evidence which could be produced by the accused for the purpose of negating the charge against him, then under the provision of this section, if such evidence be not produced, the Court may presume that it would if produced, be unfavourable to the accused who withholds it. It is in fact only under these circumstances that the presumption properly commences to operate. The law upon this point has been well expressed by Shaw C.J. in the *Commonwealth v. Webster* (1) in which case he said—"Where probably

the accused has been able to produce evidence which would exonerate him, but he has failed to do so, the burden of proof lies on the accused to make out the whole case by substantive evidence. But when pretty stringent proof of circumstances is produced tending to support the charge and it is apparent that the accused is so situated that he could offer evidence of all the facts and circumstances as they existed and show, if such was the truth, that the suspicious circumstances can be accounted for consistently with his innocence and he fails to offer such proof, the natural conclusion is that the proof if produced instead of rebutting would tend to sustain the charge. But this is to be cautiously applied and only in cases where it is manifest that proofs are in the power of the accused, not accessible to the prosecution" (5).

If, moreover, an accused or other person, not merely abstains from giving evidence but commits spoliation, that is suppresses or destroys evidence which he ought to produce or to which the other party is entitled, the strong presumption will be drawn against him. So strong is the presumption in such a case that the ordinary presumption of innocence may be overthrown and a presumption of guilt raised the general rule being "*Omnia præsumuntur contra*

(1) *Nisaran Chandra Roy v. R.* (1907) 11 C. W. N. 1085.

(2) *Hurry Clurn v. R.* 10 C. 140 where it was held that it was entirely open to the defence to adduce no evidence at all but to rely upon the evidence of the witnesses for the prosecution as to which there was certainly room for forming two opinions.

(3) See *In re Dhunoo Kari* 8 C. supra at p. 125 where it was pointed out that the mere fact of witnesses being summoned for the defence was not a sufficient reason for relieving the prosecution of the duty

of calling them.

(4) 5 Cush. 316 (Amer.) cited in and observed upon in *Lawson* Pres. Ev. 120, 121.

(5) See to the same effect *Wills v. Commonwealth* Ex. 5 6th Ed. 97. [In explained appearances of suspicion] where it is said "the force of suspicious circumstances is augmented whenever the party attempts no explanation of facts which he may reasonably be presumed to be able and interested to explain" and see *Best*, Ev. § 346.

spoliatorem” whose conduct is attributed to a supposed consciousness that the truth would operate against him (1) Where a person is proved to have suppressed any species of evidence, or to have defaced or destroyed any written instrument, a presumption will arise that, if the truth had appeared, it would have been against his interest, and that his conduct is attributable to his knowledge of this circumstance (2) So applying the maxim “*Omnia præsumentur contra spoliatorem*,” the High Court held that, where a vessel was seized on suspicion of having a greater quantity of salt on board than was allowed by its permit, and immediately afterwards a number of men boarded the boat, and, with the assistance of the agent of the owner, threw a considerable quantity of salt overboard, a presumption arose that there was an excess of salt on board at the time of the seizure beyond the amount allowed by the permit (3) And in

service land, the plaintiff alleged that the land had been granted in free *inam* by a *sanad*, which he petitioned the *Mamluk* send to the Collector, and, on a reference by found that “the Collector did destroy the copy of a *sanad* such as the plaintiff petitioned the *Mamlukdar* to search for” — It was held that it was not competent under such circumstances for the defendant to say that the document was not such a one as could legally be admitted in evidence, and that the case came within the rule *omnia præsumentur contra spoliatorem* (4) Where the Government failed to produce records which would have shown whether certain lands were found in the limits of a *zemindari*, it was held that the presumption under this Illustration was raised (5) In a suit to recover the value of plundered property, where a question arose as to the amount of the property misappropriated, it was ruled that, unless the defendant produced the property and showed it not to be of the value stated by plaintiff, the strongest presumption should be made against him and the highest value assumed (6) The maxim, however, only applies where a man by his own tortuous act withholds the evidence by which the nature of his case would be manifested (7) But in an action for goods sold against a defendant who has been guilty of no fraud or improper conduct, in the absence of evidence of the quality of the goods which were delivered, the presumption is that such goods were of the cheapest description (8)

Where a party objected to the admissibility of a document which was afterwards withdrawn, and the Judge in summing up to the jury, said that the

(1) Wills Circumstantial Ev. s 7, 6th Ed 128, Lawson Pres Ev, 140, Taylor Ev, § 116, the rule is evidently based on the principle that no one shall be allowed to take advantage of his own wrong, see note at p 122, 3 Bom H C R, A C J (1886) “If” says Lord Holt, “a man destroys a thing that is designed to be evidence against himself a small matter will supply it” *Anon*, 1 Ld Raym, 731, but see *Williamson v Rover Cycle Co*, C A, Ir (1901), 2 Ir R., 615

(2) *Framji Hormasji v Commissioner of Customs*, 7 Bom. H. C. R., A C J, 89, 92, 93 (1870) per Westropp C J, citing Russell on Crimes iii 217, 4th Ed, and many of the English decisions on the subject of this presumption And see *Ardeshtur Dhanjibhai v Collector of Surat*, 3 Bom. H. C. R., A C J, 116, 120

(1866), Roscoe Cr Ev, 90 Of course the destruction or mutilation of a document is not spoliation within the meaning of the rule if caused by mere inadvertence or mistake Lawson, Pres Ev, 15.

(3) *Framji Hormasji v Commissioner of Customs*, 7 Bom H C R, A C J, 89 (1870)

(4) *Ardeshtur Dhanjibhai v Collector of Surat* 3 Bom H C R, A C J, 116 (1866)

(5) *Srs Raja Purihasarathy Appa Row Bahadur v Secretary of State*, 38 M, 620 (1915)

(6) *Soondur Monce v Bhoobun Mohun*, 11 W R, 536 (1869), see *Armory v Delamirie* 1 Smith L. C., 385

(7) *Wajayak v Collector of Bombay*, 26 B, 339, 351 (1901)

(8) *Clunes v Pezzey*, 1 Camp., 8

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It must be borne in mind that the rule mentioned in this *Illustration* (like most of the other rules of evidence contained in this Act) applies equally to criminal and civil cases, nor does the case law in reality tend to any other conclusion. The effect of this section and of the preceding cases (cited in the last note) which must be considered with reference to their own particular circumstances, may be summarised and explained as follows.—It lies upon the prosecution affirmatively and with reason to prove the facts of the case and the duties of the prosecution in the event of acquittal (2). If the prosecution does not discharge its duty of producing all its available evidence, it is no answer to say that the accused, who has no such duty cast upon him, might have produced that evidence (3). No inference unfavourable to the accused can be drawn in such a case against him. When, however, the prosecution has called all its available evidence, and has made out a complete case against the accused and that case discloses that there is evidence which could be produced by the accused for the purpose of negating the charge against him, then under the provision of this section, if such evidence be not produced, the Court may presume that it would, if produced, be unfavourable to the accused who withholds it. It is in fact only under these circumstances that the presumption properly commences to operate. The law upon this point has been well expressed by Shaw C J in the *Commonwealth v Webster* (4) in which case he said:—“Where probably proof is brought of a state of facts tending to criminate the accused the absence of evidence tending to a contrary conclusion is to be considered, though not alone entitled to much weight, because the burden of proof lies on the accuser to make out the whole case by substantive evidence. But when pretty stringent proof of circumstances is produced, tending to support the charge and it is apparent that the accused is so situated that he could offer evidence of all the facts and circumstances as they existed, and show, if such was the truth that the suspicious circumstances can be accounted for consistently with his innocence and he fails to offer such proof, the natural conclusion is that the proof if produced instead of rebutting would tend to sustain the charge. But this is to be cautiously applied, and only in cases where it is manifest that proofs are in the power of the accused, not accessible to the prosecution” (5).

If, moreover, an accused or other person, not merely abstains from giving evidence but commits spoliation, that is, suppresses or destroys evidence which he ought to produce, or to which the other party is entitled, the strongest presumption will be drawn against him. So strong is the presumption in such a case that the ordinary presumption of innocence may be overthrown and a presumption of guilt raised the general rule being “*Omnia præsumuntur contra*

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or Government

service land, the plaintiff alleged that the land had been granted in free *inam* by a *sanad*, which he petitioned the *Mamluk* send to the Collector, and, on a reference by found that "the Collector did destroy the

copy of a *sanad* such as the plaintiff petitioned the *Mamlukdar* to search for" — It was held that it was not competent under such circumstances for the defendant to say that the document was not such a one as could legally be admitted in evidence, and that the case came within the rule *omnia presumuntur contra spoliatorem* (4) Where the Government failed to produce records which would have shown whether certain lands were found in the limits of a *zamindari*, it was held that the presumption under this Illustration was raised. (5) In a suit to recover the value of plundered property, where a question arose as to the amount of the property misappropriated, it was ruled that, unless the defendant produced the property and showed it not to be of the value stated by plaintiff, the strongest presumption should be made against him and the highest value assumed. (6) The maxim, however, only applies where a man by his own tortuous act withholds the evidence by which the nature of his case would be manifested (7) But in an action for goods sold against a defendant who has been guilty of no fraud or improper conduct, in the absence of evidence of the quality of the goods which were delivered, the presumption is that such goods were of the cheapest description (8)

Where a party objected to the admissibility of a document which was afterwards withdrawn, and the Judge in summing up to the jury, said that the

(1) Wills Circumstantial Ev s 7 6th Ed 128 Lawson Pres Ev, 140 Taylor Ev § 116, the rule is evidently based on the principle that no one shall be allowed to take advantage of his own wrong, see note at p 122, 3 Bom H C R, A C J (1886) 'If' says Lord Holt 'a man destroys a thing that is designed to be evidence against himself, a small matter will supply it' *Anon* 1 Ld Raym 731 but see *Williamson v Rorer Cycle Co* C A, Ir (1901), 2 Ir R, 615

(2) *Francis Hormazji v Commissioner of Customs*, 7 Bom H C R, A C J, 89 92 93 (1870) per Westropp, C J, citing Russell on Crimes iii 217, 4th Ed and many of the English decisions on the subject of this presumption And see *Ardeshir Dhanjibhai v Collector of Surat*, 3 Bom H C R, A C J, 116, 120

(1866) Roscoe, Cr Ev, 90 Of course the destruction or mutilation of a document is not spoliation within the meaning of the rule if caused by mere inadvertence or mistake Lawson Pres Ev, 15

(3) *Francis Hormazji v Commissioner of Customs*, 7 Bom H C R, A C J, 89 (1870)

(4) *Ardeshir Dhanjibhai v Collector of Surat* 3 Bom H C R, A C J, 116 (1866)

(5) *Sri Raja Purthasarathy Appa Row Bahadur v Secretary of State*, 38 M, 620 (1915)

(6) *Soondur Monee v Bhobun Mohun*, 11 W R., 536 (1869). see *Armory v. Delamirie* 1 Smith L. C., 335

(7) *Vinayak v Collector of Bombay*, 26 B, 339, 351 (1901)

(8) *Clunes v Pezzey*, 1 Camp, 8

document was in Court, and might have been produced but for the party's objection, and that the jury were at liberty to draw an inference from such objection and non production, it was held that there was no misdirection (1) But where a document is privileged, no adverse inference can be drawn from its non production (2)

The presumption arising from the non production of evidence within the power of the party does not relieve the opposite party altogether from the burden of proving his case (3), and though the fact of spoliation standing alone may defeat, it cannot of itself sustain, a claim (4) Lastly, the presumption is to be made after regard has been had to the common course of natural events human conduct and public and private business in their relation to the facts of the particular case (5)

Illustration (h) The Court may presume that if a man refuses to answer a question which he is not compelled to answer by law (6) the answer if given would be unfavourable to him So while the Criminal Process to examine the accused, and the latter does not answer or by giving false evidence to draw such inference from such refusal or in the case of the subject matter of section 148, *post* the Court may, if it sees fit draw from the witness's refusal to answer, the inference that the answer if given would be unfavourable

Illustration (f) The Court may presume that the hands of the obligor, the obligee usually vigilant in guarding their

is a *prima facie* presumption of payment of money, or the or a promissory note is has been duly paid or

(1) *Sutton v Devonport* 27 L J C P 54 The case is like the ordinary one where there is a witness in Court who could give an account of something which would affect the case of one party and who is not called and in such case the jury may assume that his evidence would not have been favourable to that party *ibid per* Crowder J (*see* Taylor Ev § 117) *Sed quia* as to the correctness of this decision for a person should not suffer by taking objection on which he has a right to succeed Though it is to be observed that in this case there appears to have been no adjudication upon the question of the admissibility of the document which on objection was withdrawn still this makes no difference. For there is as much or as little reason for drawing an inference against the party objecting to the admissibility of the document as against the party withdrawing the document on such objection

(2) *Weston v Peary Mohun Das* 40 C. 898 (1913)

(3) *Lawson* Ev 137

(4) *Id* 152 *Cowper v Cowper* 2 P Wms 749 *re altern v Melhursh* Amb 248 25

(5) *V Nayak* 26 B 31 (1901) Collector of Bombay where it was held that the facts of the

presumpt on

(6) *See* ss 121—129 *post* A witness is not excused from answering on the ground that the answer will criminate s 132 *post* as to criminalizing documents *see* s 130 *post* Persons are not compelled to answer interrogations regarding certain matters under the provisions of s 19 Reg VII of 1822 *See* Field Ev 607 But *see* *Lawson* Pres Ev 120 137 where the rule is stated to be that the omission of a party to an action to testify to facts or to produce evidence in explanation of or to contradict adverse testimony raises a presumption against his claims unless the evidence is not peculiarly within his power or is privileged *Wentworth v Lloyd* 10 H L Cas 589

(7) *Cr Pr Code* s 342 *v* also *ibid* ss 161 175

(8) *See* for an application of this rule *Abdul Karim v Manji Hansraj* 1 B 295 (1876) *Shearman v Flenning* 5 B L R 619 (1870) and case cited *post*

(9) *See* *Bhog Hongkong v Ramanathan Chetty* 29 C. 334 (1902) *Aung Myat v Hla May* 12 Bur L T 116 s c 52 I C 650 If the drawer alleges that the maker came into possession of the note unlawfully the onus is on him to prove it *ibid*

that the goods ordered have been delivered. Similarly a receipt for the last years or quarters rent is evidence of all the rent previously accrued having been paid (1). The plaintiff in a suit on a bond for money, with a view to anticipate the possible production of the bond by the defendant and the presumption of payment that might otherwise be drawn from its being in the possession of the obligor accounted for not producing it by alleging that the defendant had stolen it. The defendant admitted the execution of the bond but alleged that he had paid it. *Held* that the defendant was bound to begin and prove payment either by the production of the bond or other evidence or by both (2). In the case cited in the Privy Council where in a suit for a sum due on a mortgage bond the plaintiff had alleged that the original was lost and had tendered a copy and the defendant had admitted the execution but had pleaded that the bond had been discharged and had produced the original which purported to bear an endorsement by the mortgagee's agent it was held that under this section the *onus* of proving that a plaintiff sued for confirmation which had been mortgaged to him

of the deed was an absolute sale but an *ekrar* was executed at the same time as the mortgage which reserved the equity of redemption to the mortgagor. This *ekrar* was made over to the defendant the mortgagor. Plaintiff's allegation was that the *ekrarnamah* was returned to him by the mortgagor who thus surrendered the equity of redemption. Defendant alleged that the *ekrar* had been lost and had somehow found its way to the plaintiff. *Held* that the presumption of law was in favour of the plaintiff who had possession of the *ekrar* and that the *onus* of proving its loss lay upon the defendant (4). On the other that it remains in force from the fact that it remain in the hands of the grantee long one, it may of course be that the circumstances of the case rebut it (6). Consent raises a presumption in favour of the validity of a transaction. But the presumption is rebuttable (7).

Consent

It is a very general presumption that things once proved to have existed in a particular state are to be understood as continuing in that state until the contrary is established by evidence either direct or circumstantial (8). Thus where possession the authority of an agent, the holding of an office, adultery, insanity a debt or obligation or the like, have been shown their continuance will be presumed (9). The subject has been already dealt with in the notes to *Illustration (d)* to which the reader is referred. Common applications of this presumption are the rules touching the continuance of life enacted in sections 107 and 108 *ante* and of certain judicial relations such as partnership, tenancy and agency enacted in section 109 *ante*. Connected with the subject of continuance of life is the question of the presumption of survivorship in common disaster. Allusion is here made to those cases where several persons, generally of the same family have perished by a common calamity such as shipwreck

Continuance

(1) Taylor Ev. § 78 and cases there cited

(2) *Clinis Kuar v Uda Ram* 6 A. 73 (1883)

(3) *Milan ad Mahdi Hasan Khasi v Mandar Das* P. C. 34 A. 511 (1912) per Ameer Ali J.

(4) *Ran Coor v Ram Sahaje* 11 W. R. 151 (1868)

(5) *Chockal ngam Pillo v Mayand Chettar* 19 M. 485 496 (1896)

(6) *Bhog Hongkong v Ramanathan Chetty* 29 C. 334 (1907) s. c. L. R. 29 1 A. 43 4 Pom. L. R. 375

(7) *Ramesh Chandra Chakrabarti v Sasi Bhusan Upadhyay* 23 C. W. N. 1025 s. c. 30 C. L. J. 56

(8) Best Ev. § 405 Taylor Ev. §§ 196—203. That is continuing forward. If possession in one year be found there is no presumption as to possession in previous year see 50 I. C. 196

(9) *Ib.* see *D. P. Singh v Gaud Singh* 1 All. L. J. (1903) where a mortgage having been admitted by the defendants the *onus* was held to lie on them to show that it had ceased to exist.

extraneous confusion in a civil action or trial, and where the power in point of time of the death of one over the other exercises an influence on the result of their claims. The civil law assumed certain arbitrary rules of presumptions in determining the relative times of death of two or more persons who perished in the same catastrophe. These rules were based on the age, sex or state of health of the parties. So a child under the age of puberty was presumed to have died before its parent, but if agreed that are the rule was reversed. These fixed presumptions no longer were permitted in the Common Law, and the Courts resorted to the original mode of ascertaining the truth have laid on the rule that the case must be determined upon its own proper facts or on some other evidence where the evidence is sufficient to support a finding of survivorship, but in the absence of any such evidence the question of which party alive is regarded as unascertainable and in such cases the question determined as if the death of all occurred at the same moment. In other words, the fact of survivorship, like every other fact, must be proved by the party asserting it (1). This is a very English case where the bodies of a husband and wife were found and a question the Court says, "have to cross the death of the wife on or before the day when she was last seen alive and declared that there was no reason to believe that her husband had survived her" (2).

Although the rule is in the expression of commerce of the exact
state of things we have! we cannot say it is stated in very general terms and
that there is a necessity of interpretation. It is always adaptable, and will
sometimes extend to considerable width in its application to be suited
to very different circumstances. The rule has been held to apply to cases
where obviously after a limited time the population will have declined.
Perhaps the chief value of the present rule is to determine, in the case of such
it applies, on what shall be the human element: and this view of the
nature of the problem is the key taken to the solution of the problem.

107-119

Ends Law

If Hindu temples were in one part of the country to another the
prevalence is that they can't win then the law and custom as to conversion
prevailing in the country from which they came (1)

E-12
 LAW.
 AUGUST 22,
 BY MAIL

The acquire of property presumably results to remain in an over, and in the case of a Hindu wife the property is in the husband when the fund with which the property is acquired is one which derived from her husband's property was at her disposal. Inasmuch as the wife's absolute power of disposal over the fund derived from the husband's estate is now fully recognized, she will be presumed in the absence of an intention to be intended to the contrary to retain the same control over the investment of such funds.

And where a Hindu woman executes an instrument which is for absolute property in the event of failure of issue, she is deemed to be making it for the estate or will be presumed that she intended that the property to be an absolute to the estate (6)

(1) The first of these is the fact that the Commission has not yet received any information from the Government regarding the results of its investigation into the activities of the Communist Party in the United States. The Commission has been informed that the Government has been unable to obtain any reliable information from the Communist Party regarding its activities in the United States. The Commission has been informed that the Government has been unable to obtain any reliable information from the Communist Party regarding its activities in the United States. The Commission has been informed that the Government has been unable to obtain any reliable information from the Communist Party regarding its activities in the United States.

(2) In the role of Guy (1981)
Time L.R. 1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 83

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(1) $\frac{1}{2} \times \frac{1}{2} = \frac{1}{4}$ and $\frac{1}{4} \times \frac{1}{4} = \frac{1}{16}$
 (2) $\frac{1}{2} \times \frac{1}{4} = \frac{1}{8}$ and $\frac{1}{4} \times \frac{1}{8} = \frac{1}{32}$
 (3) $\frac{1}{4} \times \frac{1}{4} = \frac{1}{16}$ and $\frac{1}{16} \times \frac{1}{16} = \frac{1}{256}$
 (4) $\frac{1}{4} \times \frac{1}{8} = \frac{1}{32}$ and $\frac{1}{32} \times \frac{1}{32} = \frac{1}{1024}$
 (5) $\frac{1}{8} \times \frac{1}{8} = \frac{1}{64}$ and $\frac{1}{64} \times \frac{1}{64} = \frac{1}{4096}$
 (6) $\frac{1}{8} \times \frac{1}{16} = \frac{1}{128}$ and $\frac{1}{128} \times \frac{1}{128} = \frac{1}{16384}$
 (7) $\frac{1}{16} \times \frac{1}{16} = \frac{1}{256}$ and $\frac{1}{256} \times \frac{1}{256} = \frac{1}{65536}$
 (8) $\frac{1}{16} \times \frac{1}{32} = \frac{1}{512}$ and $\frac{1}{512} \times \frac{1}{512} = \frac{1}{262144}$
 (9) $\frac{1}{32} \times \frac{1}{32} = \frac{1}{1024}$ and $\frac{1}{1024} \times \frac{1}{1024} = \frac{1}{1048576}$
 (10) $\frac{1}{32} \times \frac{1}{64} = \frac{1}{2048}$ and $\frac{1}{2048} \times \frac{1}{2048} = \frac{1}{4194304}$
 (11) $\frac{1}{64} \times \frac{1}{64} = \frac{1}{4096}$ and $\frac{1}{4096} \times \frac{1}{4096} = \frac{1}{16777216}$
 (12) $\frac{1}{64} \times \frac{1}{128} = \frac{1}{8192}$ and $\frac{1}{8192} \times \frac{1}{8192} = \frac{1}{67108864}$
 (13) $\frac{1}{128} \times \frac{1}{128} = \frac{1}{16384}$ and $\frac{1}{16384} \times \frac{1}{16384} = \frac{1}{268435456}$
 (14) $\frac{1}{128} \times \frac{1}{256} = \frac{1}{32768}$ and $\frac{1}{32768} \times \frac{1}{32768} = \frac{1}{1073741824}$
 (15) $\frac{1}{256} \times \frac{1}{256} = \frac{1}{65536}$ and $\frac{1}{65536} \times \frac{1}{65536} = \frac{1}{4294967040}$
 (16) $\frac{1}{256} \times \frac{1}{512} = \frac{1}{131072}$ and $\frac{1}{131072} \times \frac{1}{131072} = \frac{1}{17179869184}$
 (17) $\frac{1}{512} \times \frac{1}{512} = \frac{1}{262144}$ and $\frac{1}{262144} \times \frac{1}{262144} = \frac{1}{68435937536}$
 (18) $\frac{1}{512} \times \frac{1}{1024} = \frac{1}{524288}$ and $\frac{1}{524288} \times \frac{1}{524288} = \frac{1}{274426394624}$
 (19) $\frac{1}{1024} \times \frac{1}{1024} = \frac{1}{1048576}$ and $\frac{1}{1048576} \times \frac{1}{1048576} = \frac{1}{1099511627776}$
 (20) $\frac{1}{1024} \times \frac{1}{2048} = \frac{1}{2097152}$ and $\frac{1}{2097152} \times \frac{1}{2097152} = \frac{1}{4398023444992}$
 (21) $\frac{1}{2048} \times \frac{1}{2048} = \frac{1}{4194304}$ and $\frac{1}{4194304} \times \frac{1}{4194304} = \frac{1}{17592186064384}$
 (22) $\frac{1}{2048} \times \frac{1}{4096} = \frac{1}{8388608}$ and $\frac{1}{8388608} \times \frac{1}{8388608} = \frac{1}{70368744177920}$
 (23) $\frac{1}{4096} \times \frac{1}{4096} = \frac{1}{16777216}$ and $\frac{1}{16777216} \times \frac{1}{16777216} = \frac{1}{281474983360000}$
 (24) $\frac{1}{4096} \times \frac{1}{8192} = \frac{1}{33554432}$ and $\frac{1}{33554432} \times \frac{1}{33554432} = \frac{1}{1125899906842624}$
 (25) $\frac{1}{8192} \times \frac{1}{8192} = \frac{1}{67108864}$ and $\frac{1}{67108864} \times \frac{1}{67108864} = \frac{1}{4503599627370496}$
 (26) $\frac{1}{8192} \times \frac{1}{16384} = \frac{1}{134217728}$ and $\frac{1}{134217728} \times \frac{1}{134217728} = \frac{1}{18014398509481984}$
 (27) $\frac{1}{16384} \times \frac{1}{16384} = \frac{1}{268435456}$ and $\frac{1}{268435456} \times \frac{1}{268435456} = \frac{1}{720575940379279360}$
 (28) $\frac{1}{16384} \times \frac{1}{32768} = \frac{1}{536870912}$ and $\frac{1}{536870912} \times \frac{1}{536870912} = \frac{1}{2882303761504217600}$
 (29) $\frac{1}{32768} \times \frac{1}{32768} = \frac{1}{1073741824}$ and $\frac{1}{1073741824} \times \frac{1}{1073741824} = \frac{1}{11529215046068469760}$
 (30) $\frac{1}{32768} \times \frac{1}{65536} = \frac{1}{2147483648}$ and $\frac{1}{2147483648} \times \frac{1}{2147483648} = \frac{1}{46116860184273869056}$
 (31) $\frac{1}{65536} \times \frac{1}{65536} = \frac{1}{4294967040}$ and $\frac{1}{4294967040} \times \frac{1}{4294967040} = \frac{1}{184467340738061030400}$
 (32) $\frac{1}{65536} \times \frac{1}{131072} = \frac{1}{8589934080}$ and $\frac{1}{8589934080} \times \frac{1}{8589934080} = \frac{1}{737869682937451776000}$
 (33) $\frac{1}{131072} \times \frac{1}{131072} = \frac{1}{17179869184}$ and $\frac{1}{17179869184} \times \frac{1}{17179869184} = \frac{1}{295140990917337600000}$
 (34) $\frac{1}{131072} \times \frac{1}{262144} = \frac{1}{34359738368}$ and $\frac{1}{34359738368} \times \frac{1}{34359738368} = \frac{1}{1180591620717440000000}$
 (35) $\frac{1}{262144} \times \frac{1}{262144} = \frac{1}{68435937536}$ and $\frac{1}{68435937536} \times \frac{1}{68435937536} = \frac{1}{4684260086400000000000}$
 (36) $\frac{1}{262144} \times \frac{1}{524288} = \frac{1}{136871875072}$ and $\frac{1}{136871875072} \times \frac{1}{136871875072} = \frac{1}{18774900736000000000000}$
 (37) $\frac{1}{524288} \times \frac{1}{524288} = \frac{1}{274426394624}$ and $\frac{1}{274426394624} \times \frac{1}{274426394624} = \frac{1}{75318656000000000000000}$
 (38) $\frac{1}{524288} \times \frac{1}{1048576} = \frac{1}{548852789248}$ and $\frac{1}{548852789248} \times \frac{1}{548852789248} = \frac{1}{301145600000000000000000}$
 (39) $\frac{1}{1048576} \times \frac{1}{1048576} = \frac{1}{1099511627776}$ and $\frac{1}{1099511627776} \times \frac{1}{1099511627776} = \frac{1}{1208915840000000000000000}$
 (40) $\frac{1}{1048576} \times \frac{1}{2097152} = \frac{1}{2199023255552}$ and $\frac{1}{2199023255552} \times \frac{1}{2199023255552} = \frac{1}{4836070400000000000000000}$
 (41) $\frac{1}{2097152} \times \frac{1}{2097152} = \frac{1}{4398023444992$

(4) James K. Brown & James C. Brown
James C. Brown (1902) M. 11

(1) [illegible] [illegible]
[illegible] C. 42 (Rm)
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(1) First Federal Reserve Bank of New York
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initial probability that the adoption was likely to have been made and that the conduct of the parties cognizant of the facts had at least been consistent with such a hypothesis (5) And in a case where there was no direct evidence of much value, but it was found that the alleged adopted son had succeeded to the inheritance and enjoyed it without opposition and that documents had been framed on the basis of his adoption, it was held by the Privy Council that the adoption could be presumed to be valid (6) Where an adoption has been acquiesced in for many years, the consent of some person competent to give away the adopted son should be presumed (7) In a suit for a declaration that an adoption long acted upon is fraudulent, the *onus* is on the plaintiff to establish

(1) *Tarini Charan v Saroda Sundari*,
3 B L. R., A. C. J 145 (1869)

(2) *Venkata Krishnamma v Annapur
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(3) *Saboo Beua v Nahagun Maits* 2 B L R, App, 51 (1869), and see *Nitta wand Ghose v Krishna Dyal*, 7 B L R, 1, 5 (1871)

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(5) *Harshankar Patriab Singh v Lal Raghuraj Singh*, P. C. (1907) 29 A. 519
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(7) Anandra Si aji Ganesh Eshant,
7 Bom H C. R (App) 33 (1863)

earthquake conflagration, railway accident, or battle, and where the proximity in point of time of the death of one over the rest exercises an influence on the rights of third parties. The civil law recognised certain arbitrary rules or presumptions for determining the relative times of death of two or more persons who perished in the same catastrophe. These rules were based on the age, sex, or state of health of the parties. So a child under the age of puberty was presumed to have died before its parent but if above that age the rule was reversed. These fixed presumptions, however, never prevailed in the Common Law and the Courts rejecting this conjectural mode of ascertaining the truth have laid down the rule that the case must be determined upon its own peculiar facts and circumstances whenever the evidence is sufficient to support a finding

such evidence the question of such, and in such cases the question is the same moment. In other words

the fact of survivorship, like every other fact must be proved by the party ascertaining it (1). Thus in a recent English case where the bodies of a husband and wife were found tied together, the Court gave leave to swear the death of the wife on or since the day when she was last seen alive and declared that there was no reason to believe that her husband had survived her (2).

Although this rule as to the presumption of continuance of the existing state of things has been long sanctioned, it is stated in very general terms and must have a reasonable interpretation. It is always disputable and while sometimes entitled to considerable weight, it is frequently liable to be rebutted by very slight circumstances. The rule has been held to apply to some cases

tion of the presumption has been taken by the framers of this Act in ss 107—109, *ante*

Hindu
Law

If Hindu families migrate from one part of the country to another the presumption is that they carry with them the laws and customs as to succession prevailing in the province from which they came (4).

Hindu
Law
Acquisitions
by widow

The acquirer of property presumably intends to retain dominion over it and in the case of a Hindu widow the presumption is none the less so when the fund with which the property is acquired is one which, though derived from her husband's property, was at her absolute disposal. Inasmuch as the widow's absolute power of disposition over the income derived from the widow's estate is now fully recognised, she will be presumed, in the absence of an indication of her intention to the contrary, to retain the same control over the investment of such income (5).

And where a Hindu widow spends the income which is her absolute property in the erection of buildings on lands belonging to the estate it will be presumed that she intended such buildings to be an accretion to the estate (6).

(1) *v. ante* pp 160—161. *Best Ev* 410. *Taylor Ev* §§ 202, 203. *Underwood v Wing* 19 Beav. 459. 4 DeG M & G 633. *Wing v Angrave* 8 H L Cas 183. The strength and health etc of a party may be properly considered as a circumstance but standing alone it is sufficient to shift the burden of proof. *Wharton Ev* §§ 1280—1282.

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(4) *Parbati Kumari v Jagadish Chunder* 29 C 433 (1902).

(5) *Akhanna v Venkaya* 25 M 31 (1901).

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In addition to the following notes reference should be made to those cited in Commentary to ss. 101—104 ante. It is a doctrine of Hindu law in the case of adoption that 'permission is to be presumed in the absence of prohibition.' This maxim however relates to the person who gives and not to the person who receives a child in adoption (1). Adoption being a proper act it will be presumed that when the majority give their consent such assent was given on *boni fide* grounds. (2) After a long lapse of time and when there is satisfactory evidence of the recognition of an adoption for a series of years the presumption is that everything necessary to render the adoption valid has been performed. So in a case to set aside an adoption on the ground that the ceremonies had not been performed where there was satisfactory evidence showing that the adoption had been continuously recognised for a series of years and that the party adopted had been in possession either in person or through his guardian of the property in dispute *held* that the Court might well dispense with formal proof of the performance of the ceremonies unless it were distinctly proved on the part of the plaintiff that the ceremonies had not been performed (3). A Hindu testator by his will gave authority to his widow with the consent of his mother to adopt a son, in pursuance of which a son was adopted and the other provisions of the will acquiesced in by the family for twenty-seven years, when a suit was brought by one of the testator's heirs claiming the estate then in possession of the adopted son on the ground that the adoption was invalid. *Held* that, although the defendant was bound to prove his title as adopted son as a fact yet from the long period during which he had been received as adopted son every allowance for the absence of evidence to prove such fact was to be favourably returned and that the case was analogous to that in which the legitimacy of a person in possession had been acquiesced in for a considerable time and afterwards impeached by a party who had a right to question the legitimacy when the defendant in order to defend his estate is allowed to invoke against the claimant every presumption which arises from long recognition of his legitimacy by the members of his family and that the case of a Hindu long recognised as an adopted son raised even a stronger presumption in favour of the validity of his adoption arising from the possibility of the loss of his rights in his own family by being adopted in another family (4). It was held by the Privy Council that in the absence of proof of a valid adoption (which proof the lapse of time had made impossible) it was incumbent on the appellant before any presumption of the fulfilment of the conditions of such adoption was justified to establish an initial probability that the adoption was likely to have been made and that the conduct of the parties cognizant of the facts had at least been consistent with such a hypothesis (5). And in a case where there was no direct evidence of much value but it was found that the alleged adopted son had succeeded to the inheritance and enjoyed it without opposition and that documents had been framed on the basis of his adoption it was held by the Privy Council that the adoption could be presumed to be valid (6). Where an adoption has been acquiesced in for many years, the consent of some person competent to give away the adopted son should be presumed (7). In a suit for a declaration that an adoption long acted upon is fraudulent the onus is on the plaintiff to establish

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(2) *Chandrasekhar v. Govindaswami*, 23 M. 480 (1899).

(3) *Sahay v. Sarda* (supra) 17 C. L. R. A. C. 1 145 (1899) and *Govindaswami v. Govindaswami*, 23 M. 480 (1899).

(4) *Govindaswami v. Govindaswami*, 23 M. 480 (1899). See *Maynes Hindu Law* § 145. West & Petherford.

FD 1037.

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earthquake conflagration railway accident or battle and where the presumption of time of the death of one over the rest exercises an influence on the rights of third parties. The civil law recognised certain arbitrary rules or presumptions for determining the relative times or birth of two or more persons who perished in the same catastrophe. These rules were based on the age, sex, or state of health of the parties. So a child under the age of puberty was presumed to have died before its parent but if above that age the rule was reversed. The fixed presumptions however never prevailed in the Common Law and the Courts rejecting this conjectural mode of ascertaining the truth, have laid down the rule that the case must be determined *upon its own peculiar facts and circumstances* whenever the evidence is sufficient to support a finding of survivorship but in the absence of any such evidence the question of such survivorship is regarded as unascertainable and in such cases the question is determined as if the death of all occurred at the same moment. In other words, the fact of survivorship like every other fact must be proved by the party ascertaining it (1). Thus in a recent English case where the bodies of a husband and wife were found together the Court gave leave to swear the death of the wife on or since the day when she was last seen alive and declared that there was no reason to believe that her husband had survived her (2).

Although this rule as to the presumption of continuance of the existing state of things has been long sanctioned it is stated in very general terms and must have a reasonable interpretation. It is always disputable and while sometimes entitled to considerable weight it is frequently liable to be rebutted by very slight circumstances. The rule has been held to apply to some cases where brought after a limited time the presumption could have little weight. Perhaps the chief value of the presumption is to determine in the cases to which it applies on whom shall rest the burden of proof (3) and this view of the function of the presumption has been taken by the framers of this Act in sections 10^a—10^d ante.

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And where a Hindu widow spends the income which is her absolute property in the erection of buildings on lands belonging to the estate it will be presumed that she intended such buildings to be an accretion to the estate (6).

1. See pp 160—161. Best C 40 Taylor E 332. 2. *Chatterjee v Ng* 19 Beav 459 + DeG M & G, 63 H ng v *Ingrow* 3 H L Cas, 187. The strength and health etc., of a party may be properly considered as a circumstance standing alone is sufficient to shift the burden of proof. *Wharton*, 33 1230—1232.

In the words of Goss (1908) Times L R. v 4, p 492, following *In the goods of Bennett* (1901) P 141 in which case husband and wife were

in a massacre in China.

See Jones E 322 see *Wharton*, C §§ 1238—1236 (on presumptions of continuity and identity) and 7. 1234—1232.

4. *Parvati Kanner v Jagannath Choudhary* 29 C. 422 (1901). 5. *Hanna v Hanna*, 25 M. 551 (1901).

6. *Rao v Pankajaram Aramiah Appa Rao v Pankajaram Pankajaram Gopal Rao* 31 M. 321.

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107—109 ante

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in the absence of proof of a valid adoption (which proof the lapse of time had made impossible) it was incumbent on the appellant, before any presumption of the fulfilment of the conditions of such adoption was justified, to establish an initial probability that the adoption was likely to have been made and that the conduct of the parties cognizant of the facts had at least been consistent with such a hypothesis (5) And in a case where there was no direct evidence of much value, but it was found that the alleged adopted son had succeeded to the inheritance and enjoyed it without opposition, and that documents had been framed on the basis of his adoption, it was held by the Privy Council that the adoption could be presumed to be valid (6) Where an adoption has been acquiesced in for many years, the consent of some person competent to give away the adopted son should be presumed (7) In a suit for a declaration that an adoption long acted upon is fraudulent, the *onus* is on the plaintiff to establish

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the fraud which he alleges (1) It is incumbent upon one seeking to dispute an adoption on the ground that the person making it was a "disqualified proprietor," to show that all the procedure necessary to make such person a disqualified proprietor of a Hindu to be represented by an adopted son is clear, effect should be given to it, if this is possible without contravening the law (3) It is a rudimentary principle of Hindu Law that no one can adopt a son to a dead man except his widow, but her choice may be restricted in various ways as when the husband named persons whose consent would be necessary (4) In a case in the Madras High Court where a widow authorised by her husband to adopt a son if and when she chose adopted her own brother by the interested advice of her father when she was eleven years old, it was held that adoption when a minor made without independent advice was void *ab initio* and could not be validated by later ratification (5) No estoppel arises from an invalid adoption unless through it the position of the party setting up the estoppel has been changed in the absence of the donor to the last male owner applies to a Hindu family governed by the Mitakshara Law (8) As to estoppel by adoption, see notes to section 115 *post*, and generally section 101—104, *ante* As to Marriage, *vide post* "Marriage" notes to section 112 *ante* and Index, sub *vide*, "Marriage"

The principle of joint tenancy appears to be unknown to Hindu law, except in the case of coparcenary between the members of an undivided family Among Hindus when property is given to two persons jointly, there is no presumption that the donor intended to annex the condition of ownership (9)

Hindu Law
Gift

As to the presumption of English law that a gift made under certain circumstances is a *donatio mortis causa* being inapplicable to Hindus see the case undermentioned (10) A deed of gift in favour of a daughter will not be treated as a gift in perpetuity unless such intention is clearly shown, for since a Hindu is ordinarily aware that a woman normally takes only a limited interest, and since he ordinarily wishes that his estate should not pass away from his family,

vests property in the grantee and his descendants by terms sufficient to create an hereditary estate, such estate is not made inalienable merely by a direction that certain persons are to be maintained (13)

Hindu Law
Endowment

In the case of endowments made by Hindus for the worship of idols it is presumed that the intention of the donor is to preserve the *sheba* in the family rather than to confer a benefit on an individual, but in the absence of words in the deed of gift denoting an intention that the gift should belong to the family, that presumption will not arise (14) Where certain Hindu texts were referred to,

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|---|---|
| (1) <i>Gooroo Prosunno v Nilmadhub Singh</i> 21 W R 84 (1873) | 38 M, 1105 (1915) |
| (2) <i>Ishri Prasad v Lalji Jas</i> 22 A 294 (1900) | (9) <i>Bas Dixali v Patel Becharadas</i> 26 B, 445 448 (1902) |
| (3) <i>Sarada Prasad Pal v Rama Pati</i> 17 C W N 319 (1912) | (10) <i>Kumara Upendra v Nobin Krishna</i> 3 B L R (O C) 113 (1869) |
| (4) <i>Parito Lal Dutt v Surnomoyi Dasi</i> , P C 27 C 996 (1900) | (11) <i>Nanda Gopal Sinha v Poresk Moni Deb</i> 17 C L J 464 (1913) |
| (5) <i>Sattogaji v Venkataswami</i> 40 M 925 (1917) | (12) <i>Secretary of State v Rashidul Huq</i> 18 C L J 31 (1912) |
| (6) <i>Fathul-nga Mudali v Natesa Mudali</i> 37 M, 529 (1914) | (13) <i>Secretary of State v Rashidul Huq</i> 18 C L J 31 (1912) |
| (7) <i>Ib</i> | (14) <i>Chundernath Roy v Koor Gobind nath</i> 11 B L R 86 114 (1872) |
| (8) <i>Madana Mohana v Purushatama</i> | |

to show that a *Bairagi* is condemned to a life of perpetual poverty, and is incapable of acquiring property for his own use and benefit; it was held that such precepts could not be looked on as anything more than counsels of perfection, and could not be held to carry much weight in the absence of clear and satisfactory proof that, as a matter of fact, the *mohunt* in question had no private funds at his disposal (1)

Hindu law is in the nature of personal usage or custom, and where an ancient family is in favour of a migrated (2) In a part of the country they are governed by the law adopted by showing that, except as regards marriage, all ceremonies in the family are performed according to the law of the Bengal school and by Bengal priests or by other facts (3)

Hindu Law
Family
Custom

When a Hindu family is joint in food and worship, and is shewn to be possessed of some joint property (5), the presumption is that all the property they are possessed joint funds at rate or self acc

Hindu Law
Joint
property

This presumption of joint property arising out of a nucleus of joint property cannot be sufficiently rebutted by evidence that the name of one member of the family only appeared as that of sole owner in revenue records or in other documents relating to the property (7) But in a case in the Privy Council it was held that while separate entries in revenue records may be in themselves

(1) *Shree Mohan Kishora v. Coimbatore Spinning Co.*, 26 M. 79, 82 (1902)

(2) *Surendra Nath v. Hiramani Barmain* 1 B L R (P. C.), 26 (1868)
Pitambar Chandra Saha v. Nishikanta Saha 32 C L J 52
Sarada Prasanna v. Uma Kanta 37 C L J 233

(3) *Pirthee Singh v. Sheo Soonduree* 8 W R 261 (1867)

(4) *Rai Bromo v. Kaminee Soonduree*, 6 W R 295 (1866)
Pitambar Chandra Saha v. Nishikanta Saha, 32 C L J, 52

(5) *Denanath Shaw v. Hurrinaram Shaw* 12 B L R, 349 (1873), *Taruck Chunder v. Jogeshur Chunder*, 11 B L R 193 (1873), *per Couch C J*, overruling *Shiu Golam v. Baran Sing*, 1 B L R (A. C.) 164 and dissenting from *Khilut Chunder v. Koonj Lall*, 11 B L R, 194 (1858) s. c., 10 W R, 333, *Soobheddur Dassee v. Bolaram Dewan*, W R, Sp No 57 (1862) and approving *Koonj Beharee v. Khetturnath Dutt*, 8 W R, 270 (1867), *Dhunoodharee Lall v. Gunput Lall*, 11 B L R, 201 (1868), *Radhica Prosad v. Dharma Das* 3 B L R (A. C.) 124 (1869), *Neelkrishno Deb v. Beer Chander*, 12 Moo I A 540 (1869); s. c., 3 B L R (P. C.), 13 (1869), 12 Suth P C discussed also in *Bholanath v. Ajoodhia* 12 B L R, 336 (1873), s. c., 20 W R, 65 *Denanath v. Hurrinaram*, 12 B L R, 349 (1873), *Gobind Chunder v. Doorgapersaud*, 14 B L R, 337 (1874)

(6) *Dhurni Das v. Shama Soondari* 3 Moo I A, 229 (1843), *Gopeekristo Gosain v. Gunga Persaud* 6 Moo I A, 53 (1854), *Naragunty v. Vengama* 9 Moo I A, 66 (1861), *Prankishen Paul v. Mothooramohun Paul*, 10 Moo I A, 53 (1865), *Abel Ali v. Moheshur Buksh*, Sev Aug Dec, 1863, p. 801 (1862); *Tara Churn v. Joy Narain*, 8 W R 226 (1867), *Lalla Sreedhur v. Lala Madho*, 8 W R, 294 (1867) (character of strict proofs required to rebut presumption in favour of joint estate in joint Hindu family), *Prankristo v. Bhageerutte*, 20 W R, 158 (1872), *Gajendar Singh v. Sardar Singh*, 18 A, 176 (1895) Where the plaintiffs set up a case which was inconsistent with the presumption of the family remaining joint it was held that it was for them to prove that separation took place as they alleged, *Ram Ghulam v. Ram Behari*, 18 A, 90 (1895), *Anand Rao Gunpatrao v. Vasant Rao Madhanrao* (1907), 11 C W N, 478, *Lal Bahadur v. Kanhaiya Lal*, P C (1907), 29 A, 244, *Ganpat Marwari v. Balmakund Behara* 18 C L J, 548 (1913)

(7) *Cheettha v. Mischeen Lall*, 11 Moo I A, 369 (1867), *Hyder Hosain v. Mahomed Hossain*, 14 Moo I A, 401 (1872), *Jussoondah v. Ajoodhia*, 2 Ind. Jur., N S, 261 (1867); *Janokee Dassee v. Kisto Komul Marsh*, 1 (1862).

inconclusive in rebuttal of the presumption of jointness, yet when they are supported by other transactions pointing to separation, and no evidence to reconcile such entries and such transactions with jointness is given by the members of the family, separation may be taken as proved (1). Nor is evidence only of separation in mess sufficient to rebut the presumption (2), although separation in both dwelling and food is not conclusive evidence of separation in estate, will give rise in Hindu law to a presumption of separation in estate (3). Where the members of a Mahomedan family live in commensality they do not form a joint family in the sense that Hindus do, and there is therefore no presumption at all in Mahomedan law that the acquisitions of the several members are made for the benefit of the family jointly (4). The Bombay High Court dissented from the High Courts of Calcutta, Madras and Allahabad on this point till recently, but now a Full Bench of that High Court has held that Art 127 of the Second Schedule of Act XV of 1877 does not apply to the property of a Mahomedan or any other person not a Hindu, in the absence of proof that he had adopted as a custom the Hindu law of the joint family (5). In the case of further acquisitions, it would not be sufficient to show that the consideration money passed out of the hands of the member claiming the purchased property as self acquired without its being shown that the funds were exclusively his own (6). The fact that certain parcels are held in severalty does not do away with the presumption that the rest of the estate is joint (7), but evidence by a purchaser at an execution sale under a decree passed against one member of a joint family to the effect that there had been separate trading beyond separate funds and property belonging to the several members of the family was held to disclose a state of things sufficient to weaken, if not altogether to rebut, the ordinary presumption of Hindu law as to property in the name of one member of a joint family and throw on those alleging it the onus of establishing the joint nature of the property claimed (8). In the undermentioned case the family of the deceased, consisting of his father and two sons (of whom one was the deceased father of the plaintiff) was not shown to have had any ancestral property, but it had acquired property by trade in which the father and the two sons were jointly engaged. There being no indication of an intention to the contrary, it was held that it must be presumed that the property thus acquired was held by the members of the family as joint property with the others than as between cousins, and the common ancestor the descent has proceeded (10). There is no presumption when one coparcener separates from the others that the latter remain united (11). The presumption that all property

(1) *Ram Singh v Must Tursa Kunwar*, P C, 17 C W N, 1085 (1913), per Ameer Ali, J.

(2) *Banee Madhub v Baggobutty Churn* 8 W R 270 (1867).

(3) *Mussumat Anundee v Khedoo Lal* 14 Moo I A, 412 (1872). *Jogun Koer v Rughoonundun Lal* 10 W R 148 (1868).

(4) *Hakur Khan v Gool Khan* 8 C 826 (1882). 10 C L R, 603. See *Muhammad Wali Khan v Muhammad Mohd ud din* 24 C W N, 321.

(5) *Isaf Ahmed v Abhramji Ahmadji* 17 B 41 B 588 (1917) (Shah J dissenting). In this case it was said that the Bombay High Court in a series of wrong decisions had followed *Sajad Gulam Hussain v Bibi Anvaramissa* P J,

170 (1885) but now disregarded them in accordance with the rule in *Tricomdas Coverji Bhoja v Sri Sri Gopinath Ji Thakur* P C 19 Bom L R 450 (1916).

(6) *Koonj Beharee v Kheturnath Dutt*, 8 W R 270 (1867).

(7) *Sreeram Ghose v Sreenath Dutt* 7 W R 451 (1867).

(8) *Bodh Singh v Gunesch Chunder*, 12 B L R (P C), 317, 326 327 (1873).

(9) *Gopalasami Chetti v Arunachalam* 27 M 32 (1903). See *Muthu Rama Krishna Naicken v Marimuthu Goundan*

38 M 1036 (1915). *Kushen Pershad v Har Narain Singh* 38 I A, 45 (1911).

(10) *Moro Vishuanath v Gonesh Vilhal* 10 Bom H C R 444 453 (1873).

(11) *Balabur v Rukhmabai* 30 C 725 (1903).

held by any member of a joint family so long as the family remains joint is joint property applies to families governed by the *Dayabhaga* (1) As to the presumption that a father dealing with self-acquired property intended that it should be taken as ancestral estate, see below (2) See Notes to ss 101—104 *sub loc*, “Hindu Law”

There is no presumption that a loan contracted by the manager of a joint Hindu family has been contracted for a family purpose (3) Hindu Law
Manager

Where immovable property is devised to the testator's wife as “*matli*” of the property, unless there is something in the context to the contrary, the widow takes an absolute and not merely a life interest in the property The mere fact that the donee is the testator's wife is not sufficient to rebut the presumption of that meaning (4)

It is incumbent on a plaintiff suing as the reversionary heir of a Hindu proprietor who has died leaving a widow, to show that the property claimed in the suit and found in her possession, has vested in the husband There is no presumption of law arising where the late husband possessed considerable property, that property found to be in the possession of the widow after his death, must have been included in that which belonged to him unless he shows that she obtained the property from another source (5) Hindu Law
Suit by
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And t
In kinds, no presumption that of innocence Innocence

evidence required to overcome this presumption
reasons which led to the adoption of this presumption
evidence of the old criminal law yet the sacredness of reputation and liberty still gives sanction to the rule that the law presumes in favour of innocence Every man is to be regarded as legally innocent until the contrary be proved, and criminality is never to be presumed (7) In the inferior Courts of this country, the right principle is occasionally reversed, and a person is presumed to be guilty the moment he is accused, and every attempt on his part to prove his innocence is regarded as vexatious (8) When the facts found proved in a case are perfectly consistent either with the innocence or guilt of the accused the presumption of innocence should prevail (9) The inference of guilt can only be

asserting the affirmative of the issue, yet if proof of a negative is necessary to

(1) *Rama Nath Chatterjee v Kusum Kamini* 4 C L J, 56

(2) *Nagalingam Pillai v Ramachandra Tevar* 24 M 429 (1901)

(3) *Souru Padmanabh v Narayanrao* 18 B 520 (1893) See *Krishna v Vasudev* 21 B 808 (1889)

(4) *Mussumat Surajmani v Rabi Nath Ogha* P C (1907), *Times L R v 24*, 218 approving *Padam Lal v Tek Singh*, 29 A, 217

(5) *Ditan Rau v Indarpal Singh* 26 C 871 (1889)

(6) *Weston v Pearu Nola Das* 40 C 898 (1913)

(7) *Burr Jones* Ev § 111 *Taylor* Ev §§ 112—118, *Best Ev* §§ 334 346, 1 *Greenleaf*, § 35, *Lawson Pres Ev*, 433

et seq *Wharton*, Ev § 1244, *Starkie*, Ev 755

(8) *Sheopraakash Singh v Raulins*, 28 C 594 (1901)

(9) *R v Ramchandra Dhondoo* 6 Bom L R, 551 (1904)

(10) *Emperor v Kanglei Mah* 41 C, 601 (1914), *per Woodroffe, J*

(11) *Taylor* Ev § 114 *Burr Jones* Ev §§ 11, 100 102, *Best Ev*, §§ 329, 334 346 The presumption of innocence is stronger than the presumption of payment continuance of life or of things generally and of marriage, but is less strong than the presumption of knowledge of the law or of sanity, *Lawson Pres Ev* 582

establish guilt, such proof must be given (1) The presumption of innocence in Criminal cases signifies no more than that if the commission of a crime is directly in issue it must be proved beyond reasonable doubt (2) The proof of guilt must depend on positive affirmation and cannot be inferred from mere absence of explanation, but if there is evidence which involves an accused person in considerable suspicion, he is called in (for his own sake) to reconcile it with his innocence (3)

This presumption has its most frequent applications in the criminal law; but though it has sometimes been said to have no place in civil issues except so far as it regulates the burden of proof (4) yet the weight of authority in England is to the effect that whether in a criminal or in a civil proceeding the offender or in some collateral party must be innocent until strictly proved to be guilty beyond a reasonable doubt (5) The presumption of innocence in civil cases has been stated to be that "a person who is shown to have done any act is presumed to have done it innocently and honestly and not fraudulently, illegally or wickedly" (6) In accordance with this principle, it has been held in America that in a civil action on a policy of insurance a death must be presumed to have been a natural one and not a suicide when there is no evidence as to its cause since suicide is felony (7) The presumption of innocence may be overthrown and a presumption of guilt be raised by the misconduct of the party in suppressing or destroying evidence (8)

The presumption is of constant application in civil actions when fraud is in issue in the sense that fraud will not be presumed in the absence of evidence of fraud. In transactions being presumed honest and honesty are presumed, and conveyances, sales and contracts generally are presumed to have been made in good faith until the contrary appears. *Odiosa et inhonesta non sunt in lege presumenda* (9) So also the law presumes against vice and immorality, and on this ground presumes strongly in favour of marriage, so that cohabitation and reputation are generally held to be presumptive evidence of marriage (10) One of the strongest illustrations of this principle (although resting also in some

(1) *Williams v East India Co* 3 East 192, Taylor, Ev § 113

(2) *Amrita Lal Hazra v Emperor* 42 C. 957 (1915)

(3) *Id*

(4) Wharton Ev § 1245 It has been said that this presumption has no evidentiary force being founded on no presumption of fact being in most instances a paraphrase of the rules regulating the burden of proof, and that what is meant is this if a man be accused of crime he must be proved guilty beyond reasonable doubt Best Ev Amer Notes pp 309 310 386 The weight of American authority appears to support the proposition that in civil actions although the charge of a crime is to be established a preponderance of testimony is sufficient Burr Jones Ev §§ 15 193

(5) Steph Dig Art 94 Taylor Ev § 112 Best Ev 346 *Mayen v Alston* 16 M 245 [He is clearly well founded in saying that so far as appellants impute to respondents misconduct or dereliction of duty it is for the former to establish

their case The presumption is against such misconduct or violation of duty until it is proved by the party who makes the imputation] *Per Muttusami Ayyar J Gaur Mohan v Tarachand* 3 B L R., App 17 at p 20 (1869) It must be always borne in mind that want of *bona fides* should not be presumed against any body *per Mitter J*

(6) Lawson Pres Ev Rule 19 p 93

(7) *Walcott v American Life etc Society* (1891) 33 Am St R, 923

(8) *v ante* p 785

(9) Best Ev § 349 see *ante* notes to ss 101—104 p 670 and *not* to s 111 *ante* Kerr Friuds 2nd Ed 448 Lawson Pres Ev 93 *Savilappa v Devchand* 26 B 132 (1901) [There is no more reason to presume fraud than to presume negligence]

(10) Best Ev § 349 Lawson Pres Ev 104 exceptional cases are criminal and divorce proceedings *v ante* s 50 pp 447 448 and see *Marriage* p 799 *post* for the presumption as to dissolution see Burr Jones Ev § 13

degree on grounds of public policy) is the presumption in favour of the legitimacy of children (1)

It is a branch of this rule that ambiguous instruments or acts shall, if possible be construed so as to have a lawful meaning. Thus where a deed or other instrument is susceptible of two constructions, one of which the law would carry into effect, while the other would be in contravention of some legal principle or statutory provision, the parties will always be presumed to have intended the former (2). There is a legal presumption in favour of a deed that it is honest and is what it purports to be (3). Wrongful or tortuous conduct will not be presumed (4). All persons are presumed to have duly discharged any obligation imposed on them by law. Thus the judgments of Courts of competent jurisdiction are presumed to be well founded, and their records to be correctly made, judges and jurors are presumed to do nothing causelessly or maliciously, public officers are presumed to do their duty, and the like (5). Further, all testimony given in a Court of Justice is presumed to be true until the contrary appears, perjury not being presumed (6). When a person is required to do an act, the omission to do which would be criminal, his performance of that act will be intended until the contrary is shown (7).

On the same principle rests the rule that negligence is not to be presumed; it is rather to be presumed that ordinary care has been used. And the person charging negligence must show that the other party by his act or omission has violated some duty incumbent upon him and thereby caused the injury complained of (8). The rule does not apply in the case of common carriers, who, on grounds of public policy, are presumed to have been negligent, if goods entrusted to their care have been lost or damaged (9). Railway Companies are not common carriers of passengers. Where such a company is sued for not carrying safely, negligence alleged against them must be proved affirmatively when denied (10).

Where a thing is shown to be under the management of the defendant or his agent, and where an accident in the ordinary course of events does not happen when the business is properly conducted, the accident itself, if it happens, raises a presumption of negligence in the absence of any explanation. In such cases the facts are said to speak for themselves. *Res ipsa loquitur* (11). When goods which have been entrusted to bailees for hire are lost, it lies on the bailees to show that they have taken as much care of the goods as a man of ordinary prudence would, under similar circumstances, have taken of his own goods of a

(1) Best Ev, 349, see s 112 ante, and cases there cited, Lawson, Pres Ev, 106 108. *Dularey Singh v Suraj Dhan Singh*, 43 I C, 478.

(2) Best Ev § 347.

(3) *Srimati Lakshmani v Mohendranath Dutt*, 4 B L R P C, 16, 27 (1869).

(4) Best Ev § 350.

(5) Best Ev § 350 until the contrary appears every person will be presumed to have conformed to the laws *R v Hawkins*, 10 East, 211.

(6) *Ib*, § 352.

(7) *Starkie Ev* 756.

(8) *Lawson Pres Ev*, 102 103, *Burr Jones Ev*, § 14. As to whether carriers' "negligence clause" is good in India, see *Sheikh Mahamad Ravuthar v British India Steam Navigation Co*, 32 M, 95.

(9) *Ross v Hill* 2 C B 890, *Coggs v Bernard*, 2 Ld Raym, 818, *Choutmull Doogur v Rivers Steam Navigation Co*,

24 C, 786 (1897), 26 C, 398 (1898); s c 3 C W N, 145.

(10) *East Indian Railway Co v Kaldas Mukherji*, 28 C, 401 (1901) reversing decision of Lower Court reported in 26 C, 465 (1898), 3 C W N, 781, 2 C W N, 609. A passenger may lawfully attempt to get rid of inconvenience or danger caused by negligence, provided that in so doing he runs no obvious disproportionate risk and is not himself guilty of negligence. *Bromley v G I P Railway Co*, 24 B, 1 (1899).

(11) *Byrne v Broadle* 2 H & C 722, *Scott v London Dock Co*, 24 L J, Ex, 220, *Kearney v London & Brighton Railway Co*, L R, 5 Q B, 411, *Choutmull Doogur v Rivers Steam Navigation Co*, 24 C 786 (1897), 26 C, 398 (1898), *East Indian Railway Co v Kaldas Mukherji*, 28 C 404 (1901), 26 C, 465 (1898).

similar kind and that the loss occurred notwithstanding such care. If they fail to satisfy the Court on that point, they are liable for the loss (1). Where goods are delivered to a Railway Company for carriage not "at owner's risk," and such goods are lost or damaged, the loss is to be borne by the owner, and the onus is on the owner suing for negligence on the part of the

Company, it is for the latter to prove that they have exercised the care required by the Contract Act of bailees for hire (2). In a recent case where packages of sugar were carried by a Railway Company on the owner's risk note and he, in consideration of lower freightage, had agreed that the Company should only be liable for loss of one or more complete packages through its wilful neglect or through theft or wilful neglect by its servants, and some of the packages were stolen, it was held that the *onus* was on him to prove the Company's liability, for under section 72 of the Indian Railways Act it had power to contract itself out of sections 157 and 161 of the Contract Act (3). Where goods consigned under a through booking are injured in transit, the delivering Railway Company will not be liable under section 80 of the Indian Railways Act in the absence of proof that the injury occurred on their line (4). A Steamship Company is not a bailee, but a common carrier subject to the Carrier's Act and even in the case of a consignment on an owner's risk note the *onus* is on it to disprove negligence in case of loss (5).

A *prima facie* case does not take away from a defendant the presumption of innocence though it may, in the opinion of the jury, be such as to rebut and control it, but that presumption remains in aid of any other proofs offered by the defendant, to rebut the prosecutor's *prima facie* case (6). It is clear that a presumption may be rebutted by a contrary and stronger presumption (7) to be (8) that continuance of (9), and the

(1) *Trustees of the Harbour Madras v. Best & Co* 22 M 574 (1899)

(2) *Nanku Rai v. Indian Midland Railway Co* 22 A 361 (1900)

(3) *East Indian Railway Co v. Nathul Behari Lal* 39 A 418 (1917)

(4) *East Indian Railway Co v. Nopie Chand Magniran* 19 C L J 434 (1914) and see as to liability of Railway Companies *East India Railway Co v. Nilkanta Roy* 19 C L J 142 (1914) following *Sheebarut Ram v. Bengal N W Railway* 16 C W N 766 (1912) but see *Lal Chand Sen Karan v. East Indian Railway Co* 17 C W N 635 (1913) foot note

(5) *India General Steam Navigation Co v. Bhagvan Chandra Pal* 40 C 716 (1913) following *Choutmul Dougur v. River Steam Navigation Co* 24 C 786 (1897) and see as to liability of steamship companies *India General Steam Navigation Co v. Gopal Chandra Guin* 41 C 80 (1914) and *Narang Rai Agarwalla v. River Steam Navigation Co* 34 C 419 (1907)

(6) *Commonwealth v. Kimball* 24 Pick (Mass) 373 (Amer) *Nibaran Chandra Roy v. R* (1907) 11 C W N 1085

(7) *Jayne v. Price* 5 Taunt 376

(8) *Lawson Pres Ex* 447

(9) *R v. Inhabitants of Gloucestershire*

2 Barn & Ald 386 [it was there held that the law presumes the continuance of life but it also presumes against the commission of crimes that the cases cited were distinguishable as they decided only that seven years after a person has been last heard of his death was to be presumed but that they did not show that where conflicting presumptions exist death may not be presumed at an earlier period] See however *R v. Inhabitants of Harborne* 2 Ad & Ellis 540 *Lapsley v. Grierson*, 1 H L Cas 500 *Starkie Ev* 755

(10) *Klein v. Landman* 29 Moo 239 (Amer) [A and B as husband and wife sued C for slander they proved their marriage but C proved declarations of the wife that she had been married in Germany to another man. It was presumed that the previous marriage had been dissolved by death or divorce.] It was here said — The presumption of law is that the conduct of parties is in conformity to law until the contrary is shown. That a fact continuous in its nature will be presumed to continue after its existence is once shown is a presumption which ought not to be allowed to overthrow another presumption of equal if not greater force in favor of innocence

presumption of marriage (1) But it is otherwise as to the presumption of knowledge of the law (2) and the presumption of sanity (3)

Possession, knowledge or motive, may overthrow the presumption of innocence and raise in its place a presumption of guilt (4), as also may conduct of spoliation (5) As to criminal intention, *post* "*Intention*" A person on trial for one crime cannot be presumed guilty because he has at another time, committed a similar or different crime, and the latter fact is not admissible in evidence against him (6)

But to prove knowledge or intent or motive a collateral crime may be shown (7) and a separate crime from that charged may be shown where it is necessary to prove that the crime charged was not accidental (8) And so in the case of embezzlement effected by means of false entries, a single false entry might be accidentally made, but the probability of accident would diminish at least as fast as the instances increased (9)

A separate crime from that charged may also be proved where it forms part of the *res gestæ* (10) It frequently happens that, as the evidence of circumstances must be resorted to for the purpose of proving the commission of the crime, those circumstances involves the proof of innocence In such cases it is proper to open If one or more links of that chain consist of circumstances which tend to prove that the prisoner has been guilty of other crimes than that charged, this is no reason why the Court should exclude those circumstances They are so intimately connected and blended with the main facts adduced in evidence that they cannot be departed from with propriety, and there is no reason why the criminality of such intimate and connected circumstances should exclude them more than other facts apparently innocent (11)

(1) *Clayton v Wardell*, 4 N Y 230 (Amer) *Case v Case*, 17 C, 598 (Amer) A presumption of marriage arises from cohabitation M and Y were proved to have lived together and cohabited Y afterwards married S The presumption that Y did not commit bigamy prevails over the presumption that M and Y were married

(2) Ignorance of the law according to the well known maxim excuses no one and cannot be pleaded as an excuse for the commission of a crime See cases cited in Lawson Pres Ev, 453—457

(3) Thus if A is charged with a crime, the presumption is that A was sane when he committed it and if he wishes to be excused on the ground of non responsibility he must prove insanity, Lawson, Pres Ev, 457—459 See s 105, *ante*

(4) Lawson, Pres Ev, 478 as to possession of stolen goods see s 114, III (a), and as to motive *Starkie* Ev, 50, 51 and notes to ss 8 14, *ante*

(5) *ante*, p 786

(6) *ante*, p 137, and notes to ss 14 and 15 *ante*, *R v Cole* 1 Phil, Ev, 508, Lawson Pres Ev, 481—486, Steph Dig, 162—164, where this rule is stated to be one of the most characteristic and distinctive features of the English criminal

law Up to however the beginning of the 18th Century there are to be found numerous instances of the admission of evidence of this kind see 6 How St Tr, 935

(7) S 14 *ante* and cases there cited, *Duns case*, 1 Moody, 146, Lawson Pres Ev 487—489 *R v Francis* L R 2 C C R 128 *R v Cooper*, 1 Q B D, 19, *R v Cleaves*, 4 C & P, 221

(8) S 15 *ante* and cases there cited *R v Gray*, 4 F & F, 1102, Lawson Pres Ev, 489, 490, *R v Richardson* 2 F & F, 313, *R v Geerring* 18 L J M C, 215, *R v Cotton*, 12 Cox, C C, 400, *R v Garner*, 3 F & F, 681, *R v Voke*, Russ & Ry, 531, *R v Roden* 12 Cox, C C, 630, *R v Dossett*, 2 C & K, 306

(9) *State v Lapage*, 57 N H, 245 (Amer)

(10) S 65 *ante*, and cases there cited, Lawson, Pres Ev, 490—492, and see *R v Taylor*, 5 Cox, C C, 138 [A is indicted for arson in setting fire to a rick the property of B Evidence of A's presence and conduct at fires of other ricks on the same night the property of C and B is admissible]

(11) *Walker's case*, 1 Leigh (Va), 557 (Amer)

As there is a general presumption in favour of innocence, so where certain facts are proved there may arise presumptions in disfavour of innocence (1)

Mahom-
medan
Law

The rule as laid down in section 112, which is a rule of substantive law rather than of evidence, has no application to Mahommedans so far as it conflicts with the Mahommedan rule that a child born within less than six months after the marriage of its parents is not legitimate (2) But Mahommedan law raises a strong presumption in favour of legitimacy In a case where a child was born to a father, of a woman who had resided during a period of seven years in his female apartments anterior to the birth of the child taking place, and while so residing was recognised to a certain extent as his wife, and the child was born under his roof and continued to be maintained in his house without any steps being taken on the father's part to repudiate his title to legitimacy as his offspring it was held that that was presumptive evidence of marriage and legitimacy according to Mahommedan law (3) Cohabitation and birth with treatment tantamount to acknowledgment is sufficient to prove legitimacy although mere cohabitation alone will not suffice to raise such a legal presumption of marriage as to legitimize the offspring An ante-nuptial child is legitimate, a child born out of wedlock is illegitimate, if acknowledged, he acquires the status of legitimacy When therefore a child really illegitimate by birth becomes legitimated it is by force of an acknowledgment, express or implied, directly proved or presumed. These presumptions are inferences of fact The child of a concubine may become legitimate by treatment as legitimate Such

presumption in favour permitted to override Where a son, although not recognised by his father on any particular occasion, was always treated on the same footing as the other legitimate sons, the Privy Council held that this raised some presumption that his mother was the father's wife (5) In another under the circumstances of the not justified. In arriving at ed that they wished it to be r question the position that,

according to Mahommedan law, the legitimacy of a child may be presumed from circumstances without any direct proof either of marriage or of any formal act of legitimation (6) The acknowledgment of the child as the offspring of the acknowledged where the circumstances render it within the bounds of possibility (7) is, however, not merely *prima facie* evidence which may be rebutted, but establishes the fact acknowledged (8) The acknowledgment of paternity

(1) See Ch 22 of Lawson on Pres. Evidence where these presumptions will be found collected arranged in rules and commented upon.

(2) Wilson's Digest of Mahommedan Law, p 83, Field's Evidence Act 6th Ed 373

(3) *Hidayat Oollah v Jan Khanum* 3 Moo I A 295 See also *Jesant Singjee v Jet Singjee* 3 Moo I A, 245 (1844) *Oomda Bibee v Shah Jonab* 5 W R 132 (1866), (the acknowledgment of a father renders a son or daughter a legitimate child and heir unless it is impossible for him or her to be so) *Nazabunnissa v Fuzloonnissa* March Rep 428 *Ashrafunnissa v Acreman* 1 W R, 17 (1864) For case of admissibility of evidence of family custom varying strict Mahommedan Law see *Muhammad Ismail Khan v Lala Sheomukh Rai* P C, 17

C W N 97 (1912)

(4) *Ashrafoddorlah v Hyder Hossein*, 11 Moo I A 94 p 113 (1856), *Ismail Khan v Fidayatunnissa* 3 A, 723 (1881) Wilson's Digest of Mahommedan Law p 84

(5) *Khajooroonissa v Rowshan Jehan* 2 C 184 199 (1876)

(6) *Mahomed Banker v Shurgoon Nissa* 8 Moo I A 136 (1860) s. c. 3 W R. (P C) 37 See also *Musammal Jariut ul Batool v Hoseince Begum* 11 Moo I A 194 (1864) See also *Azizunnissa Khatoon v Karimunnissa Khatoon* 23 C 130 (1896)

(7) *Meer Arshraf v Meer Arshed* 16 W R, 260 (1871)

(8) See also on acknowledgment of child by father under Mahommedan Law *Oomda Bibee v Shah Jonab* 5 W R 132 (1866) In re *Bibee Anjeebunnissa*, 4 B.

legitimizing the child ought to be clear and distinct (1), but need not be of such a character as to be evidence of marriage (2) It was held in the case cited that the succession of a Mahomedan being an individual succession there is no presumption such as exists in the case of a Hindu joint family that property purchased in the name of a member of the family was purchased out of joint undivided property, that *prima facie* therefore the property bought in the name of the deceased brother was bought with his money (3)

The mere cohabitation of a man and woman, or their behaviour in other respects as husband and wife always affords an inference of greater or less strength that a marriage has been solemnized between them Their conduct being susceptible of two opposite explanations the Court giving effect to the presumption of innocence (*vide ante*) is bound to assume it to be moral rather than immoral (4) The law presumes the validity of a marriage ceremony (5) Where a man and a woman intend to become husband and wife and a ceremony of marriage is performed between them by a clergyman competent to perform, a

Marriage

ing to the rule of the Catholic Church a dispensation from the proper ecclesias

been a marriage in law There can, however, be no such presumption as to a

the undermentioned case (9) the dispute was between certain claimants under

L. R. (A. C.) 55 (1869) *Fu eelun Bibee v Omdah Bibee* 10 W. R. 469 (1868) *Mussamat Jaiun v Mussamat Bibee* 12 W. R. 497 (1870) *Nujmooddeen Ahmed v Beebee Zuhoorun* 10 W. R. 45 (1868) *Bibee Wuleedun v Wusee Hossein* 15 W. R. 403 (1871) *Numbo Cant v Mahatab Bibee* 20 W. R. 164 (1873) *Khajooroonissa v Roushan Jehan* 2 C. 184 (1877) s. c. 26 W. R. 36 L. R. 3 I. A. 291 *Azmat Ali v Lali Begum* 9 I. A. 8 s. c. 8 C. 422 *Malatala Bibee v Hallee w. zaman* 10 C. L. R. 293 (1881) *Sadahat Hossein v Muhammed Yusub* 10 C. 663 (1883) s. c. L. R. 11 I. A. 31 as to the offspring of an adulterous intercourse fornication or incest see *Muhammad Aleahdad v Ismail Khan* 8 A. 234 (1886) s. c. 10 A. 289 *Dhan Bibee v Lalun Bibee* 27 C. 801 (1901) *Baillies Mahomedan Law* 2nd Ed. p. 406

(1) *Kedarnath Chuckerbutty v Donzelle* 20 W. R. 352 (1873)

(2) *Wuleedun v Wusee Hossein* 15 W. R. 404 (1871) see further *Roushan Jehan v Enact Hossein* 5 W. R. 5 (1866)

As to acknowledgment as a brother see *Mir a Himmat v Sohebadde* 13 B. L. R. 182 (1873) s. c. 1 I. A. 23 21 W. R. 113 *Fields Evidence Act* 6th Ed. pp. 117 373 See for case of a son born to a Mahomedan by a Burmese woman 21 C. 666 (1893)

(3) *Mulammad Wali Khan v Muhammad Mohi ud din* 24 C. W. N. 321

(4) *Lawson Pres. Ev.* 93 95 104 *et seq.* The law in general presumes against vice and immorality *Cargile v Wood* 613 Moo. 56 (Amer.)

(5) *Ib.* 106 107 *Harrison v Mayor*, 4 DeG. M. & G. 153 *Harrod v Harrod* 1 K. & J. 4 *Fleming v Fleming* 4 Bing. 266 *Sichel v Lambert* 15 C. B. (N. S.) 782

(6) *Lopez v Lopez* 12 C., 706 (1885), discussed in *In re Millard* 10 M. 218 221 (1887)

(7) *Lopez v Lopez* supra.

(8) *In re Millard* 10 M. 218 221 (1887) explaining *Lopez v Lopez*, 12 C., 706 supra.

(9) *Sheppard In re George v Thyer* (1904) 1 Ch. 450

a will, and the question was whether certain of them were legitimate children of one *G A*. There was no direct evidence of the marriage of the parents which was alleged to have taken place recently in France. But there was evidence that *G A* and the mother of the claimants whose legitimacy was in question had lived together in England as man and wife. There was also some evidence of recognition of the children by the family. Upon this evidence the Court dispensed with strict proof of marriage *de facto*, and held in favour of the legitimacy of the claimants in question. Referring to the Privy Council case of *Sastry Ilaider Iroigary v Sembycutty Iayah*(1) the Court pointed out that it was not essential to prove either the fact of marriage or the recognition of children by the family and that the presumption of marriage must prevail when the evidence shows that the parties were living together as man and wife for a sufficiently long period of time. An attempt was made to establish that the French law did not permit such marriage.

The Court assumed this and found in favour of marriage. When once you get to this that there is a presumption in favour of there being a marriage in law. But however much such a presumption may be taken as rightly arising in cases involving questions of inheritance so as to avoid illegitimacy where the validity and legality of the marriage is one of the most essential points in issue, as in a suit for the restitution of conjugal rights (the validity of the marriage itself being disputed) it is not enough to find that the marriage took place leaving it to be presumed that the necessary rites and ceremonies were performed, but the Court must find specifically what these rites and ceremonies are and whether they were performed (3). The presumption which ought to be made in favour of marriage where there has been a lengthened cohabitation is rebutted by showing that the conduct of the parties is inconsistent with the relation of husband and wife (4). Under the Mahomedan law the mere continuance of cohabitation under circumstances in which no obstacle to marriage exists is not alone sufficient to raise a presumption of marriage but to raise such presumption it is necessary that there should not only be a continued cohabitation but continued cohabitation under circumstances from which it could naturally be inferred that the cohabitation was a cohabitation as man and wife, and there must be a treatment tantamount to an acknowledgment of the fact of the marriage and the legitimacy of the children (5). And it has been held by the Privy Council that before applying the general presumption of marriage arising from cohabitation with habit and repute, it is necessary to make sure that the conditions necessary to it exist for instance that there was some body of neighbours many or few, or some sort of public large or small. It was held also that the habit and repute must be habit of the particular status which in the country in question is lawful marriage (6).

In criminal cases where marriage is an ingredient in an offence, as in bigamy, adultery, and the enticing of married women the fact of the marriage

(1) 6 App Cas 364 371

(2) See *Campbell v Campbell* (The Breckinridge case) L R 1 H L Sc. 182

(3) *Surjyan on Das v Kali Kanta* 28 C J 50 (1900) s c 5 C W N 195 referring to *Inderan Lalungpuly v Ramaswamy Pandia* 13 Moo I A 141 (1869) *Brindaban Chandra v Chandra Karmakar* 12 C. 140 (1885) *Administrator General of Madras v Anandachari* 9 M 466 (1890)

(4) *Abdool Raack v Aga Wahomed* 21 Ind App 56 (1896) In which case will be found a discussion as to whether Bud-

dhists come under the same category as Jews and Christians with whom Mahomedans may intermarry. In *Luchmi Koor v Roohu Kath* 27 C., 971 (1900) the ordinary criteria afforded by conduct contributed but little aid to remove doubt but it was held that the oral testimony should prevail against the improbability presented by the case that a marriage should have taken place.

(5) *Masilun-nissa v Pathani* 26 A., 295 (1904)

(6) *Ma Han Di v Ma Kim* (1907), 35 C 237

must be strictly proved. The *onus* of proving that certain members of certain Brahmin families cannot enter into a legal marriage-contract is on the person who advances such a proposition, opposed as it is to the law and custom prevailing among members of the caste all over India.(1)

The constancy of natural laws is to be assumed until the contrary be proved. The ordinary physical sequences of nature are to be contemplated as probable and to be presumed to be existing among the contingencies to be accepted by reasonable men, such as the falling of water from a higher to a lower level the spreading of fire in inflammable material, and that the shock on meeting an obstacle is in proportion to momentum (2) It may also be assumed that animals as a general rule act in conformity with their nature, as that untended cattle will probably stray, that horses will take fright at extraordinary noises and sights, and the like (3) Similar presumptions may be made as to the conduct of men in masses, such as that persons in fright will act instinctively and convulsively (4) The physical presumptions relating to life and death are the subject of sections 107 and 108, *ante*, and have been also adverted to under the heading of the presumption of continuity. Mention has also been made *thereunder* of the presumptions which formerly prevailed with reference to survivorship. When simply the fact is known of the death of a person capable of having had issue, death without issue cannot be presumed. But such presumption may be drawn from any circumstances indicating non-marriage or childlessness (5) In cases where it is proved, either directly or inferentially, that there are several persons in the same circle of society, bearing the same name, mere identity of name, by itself, is not sufficient to establish identity of person with circumstances indicating of the same name at the same time with other circumstances.

are facts from which identity may be presumed (7) But ordinarily similarity of names will sustain a verdict when no dispute of identity was raised on trial (8) So a *prima facie* case of identification of the person executing a document is necessary, but such identification need not be by the attesting witness, but may be *alunde*. The proof of identity, however, need only be inferential; and the fact that the names are the same may, unless there be grounds of suspicion ordinarily supply the inference (9) And it is now held that unless the defendant's signature is by a mark (10), or unless there be evidence of a name being common in a country, or unless there be some other circumstance calculated to throw confusion on identity, mere identity of name is sufficient for a *prima facie* case (11) See further "*Continuance*," *ante*

As to the distinction between physical and psychological facts, see Best, *Physical & Psychological Presumptions*, § 12. Among psychological presumptions may be enumerated the following—In the absence of any evidence on the subject every person is presumed

(1) *Pappi Anterjenam v Tejjan Naser*, 14 Mad L J, 214 (1903)

(2) Wharton, Ev., §§ 1293, 1294

(3) *Ib.* § 1295

(4) Wharton, Ev. § 1296

(5) *Ib.* § 1279, *Richards v Richards*, 15 East 293 (see however *Doe v Deakin*, 3 C & P 402), *Doe v Griffin*, 15 East, 293 *Greaves v Greenwood*, 24 W R (Eng.) 296 *In re Phene's Trust*, L R, 5 Ch 150, *Mason v Mason*, 1 Mer, 318, *Barnett v Tugwell*, 31 Beav, 232, *In re Selwyn*, 3 Hag N S, 748, *Dowley v Winfield*, 14 Sim 277 *In re Nichols*, L R 2 P & D, 361

(6) Wharton, Ev., §§ 1273, 701, *Jones v Jones*, 9 M & W, 75

(7) *Greenshields v Henderson*, 9 M & W 70, *Sexall v Evans*, 4 Q B 626; *Murieta v Wollfagen*, 2 C & K, 744

(8) Wharton, Ev. § 1273, see *Nelson v Whittall*, 1 B & A, 21

(9) Wharton, Ev., § 739 A, *Taylor*, Ev. §§ 1857, 1858, there must be some kind of identification of the signer, *Jones v Jones*, 9 M & W, 75, see cases, *supra*, and *Smith v Henderson*, 9 M & W, 801; *Russell v Smyth*, 9 M & W, 818

(10) *Whitlocke v Musgrove*, 1 C. & M, 511

(11) Wharton, Ev., § 1273, see *Sexall v Evans*, 4 Q B, 626, *Murieta v Wollfagen*, 2 C & K, 744

Physical
presump-
tions

Psycho-
logical
presump-
tions.

to be of sound mind. Sanity is presumed. This is but an application of the rule that the ordinary mental condition is presumed to exist. Hence it follows that if a state of insanity is shown, the presumption of sanity is not only removed but there arises, in the case at any rate of insanity of a permanent type, a presumption that insanity continues (1). Thus an adjudication under the Lunatics Act raises a presumption of the continuance of insanity till sanity is proved (2).

Intention
Knowledge

A sane man, it has been said, is conclusively presumed to contemplate the natural and probable consequences of his own acts (3). It must, however, be remembered that probable consequences may result from acts as to which the law, by pronouncing them to be negligent expressly negatives intent, and it would be repugnant to justice that one should be conclusively presumed to intend the consequences of his accidental or unavoidable acts. But when the proper limitations are observed the rule is less open to the criticism which it has received (4). Though it must be presumed that when a man voluntarily does an act, knowing at the time that in the natural course of events a certain result will follow, he intends to bring about that result, there is no presumption that a person intends what is merely a possible result of his action, or a result which though reasonably certain, is not known by him to be so (5). Where a woman of twenty years of age was found to have administered *datura* to three members of her family, it was held that she must be presumed to have known that the administration of *datura* was likely to cause death, though she might not have administered it with that intention (6). In a case in the Madras High Court it was said that a man must in law be held to intend the natural and ordinary consequences of his acts, irrespective of his object at the time of doing such acts, if at such time he knows what the natural and ordinary consequences would be (7).

The presumption that a party intends the natural consequences of his acts is not to be taken too far. So one who knowingly and one who willfully tends to injure the owner (10). It has been held that one who executes a bill of sale and another who tends to injure the creditors the presumption is that one is insolvent, and the other is not. The presumption is that one who gives a preference to such creditor (11). It has, however been held in the case cited that fraudulent preference depends on the state of mind and that it would be necessary to prove that the debtor's intention was fraudulent (12). A married man is proven to have entered a house of prostitution in the evening and to have remained all night. The presumption is that he committed adultery while

(1) Taylor Ev §§ 197 370 Wharton Ev §§ 1252—1254, Burr Jones Ev § 55 and cases there cited

(2) Seshamma v Padmanabha Rao 40 M 660 (1917)

(3) Greenleaf Ev § 18 criticised in Wharton Ev § 1258 See Lawson Pres Ev Rule 96—A person is presumed to intend the natural and legal consequences of his acts Taylor Ev §§ 80—83 and see *R v Ra*, *Acua* 35 A 506 (1913) *R v Harman* 35 A 560 (1913) *R v Subbaya Chunnappa* 15 Bom L R 303 (1912) *R v Kalas* 35 A 329 (1913)

(4) Burr Jones Ev § 23 Wharton Ev 1258

(5) *R v Lakshman* 26 B 588 (1902)

(6) *R v Tulsha* 20 A 143 (1897) *R v Gutali* (1909) 31 A 148

(7) *Sellamethu Scravagan v Palla* 118th Karuppan 35 M 1186 (1912)

(8) See Taylor Ev § 83 and cases there cited criticised in Wharton Ev § 1262

(9) *R v Sheppard* R & R Cr 9 *R v Hill* 2 Moody Cr C 30 *R v Vash* 2 Den C C 498

(10) *R v Farrington* R & R Cr C 207

(11) *Ecker v McAllister* 45 Ind 290 (Amer) see English cases cited in Taylor Ev § 83

(12) *Nripendra Nath Sahu v Ashu* 108 Ghose 43 C 640 (1916), *Sharp v Jackson* A C, 419 (1899)

there (1) A baker is charged with delivering adulterated bread for the use of a public asylum. It is proved that A delivered the bread. The presumption is that he intended it to be eaten (2) He who publishes a libel is presumed to do so intentionally, though the presumption may be rebutted by proof of coercion or fraud on the part of the plaintiff (3) And where an act is criminal *per se* the general rule is to presume a criminal intent from the commission of the act. So if A is proved to have been stabbed by a deadly weapon by B from which wound he instantly died B is presumed to have intended to kill A (4) And if a man forges a document, the intent to defraud is presumed (5)

It is safer, however, and more accurate to remand all presumptions of malice and intent (as has indeed been done by this Act) to their proper place among presumptions of fact, the office of the Court in all such cases being one of induction and not deduction. The reasoning should be not:—"All acts of a certain class have a specific intent, and this act being of that class, consequently has such intent," but "the circumstances of the case make it probable that the act was done intentionally or maliciously." The process is one of inference from fact, not of pre-determination by law. And the same rule as to intention should be applied to civil as to criminal issues (6)

According to person is presumed to consequences of a crime based upon the fact that there could be no successful administration of justice if the rule were not to prevail. If prisoners accused of crime could successfully plead that they were ignorant of the illegality of their acts, no other shield for crime would need to be interposed, for no other defence could be so easily raised or so difficult to overcome (8). The same considerations which forbid a party to urge his ignorance of the law as a defence to a criminal charge also forbid that he should plead his ignorance of the law as an excuse for the failure to comply with contractual obligations or as a defence in actions of tort. So where the drawer of a bill of exchange, knowing that time had been given by the holder to the acceptor but not knowing that this discharged him and thinking himself still liable promised to pay it if the acceptor did not, he was held bound by this promise, though made under a mistake of law (9). But the maxim is limited

(1) *Itans v. Etans*, 41 Cal 103
Astley v. Astley, 1 Hagg Ecc, 720
 (Amer)

(2) *R v. Dixon* 3 M & S 12

(3) See *Pontifex v. Bignold* 3 M & Gr 63 Taylor Ev § 83. So also in suits for damages for malicious prosecution malice may be inferred from the absence of reasonable and probable cause. *Bishonath Rukhit v. Ram Dhone* 11 W R, 42 (1869). *Goday Narain v. Sri Ankutam* 6 Mad H C R 85 (1871). *Gunga Pershad v. Ramphul Sahoo*, 20 W R, 177 (1873).

(4) Lawson Pres Ev 469 Rule 97 to which that learned author appends the sub rule "But when a specific intent is required to make an act an offence, the doing of the act does not raise a presumption that it was done with the specific intent." See Taylor, Ev § 80, Best, Ev, § 433, Starkie, Ev, 757.

(5) *R v. Porteous* (1907), C C C Sess Pa, V 147, p 450.

(6) Wharton Ev §§ 1258, 1261, 1262;

Wharton Cr Ev, § 738.

(7) Wharton Ev § 1240 [the rule is rather an axiom of law than a presumption]. Lawson Pres Ev, 5, Taylor, Ev § 80. But there is no presumption of knowledge of foreign laws, Lawson Ev 14, Wharton Ev, § 1240, see Pollock on Contract 474, Best, Ev, § 336. As to exceptional cases, see *R v. Fisher*, 14 M, 342, 352 (1891).

(8) *Burr Jones Ev*, § 20. Wharton Ev § 1240, Pascal argued that society would be destroyed if such an excuse were held good (4th Prov Letter).

(9) *Stevens v. Lynch*, 12 Fast 38. See *Goodman v. Sayres*, 2 J. & W, 263, *Brisbane v. Dacres* 5 Taunt, 143, *East India Co v. Tritton*, 3 B & C, 280, *Stockles v. Stockley*, V & R 23 nor can a mistake as to the legal effect of a document be set up as a defence. *Poncell v. Smith*, L R, 14 Eq, 85. Parties are presumed to know the legal effect of their contracts. *Burr Jones Ev*, 22, and cases there cited.

to the determination of the civil or criminal liability of the person whose knowledge is in question, and cannot be legitimately made use of in a case where the parties are entirely different and distinct from him (1) Persons engaged in a particular trade are presumed to be acquainted with the general customs obtaining and followed there (2) So if it be the general custom in a certain trade to charge interest on accounts after a fixed time, parties dealing therein are presumed to be cognisant of this custom and are bound thereby (3) Every man is, in the absence of evidence to the contrary, presumed to know the contents of any deed which he executes and to be bound by it (4) So in the case of a will on proof of the signature of the deceased, he will be presumed to have known and approved of the contents and effect of the instrument he has signed (5) But mere attestation of a document does not imply knowledge of its contents. Therefore it cannot be taken as importing concurrence with the transaction attested (6) But in a case in the Madras High Court it was held that attestation with knowledge of a recital in the document may estop from denying its purport, and it was said that, having regard to the ordinary course of business among Indians in the Madras Presidency, attestation by a person with claims on the property affected must be taken as *prima facie* a representation affirming the title set out in the document (7) The burden of proof is on the party to show a material fact of which he is best cognisant (8) A person is presumed to know what he does in the sense that a person who is *capax negotii*, will not be permitted to set up ignorance of facts as ground of exculpation or defence, the law treating him in the absence of fraud or coercion as if he were cognizant of what he did (9) It is on this principle that (as observed) a person dealing in a particular market, is taken to be acquainted with its customs, and a person executing a document is assumed to know its contents.

According to the English Equity doctrine (10) "*Debitor non presumitur dote*" if a testator who is already in debt to another, leaves to that creditor by his will a legacy sufficient to cover the amount of the debt or to exceed it without in any way mentioning the debt or providing for its payment, such bequest is held to be in satisfaction of the debt, and the creditor cannot have both the debt and the legacy. This presumption has sometimes been applied by the Courts in India. In a case where a Mahomedan husband who had executed in favour of his wife a deed of dower for five lakhs of rupees, and had begun in his lifetime, but had not completed, a transfer of a sum of four and a half lakhs of sicca rupees, which was alleged to be an equivalent, and was referred to in a supplement to his will, it was held that this sum was to be taken in satisfaction of the dower, and was not a gift to the wife of that sum (11) The Indian Succession Act (12) however, does not follow the English Equity doctrine. There is a presumption that a person intends to keep alive a security when it is for his benefit to do so (13)

(1) *East Indian Railway Co v. Kali Dass* 26 C., 465, 489-490 (1898), 2 C W N 609

(2) *Sutton v. Tatham* 10 A & E 7 *Bayliffe v. Butterworth*, and numerous cases cited in Wharton, Ev., § 1243

(3) *Mc Illister v. Reab* 4 Wend 483 8 id 109 (Amer.), cited in Lawson Ev 16

(4) *Taylor* Ev § 150 (see Lawson Pres Ev 18 and s 111, ante)

(5) *Id* § 160

(6) *Lakshmi v. Rambodh Singh*, 37 A 350 (1915) and see *Banga Chandra Dhur Biswas v. Jagat Kulkore Acharjya* P C 44 C, 186 (1917), *Demo Nath Das v. Kotisar Bhatlacharya*, 21 I C, 367

(1913) *Raj Lukhee Debta v. Gokool Chunder* 13 Moo I A, 209

(7) *Kandisani Pillai v. Nagalinga Pillai* 36 M., 564 (1913) *per* Sadasiya Ayyar J

(8) S 106 *ante* Lawson Pres Ev 20

(9) Wharton Ev § 1243

(10) See leading Cases in Equity Part II

(11) *Iftikarunnissa Begum v. Amjad Ali* 7 B L R., 643 (P C) (1871) Field's Evidence Act 6th Ed

(12) See Succession Act (N of 1865), ss 164, 165, 166

(13) *Ali Mahomed v. Sleikh Mahomet*, 36 C L J., 186 (1923)

Generally speaking it is often said that a man is presumed to know the truth in regard to facts within his own special means of knowledge. More definitely the rule has been thus stated: what a person is bound to know has regard to his particular means of knowledge and to the nature of the representation, and is then subject to the test of the knowledge which a man paying that attention which every man owes to his neighbour in making a representation would have acquired in the particular case by the use of such means (1).

The ordinary presumption is that a man who has a right to act in either of two ways shall be assumed to act in the way which is in his own interest. In the familiar instance of a tenant who takes possession of land on the inheritance, he is assumed in the absence of evidence to the contrary, to have intended to keep the charge alive (2).

The presumptions which arise when evidence is withheld, where there is spoliation and where there is a refusal to answer questions, have been dealt with in the notes to *Illustrations* (a) and (b) *ante*. Many presumptions arise from conduct and are of frequent application in both civil and criminal cases, such as the presumption which arises when a party accused of crime flies from trial (3). The presumption of innocence being of a very important and extensive character has been dealt with under a separate heading (*v. ante*, pp. 793-797). Love of life may be assumed when necessary to determine the burden of proof. So if the evidence is in equilibrium on an issue of suicide, it will be inferred that suicide is not established (4). Good faith in a contracting party will be presumed except in those cases which come within the purview of section 111 *ante*. A conspicuous instance of this presumption exists in the rule that when an instrument is susceptible of two conflicting probable constructions, the Court will adopt that construction which is most consistent with good faith and will hold that such construction was intended by the parties (5). A contract will be presumed to have been made in view of a law under which it is valid (6). It has been sometimes said that when a document is shown to be genuine, the law presumes that it is true. But truth and genuineness are not convertible or equivalent, though genuineness or spuriousness afford inferences of truth or falsehood (7).

The presumption as to regularity is embodied in the familiar maxim—*Omnia presumuntur rite et solemniter esse acta* (8). This maxim "is an expression in a short form of a reasonable probability and of the propriety in point

(1) *Bigelow on Estoppel* p. 611 citing *Jarre v. Kennedy* 6 C. B. 319 322 *Doyle v. Hart* 4 L. R. Ir. Ex. D. 661 670 and dealing with the subject of representations made by a person under circumstances in which from his peculiar relation to the facts he was bound to know the true state of things.

(2) *Gokaldas v. Gopalidas v. Puranilal Pr. Isukhdas* 10 C. 1015 1046 (1884). See also *Ali Mahomed v. Sheik Mahomed* 36 C. L. J. 186 (1923).

(3) *Wharton Ev.* § 1269 *v. ante* *Innocence*. And as to inference of misappropriation see *Sona v. Emp.* 2 R. 476 (1924).

(4) *Id.* § 1247.

(5) See *Taylor Ev.* §§ 143-150A *ante* notes to III (c) and *Best Ev.* §§ 353-365 where the acts or things presumed are divided into three classes: (1) when prior acts are inferred from the existence of posterior acts as when a prescriptive right or grant is inferred

from modern enjoyment (2) when posterior acts are inferred from prior acts as when the sealing and delivery of a deed are inferred on proof of signing only,

(3) when intermediate proceedings are presumed as when a jury is directed to presume mesne assignments. The subject will also be found discussed by the same author in his *Treatise on Presumptions of law and fact* 74-86. The maxim may also be considered with reference to (1) official appointments [see *post*] (2) official acts [see III (c)] (3) judicial acts (*v. ib.*) (4) extra judicial acts [see III (f) and *post*] *Best Ev.* § 355.

(6) *Atkins v. Hode* 1 Burr. 106, *Lewis v. Darison* 4 M. & W. 654 *Haigh v. Brooks* 10 A. & E. 309 *Richards v. Black* 6 C. B. 441 *Ireland v. Inghstone*, L. R. E. & I. Ap. 395 *Muir v. Glasgow Bank*, 4 L. R. H. L. 37.

(7) *Wharton L.* § 1250.

(8) *Id.* § 1251.

of law of acting on such probability. The maxim expresses an inference which may reasonably be drawn when an intention to do some formal act is established when the evidence is consistent with that intention having been carried into effect in a proper way, but when the actual observance of all due formalities can only be inferred as a matter of probability. The maxim is not wanted where such observance is proved, nor has it any place where such observance is disproved. The maxim only comes into operation where there is no proof one way or the other, but where it is more probable that what was intended to be done was done as it ought to have been done to render it valid, rather than that it was done in some other manner which would defeat the intention proved to exist and would render what is proved to have been done of no effect⁽¹⁾. Thus it will be presumed that a guardian *ad litem* has been validly appointed if there is no evidence to the contrary⁽²⁾. The maxim has been applied in the section in *Illustration (e)* to one class of acts. acts which may be presumed to have been

Regularity

Valuable property rights often depend upon the presumption that judicial proceedings have been regularly and properly conducted, more especially when the lapse of time has rendered it practically impossible to furnish extraneous evidence that the requirements of the law have been in all respects complied with. So unless the want of jurisdiction is distinctly shown it will be presumed to have existed both as to parties and subject matter⁽⁶⁾. So in the undermentioned case it was held that having regard to the due performance of official acts it ought to be presumed in the absence of any evidence to the contrary, that the *istahar* in question which was directed by the Commissioner to the collector was duly published⁽⁷⁾. It will also be presumed that the procedure was regular. So if the papers are lost or destroyed it will be presumed that proper service was made. But no presumption will be allowed to contradict the express statements of the record, thus if the return or proof of service shows service at a particular place or upon a person not defendant and there is no averment of other service, there is no room for presumption that service was also made at another and different place or that it was made upon the defendant also⁽⁸⁾. And if the record shows certain steps to have been taken which in law are insufficient to sustain the judgment no other steps will be presumed. Thus if it appears that service was made in a particular manner, no other mode of service can be presumed, since this would be a contradiction of the record⁽⁹⁾.

(1) *Harris v Knight* L R 15 P D 179 180 *per* Lindley L J

(2) *Munshi Munni Lal v Ghulam Abbas* (1910) 37 I A 77 following *Munshi Bibi Walan v Banka Belari Pershad Singh* (1903) 30 I A 182

(3) *See* Best Ev §§ 360 361 Taylor Ev § 143 *et seq*

(4) *See* Best Ev § 359 Taylor Ev § 143 *et seq*

(5) *ante* notes to Ill (c) and cases there cited Steph Dg Art 101 Broom's Legal Maxims Co Litt 6b 332 Burr Jones Ev §§ 25—41 and the following recent cases *Girdhar v Emp* 27 C W N 1042 (1923) s c 24 Cr L J 584 *Kallu v Emp* 23 Cr L J 449 (1921) *Girdhar Sarkar v Harish Chandra* 37 C L J 331 *Mahomed Sulciman v Birendra Chandra* 50 C 243 (1923)

(6) *ante* notes to Ill (c) where the

distinction given in *Peacock v Bell* 1 Saund 73 between presumptions as to jurisdiction in the case of superior and inferior Courts is cited. The rule however that no presumptions are indulged in favour of the proceedings of inferior Courts applies only to the question of jurisdiction. Such Courts like others are presumed to have acted correctly as to matters within their jurisdiction *McGreus v McGreus* 1 Stew & P (Ala) 30 (Amer) Lawson Pres Ev 34—44 Best Ev § 861 Lawson Pres Ev 27—34

(7) *Prasunno Kunar v Secretary of State* 3 C W N 695 (1899)

(8) *Galpin v Page* 18 Wall 350 364 (Amer) Lawson Pres Ev Rule 12 p 46 a presumption cannot contradict facts averred or proved

(9) Burr Jones Ev § 27

jurisdiction but to the regular jurisdiction. When the jurisdiction act is presumed to have been rightly done until the contrary appears. This applies not only to the final decree but to every judgment or order rendered in the various stages of the master to witnesses(1) that improper evidence that if admitted, it was disregarded that every fact susceptible of proof was proved, that the charge of the Court was correct unless the record shows to the contrary, that the jury were duly sworn, and in charge of a sworn officer, duly admonished by the Judge and that they were of such intelligence as to understand the charge, that the prisoner was present in Court during all proceedings, that the judgment was regular and the verdict in proper form, that the summons was duly served; that the necessary parties were before the Court, that all persons interested had

dence for making the same (2) So if an attachment is alleged to be without authority on the ground that no copy of the decree was transmitted the maxim *omnia rite* will prevail unless it be affirmatively shown that the copy was not transmitted (3) The reasons on account of which the Courts indulge such presumptions are thus stated in an American case(4) "we are not to expect too much from the records of judicial proceedings. They are memorials of the judgments and decrees of the Judges and contain general, but not particular, detail of all that occur before them. Much must be left to intendment and presumption for it is often less difficult to do things correctly than to describe them correctly. When the extant parts of an incomplete writing exhibit traces of careless preparation, it is straining the maxim too far to presume that the parts which have disappeared must necessarily have been free from error (5) In the case cited it was held that when a mortgagee has purchased the equity of redemption in contravention of the provisions of section 99 of the Transfer of Property Act it should not be presumed that the Court granted leave to bid (6)

The presumption of the regularity of official acts not only embraces judicial acts but those of other officers (7) Though the presumption in this case has less weight and hence is more easily rebutted, the principle is the same, namely, that when an official act is shown to have been substantially regular, it is presumed that the formal requisites were also performed. Thus it will be presumed that a man acting in a public capacity has been rightly appointed(8), that entries found in public books have been made by the proper officer, that every man in his official character does his duty, until the contrary is proved (9)

(1) *Emperor v. Sayeed Ahmed* 35 A 575 (1913)

(2) *Ib* § 29 *Lawson Pres Ev* 34—44 and numerous American authorities in these text books cited the presumption of regularity extends to the proceedings of arbitrators *ib* 34, *Best Ev*, § 360, *Russell Arbitr* 11th Ed 207 218 *Taylor Ev* § 86

(3) *Saroda Prosad v. Luchmeeput Sing* 10 B L R 214 (1872), P C at p 230

(4) *Beale v. Com* 25 Pa St 11 (Amer)

(5) *Mahomed Abdul v. Cujraj Sahai* 20 I A p 75 (1893)

(6) *Uttari Chandra Das v. Raj Krishna Dalal* 24 C W N 229 s c, 31 C L J 98

(7) *Ill* (c) s 114

(8) *Ra v. Chandra Das v. Faraid Ali Khan* (1912) 34 A 253

(9) *Per Story J in Bank of United States v. Dandridge* 12 Wharton 64 69 (Amer) The presumption is that one who is proved to have acted in an official capacity possessed the necessary and proper authority *Lawson Pres Ev* 47 *Due*

The Court may also, in the absence of anything to excite suspicion, fairly assume that a Notary satisfied himself of the identity of an executant before he certified and attested a power of attorney (1). On the same principle this presumption of regularity is extended to the acts of the officers of Municipal Corporations (2). Gradually the presumption that officials obey the mandates of the law and perform their duties has been extended to include to some extent the acts of private persons as well in the transaction of affairs of business. Men are presumed to have acted legally and properly rather than otherwise and it is reasonable to assume that the usual and customary modes of business have been adopted in given cases, until some departure from the regular mode has been shown. But it is evident from the very statement of the considerations which have influenced the Courts to adopt presumptions of this class that such presumptions are far from conclusive that they must be received with caution, yet they have been applied to an infinite variety of cases, sometimes being entitled to considerable weight, in others to very little, generally their chief importance is to determine the burden or order of proof (3). Presumptions of character are frequently raised in respect of negotiable paper (4). Payment of a note will be presumed from its possession by the maker (5), and consideration will be presumed (6). Documents regular on their face are presumed to have been properly executed and to have undergone all formalities essential to their validity (7). A document is presumed to have been made on the day on which it bears date, and if more documents than one bear date on the same day, they are presumed to have been executed in the order necessary to effect the object for which they were executed (8). Every document called for and not produced

432 *Burbury v Mathes* 1 C & K
380 *Plumer v Briscoe* 19 Q B 46
Berryman v Wise 4 T R 366 *Cannell v Curtis* 2 Bing N C 228. See cases cited in Best Ev §§ 356—360 Taylor Ev § 171. The presumption is not restricted to appointments of a strictly public nature *Butler v Ford* 1 Cr & M 662 Best Ev § 357. The presumption is that public officers do as the law and their duty require them *Lawson Pres Ev* 53 *I an O'cron v Douick* 2 Camp 44 *Taylor v Cook* 8 Price 653 *Bruce v Nicolopulo* 11 Ex 129.

(1) In the goods of *Mshie* 9 C W N 986 (1905) at p 988.

(2) *Municipality of Sholapur v Sholapur Spinning Co*, 20 B 732 (1895).

(3) *Rurr Jones Ev* § 47, ante notes to III (f) Taylor Ev §§ 148—150A 176—187 and cases there cited Best Ev §§ 400—404 (presumptions from the ordinary conduct of mankind the habits of society and the usages of trade) *Lawson Pres Ev* 67—92. The presumption stated in § 177 of Taylor Ev of an indefinite hiring being a hiring for a year certain does not apply in India nor is the mere payment of wages monthly sufficient to raise the presumption that a hiring is a monthly hiring *Hughes v Secretary of State* 7 B L R 689.

(4) See III (c) s 114 Act XXVI of 1881 (Negotiable Instruments as amended by Acts V of 1914 and VIII of 1919) ss 118-122 ante and notes to III (c), ante. This illustration is an application

of the maxim under consideration Taylor Ev § 148. So also III (i) is a presumption of regularity see Taylor Ev § 178.

(5) See III (i) s 114 ante.

(6) See III (c) s 114 ante and notes to that Illustration.

(7) *ante* p 689 *Lawson Pres Ev*, 87 *Ball v Taylor* 1 C & P 417 *Re Brit sh etc Assurance Co* 1 DeG J & S 488 *Crisp v Anderson* 1 Stark 35 *Closmadene v Carrel* 18 C B, 36 *Pooley v Goodwin* 4 A & E 94 *Hart v Hart* 1 Hare 1 *Bradlaugh v DeRen* L R 3 C P 286 *Marine Investment Co v Hayside* L R 5 H L Cas 624 *Giffin v Mason* 3 Camp 7 *Re Sundlands* L R 6 C P 411, *Hall v Bainbridge* 12 Q B 699 *Burling v Plater* son 9 C & P 570. In *Apathura v Gopala Panikar* 25 M 674 (1901), the Court appears to have been of opinion that the law as to presumption which may be made in the case of documentary evidence is laid down in the sections which deal with documentary evidence and it held that this section had no application to a case of the sort then before it in which it was argued that this section entitled the Court to presume the genuineness of the original of a document of which secondary evidence had been given.

(8) *Steph Dig Art* 85, *Atkins v Horde* 1 Burr 106 Taylor Ev § 169, Best Ev § 402 *Lawson Ev* 89. As to letters see *Anderson v Weston* 6 Bing N C 296 when there is danger of collusion as in divorce see *Houlston*

after notice to produce is presumed to have been attested stamped and executed in the manner prescribed by law (1) The rule is the same where secondary evidence is given of a lost instrument (2) Where a deed is duly signed attested and witnessed there arises a presumption of sealing and delivery (3) If a will purports to have been duly signed attested and witnessed on proof of execution the Court will presume in the case of the death of the witness or in case they do not remember the facts connected with its execution that the law was complied with (4) Other presumptions arise as to the mailing and receipt of letter (5) The presumption is based on the proposition that the post office is a public agency charged with duty of transmitting letters and on the assumption that what ordinarily results from the transmission of a letter through the post office probably resulted in the given case It is presumption that the officers of such presumption arises the city or town to which delivered purporting to be an

answer to one which has been duly mailed to a person at his place of residence this fact creates a presumption that the a preliminary proof similar presumptions may of a telegram (8) In the case of communication Courts widening the scope of the rules of evidence with the expansion of business by the aid of new inventions have in several instances received as evidence the statements made at the telephone or to telephone operators and intended to be communicated to another party In such case the operator may be regarded as the agent of both parties to make and receive such communication There are however cases holding the stricter rule that where evidence of the substance of such conversation is sought to be introduced it must first be shown that the party speaking was recognised either by his voice or in some other manner (9) As to the presumption of regularity in the case of documents 30 years old see section 90 ante which is one of the applications of the maxim to extra judicial acts (10) Illustration (e) to section 114 is an example of the presumption of regularity applied to public business by public officers Illustration (f) declares that the Court may presume from the general regularity and

v S 311 C & P 24 or insolvency proceedings see *Hoe v Corry* 4 Taunt 560 *Hargis La son* 2 M & W 739 *Sclar Baggally* 4 M & W 312 *Taylor Kiehl* 1 Stark 175

(1) S 89 ante *Seph Dg* Art 86
(2) *Mane Investment Co* *Hav s de* 5 L R H L Cas 624

(3) *Steph Dg* Art 87 *Ball v Taylor* 1 C & P 417 *Greller v Neale* 1 Peake 199 *Talbot v Hodson* 7 Taunt 251 *Vermcombe v Blier* 3 S & T 580 *Re Huckvale* L R 1 P & D 375 *Ada v Kr* 1 B & P 360 *Andres v Motley* 12 C B N S 526

(4) *B goyne Sforler* 1 Rob Ecc 5 [referred to in *Jogendra Nath v Nita Churn* 7 C W N 384 386 (1903) in which the Court presumed that the attesting witnesses to a document signed after the execution of the document referred to in *Arj n Cladra Bhadra v Kalas Clandra Das* 36 C L J 373 (1922)] *Bre ciley v Still* 2 Roberts 162 *Thomson v Hall* b 426 *Rectes Lndsay* L R 3 Eq 509 *B t* see *Croft Croft* 4 S & T 10 See generally as to presumptions

in case of wills *Taylor* Ev §§ 100—168

(5) v ante pp 212—214 and cases there cited Best Ev § 403

(6) *He derso v Ca bo dale Coal Co* 140 U S 25 27 (Amer) per Brewer J

(7) *Walter v Haynes* R & M 149

(8) v ante pp 575 576 and cases there cited see also Gray on communication by telegraph

(9) *Burr Jones* Ev § 210 citing with Amer can cases the following articles 24 Weekly Law Bul 245 Are telephon communication admissible as evidence C Leg News 24 Conversations by Telephone 2 Un Law Rev 31 Presence by Telephone

(10) As to alterations in documents ancient or otherwise see s 106 ante other instances of the application of the maxim to extra judicial acts are the presumptions as to the sealing signing and delivery of documents in favour of formality in the case of wills due stamping priority of execution of deeds and the like Best E §§ 367—365

Husband
and wife

The presumption of implied authority on the part of the wife to pledge her husband's credit for necessities may be rebutted by proof of circumstances inconsistent with its existence. Such authority cannot be presumed where the husband has expressly forbidden his wife to pledge his credit (1)

Interest

The exaction of usurious interest raises a strong presumption of undue influence (2). And an attempt to conceal the rate of interest indicates an intention to get the better of the borrower (3)

Land -Pre
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The hereditary nature of a tenure or taluk may be presumed from evidence of long and uninterrupted enjoyment, and of the descent of the tenure from father to son notwithstanding the absence of words of inheritance in the instrument by which the tenure was originally created (4). In another case it was held that successive enjoyment for three generations without interference, of land granted by a zemindar to a member of his family in lieu of maintenance, justified the presumption that the original grant was intended to be absolute (5). In England proof of the possession of land or of the receipt of rent from the person in possession is *prima facie* evidence of a seisin in fee. In India the proof of possession or receipt of rent by a person who pays the land revenue immediately to Government is *prima facie* evidence of an estate of inheritance in the case of an ordinary zemindari. The evidence is still stronger if it be proved that the estate has passed, on one or more occasions from ancestor to heir (6). In a recent case it was held that the *onus* was on the Secretary of State for India to show that when a zemindari was confirmed the right to resume or assess the land was reserved (7) and in another it was held that the *onus* was on him to show that certain resumed land was not part of the assets of the zemindari (8).

(1) *Malotied Sultan Sahib v. Robin son* (1907) 30 M 543 following *Jolly v Lees* 15 C B N S 628

(2) *Ibdu! Majced v. Kf rode Clavdra Pal* 42 C 690 (1915) (ten per cent is usurious if the security is ample)

(3) *Ib*

(4) *Gopal Lal v. Tiluk Chunder* 10 Moo I A 191 (1865) s c 3 W R P C 1 *Dhuput Singh v. Goaman Singh* 11 Moo I A 433 (1867) (evidence of long uninterrupted enjoyment will supply the want of words of limitation in a pottah) See also on absence of words of inheritance and use of word *mokurrari* 5 C 543 (1879) 9 I A 33 (1881) 8 C 664 (1881) 12 I A 205 (1885), *Suttosarrun Glasal v. Moheshchunder* 12 Moo I A 263 s c 2 B L R (P C) 23 11 W R (P C) 10 258 (1868) *Kooldeep Narain v. Government* 14 Moo I A 247 (1871) s c 11 B L R 71 *Munrunjun Singh v. Telanund Singh* 3 W R 84 (1865) *Aobo Doorga v. Dwarka Nath* 24 W R 101 (1875) *Kari nakar Malanti v. Adthro Clodlre* 5 B L R 655 (1870) s c 14 W R 107 *Iakhce Kootar v. Hari Krishna* 3 B L R 226 (A C) (1869) s c 12 W R 3 (the words *mokurrari istemrari* create an hereditary right in perpetuity) *Brayanath Kallu v. Iakhce Narain* 7 B L R 211

(1871) *Isi al Khan v. Aghore Nath* 7 C W N 734 (1903) *Il interscale v. Sarat Clandra* 8 C W N 155 (1903) *Isni al Khan v. Mrunmoy Das* 8 C W N 301 (1903) A *maurari* title was presumed from continuous payment of rent for more than a hundred years. Any presumption arising from long possession is of course negatived where the origin of the tenancy is known *Isni al Khan v. Brogton* 5 C W N 846 (1901) See *Upendra Krishna v. Isi al Khan* 9 C W N 889 (1904) *Nalraton Maidal v. Isni al Khan* 8 C W N 895 (1904) See an article on Presumption as to permanent tenancy in homestead land 5 C W N cccvii
(5) *Jaganmaddah Narayana v. Pedda Pakr* 4 M 371 (1881)

(6) *Collector of Trichopoly v. Tekka* 14 B L R 139 L R 1 I A 283 (1874)

(7) *Secretary of State v. Kirtibas Bhupati Harichandas* 42 C 710 (1915)

(8) *Sri Raja Parilasarathy Appa Rao v. Secretary of State* 38 M 670 (1915) (pre settlement)

(9) *Mahlab Chand v. Bengal Govern* 4 Moo I A 497 See as to *lakiraj* tenures ante ss 100-104 *Iakhraj* Fields Evidence Act 6th Ed 323 342 370

presumption of the *lakhiraj* having commenced before 1790 (1) In a question of boundary between a *lakhiraj* tenure and a zemindar's *mal* land there is no presumption in favour of one or the other but the *onus* is on the plaintiff to prove his case (2) If a person sets up as against the Government a permanent or perpetual settlement it is incumbent on him to make out that case Unsettled and unoccupied waste land not being the property of any private owner, must be held to belong to the State (3) The Madras High Court has held that where waste land jungle or forest is in a zemindari, the presumption is that the zemindar is the owner of the *kudivaram* and *malivaram* right and that the *onus* is on the ryots to show that the *kudivaram* right is vested in them (4) A purchaser at a sale for arrears of Government revenue "is remitted to all the rights which the original settlor at the date of the perpetual settlement had, and may in consequence of that, sweep away or get rid of all the intermediate tenures and incumbrances created by preceding zemindars since that date In the assertion of this right the auction purchaser is, no doubt in many cases allowed to have the benefit of a certain presumption, and by virtue thereof to throw the burthen of proof on his opponent That presumption is, however, founded not so much upon the principle just mentioned as upon the principle that every *bigla* of land is bound to pay and contribute to the public revenue, unless it can be brought within certain known and specified exceptions, and that the right of the zemindar to enhance rent is also presumable, until the contrary is shown Accordingly in many cases which may be found in the books a very heavy burden of proof has been placed upon the defendants whose tenures have been questioned by auction purchasers, and they have had to prove in circumstances of great difficulty that their tenure did really exist at the date of the perpetual settlement, or even twelve years before, in order to escape the consequences of the claim It is however, to be observed that the course of of *lakhiraj*, modified t

presumptions arising from proof of long and undisturbed possession" (5) It is, however, necessary for the purchaser to take some clear step for avoiding or cancelling the tenure, otherwise the presumption will be that the tenure is unaffected (6) In every case the question what lands are included in the Permanent Settlement of 1793 is a question of fact and not of law (7) But the question whether a tenancy is by nature at will or permanent is a mixed question of fact and law (8) Where lands were let out more than sixty years before the suit, for building purposes, the ancestors of the defendants having erected thereon a house more than sixty years before the suit, and having with the defendants resided there from first to last, it was held that the Court was at liberty to presume that the land was granted for building purposes, and that the grant was of a permanent character (9) A tenancy having been created by *labulyat* which did not contain any words of inheritance, nor even the usual

(1) *O nesh C under v. Dikhina Soondry* W. R. Sp. No. 95 (1863)

(2) *Beer Chunder v. Rai Guttij* 3 W. R. 209 (1867)

(3) *Prasunno Kumar v. Secretary of State* 3 C. W. N., 695 (1899)

(4) *Arunachalla Ambalam v. Orr*, 40 M. 722 (1917) For *namdar* and *kudivaram* right see *Srimathi Jagannatha v. Kutaiyabazudu* 39 M. 21 (1916)

(5) *Forbes v. Meer Mahomed* 12 B. L. R. 215, 20 W. R., 44

(6) *Surnoojee v. Satteshchunder Roy* 10 Moo. I. A. 123 (1864), *Assanoollah v. Obhay Chunder* 13 Moo. I. A. 317, 318

(18/0)

(7) *Jagadindra Nath v. Secretary of State*, 30 C. 291 (1901) see notes to s. 36

(8) *Surendra Nath Roy v. Duarkanath Chakravarti*, 44 C. 119 (1917), *Raja Mukund Deb v. Gopi Nath Sahu* 21 C. L. J. 45 (1914)

(9) *Gungadur Shikhdar v. Ajmuddin Slah* S. C. 960 (1882) Referred to in *Rakkhat Das v. Dinomoyi Deb* 16 C., 652 (1889) *Onkarappa v. Subaji Pandurang* 15 B. 72 (1890) *Jeshuadabai v. Ramchandra* 18 B. 81 (1893) *Nobin Mondul v. Cholm Mullick*, 25 C., 897 (1898)

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The hereditary nature of a tenure or taluk may be presumed from evidence of long and uninterrupted enjoyment, and of the descent of the tenure from father to son, notwithstanding the absence of words of inheritance in the instrument by which the tenure was originally created (4) In another case it was held that successive enjoyment for three generations, without interference, of land granted by a zemindar to a member of his family in lieu of maintenance, justified the presumption that the original grant was intended to be absolute (5) In England proof of the possession of land or of the receipt of rent from the person in possession is *prima facie* evidence of a seisin in fee. In India the proof of possession or receipt of rent by a person who pays the land revenue immediately to Government is *prima facie* evidence of an estate of inheritance in the case of an ordinary zemindari. The evidence is still stronger, if it be proved that the estate has passed, on one or more occasions, from ancestor to heir (6) In a recent case it was held that the *onus* was on the Secretary of State for India to show that when a zemindari was confirmed the right to resume or assess the land was reserved (7), and in another it was held that the *onus* was on him to

his title to exemption, not by inference but by positive proof required by the Regulations (9) Registration by a Collector of land as *lakhtiraj* in 1793 affords

(1) *Mahomed Sultan Sahib v. Robinson* (1907) 30 M 543, following *Jolly v. Rees* 15 C B N S 628

(2) *Ibdu Majeed v. Khirode Chandra Pal* 42 C 690 (1915) (ten per cent is usurious if the security is ample)

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(1871), *Ismail Khan v. Aghore Nath*, 7 C W N 734 (1903), *Winterscale v. Sarat Chandra*, 8 C W N, 155 (1903), *Ismail Khan v. Munmozil Das* 8 C W N, 301 (1903) A *maurasi* title was presumed from continuous payment of rent for more than a hundred years Any presumption arising from long possession is of course, negatived where the origin of the tenancy is known *Ismail Khan v. Broughton* 5 C W N 846 (1901) See *Uperdra Krishna v. Ismail Khan*, 8 C W N, 839 (1904) *Nilratna Mandal v. Ismail Khan*, 8 C W N, 895 (1904) See an article on 'Presumption as to permanent tenancy in homestead land' 5 C W N, cccxxix (5) *Jagannadah Narayana v. Pedda Pakir*, 4 M 371 (1881)

(6) *Collector of Trichinopoly v. Tekka mani*, 14 B L R, 139, L R, 1 I A, 283 (1874)

(7) *Secretary of State v. Kirtibas Bhu pati Harichandas*, 42 C, 710 (1915)

(8) *Sri Raja Parthasarathy Appa Rao v. Secretary of State*, 38 M, 620 (1915) (pre-settlement)

(9) *Mahtab Chand v. Bengal Government*, 4 Moo I A, 497 See as to *lakhtiraj* tenures ante, ss 100—104 *Lakhtiraj*, Field's Evidence Act 6th Ed 323 342, 370

lease it is presumed that there is an implied agreement and that he does so on the same terms and conditions as were mentioned in the lease, until the parties come to a fresh settlement (1) Proof of possession for a number of years and of payment of rent during that time to the landlord raises a presumption that such possession was by virtue of a title from the landlord, though there may be no proof of the specific title claimed (2) Where a ryot shows payment of rent for any particular year, the presumption is that the rent for previous years has been paid and satisfied, unless the contrary is shown by the landlord (3) There is no presumption in South Canara that a tenancy is either *chalgeni* or *mulgeni*. Immemorial possession on a uniform rent will raise a presumption in favour of *mulgeni* tenure, and the burden will be on the other party to prove that the tenant was holding on *chalgeni* tenure (4) The presumption raised by an entry in a record of rights that certain land is *brahmottar* prevails till it is rebutted (5) There is no presumption in India that a grant of land includes the minerals under it for the word "grant" has not the special and technical meaning assigned to it in English Law (6) The nature of the presumption raised by section 201 of the Agra Tenancy Act, 1901, has been considered (after several conflicting decisions) by a Full Bench of the Allahabad High Court in a case in which it was held that where under that Act a plaintiff is recorded as having a proprietary right, the Revenue Court is bound to presume in his favour and so is not competent to receive evidence on the question of proprietary title (7) The rebuttable presumption as to tenure under the Bengal Tenancy Act, section 5, clause 5, was held to be a presumption created by the date of that Act, for it

Privy Council it

Land Revenue Act was fatal to a claim to deal as private property with land entered in a record of rights as a graveyard and *wakf* by user if not by dedication (9) Where it is admitted that a tenure is permanent, heritable and transferable, a presumption ordinarily arises in favour of the tenant, and the onus of showing that the tenure is wanting in the characteristic of fixity of rent is thrown upon the landlord (10) See further as to presumptions in the case of possession, the Notes to section 110, *ante*, and see Notes to sections 101—104, "Landlord and Tenant"

Delay in suing to enforce rights raises a presumption unfavourable to the person who makes such delay. If some presumption usually arises against a claimant as to rights the proof of which lay on the part

Litigation:
Procedure

(1) *Enayutollah v. Elahcebulah* W R (1864) Act X 42 *Jumant Ali v. Chutterdharee Sahce* 16 W R 185 (1871), *Tara Chunder v. Ameer Mundul* 22 W R 394 (1874) *Altah Bibee v. Joogul* 25 W R 234 (1876) see also Bengal Tenancy Act (VIII of 1885), *Mati Lal Karnam v. Darjeeling Municipality* 17 C L J, 167 (1913)

(2) *Adhar Chandra Pal v. Dibakar Bhujan* 41 C, 394 (1914)

(3) *Sooruth Soondaree v. Brodie* 1 W R, 274 (1864), *Murthijee Singh v. Choker Narain* 2 W R, 58 (1865), *Enayut Hoosain v. Deedar Bux*, W R (1864) Act X, 97

(4) *Kittu Hegadith v. Channamma Shettath* (1907), 30 M 1908

(5) *Nandlal Pathak v. Mohanth Chandra Das*, 17 C L J 462 (1913)

(6) *Shashi Bhusan Misra v. Jyoti Prasad*

Singh Das P C, 44 C 585 (1917), *Hari Narain Singh Deo v. Sriram Chakravarti* P C 37 C 723 (1910), 37 I A, 136 *Durga Prasad v. Braja Nath Bose* P C 39 C 696 (1912), 39 I A, 133

(7) *Durga Prasad v. Hazari Singh* F B (1911) 33 A, 799, following *Bechan Singh v. Karan Singh* (1908), 30 A 447, and overruling *Dhanka v. Umrao Singh* 30 A 58, *Dil Kunwar v. Udas Ram* 29 A 148 *Waris Ali Khan v. Pursotam Narain* (1910), 32 A 427

(8) *Jagabandhu Saha v. Magnamey Dassee* 44 C 555 (1917)

(9) *Court of Wards v. Ilahi Baksh* 40 I A 18 (1912)

(10) *Port Canning Co v. Kalyani Deo* 32 C L J, 1, (P C), 24 C. W N., 369, 47 C 280

(11) *Sham Chand v. Kishen Prasad* 14 Moo I A 595 600 (1872)

words *mourasi mokurar*

that the lease was taken
been no recognition of
by receipt of rent from
buildings standing on it

and the land having always been let out in *ijara*, held that these facts were not sufficient to warrant the inference that the tenancy was, when first created, intended to be permanent or was subsequently by implied agreement converted into a permanent one (1) In a subsequent case (2) the facts of long possession of a tenancy by the tenants and their ancestors, and of the landlord having permitted them to build a *pucca* house, which had existed for a very considerable time and which was added to by successive tenants, and of the tenure having been from time to time transferred by succession and purchase in which the landlord acquiesced, or of which he could not have been ignorant, were held sufficient to nature In the words is

was of a permanent
was held that while
an estate of inherit-

sufficient certainty (3) In this case it was said that a substantial premium for a lease is one of the best evidence of a permanent tenancy, the fact that a

absolute owner of an estate borrowed moneys ostensibly to pay off a mortgage, there being no intermediate incumbrance, it was held that the presumption must be that his intention was to extinguish the mortgage, and not to keep it alive (4), but in the case of a first and second mortgage, and in the absence of evidence to the contrary, it would be presumed that he intended to keep the prior charge alive for his own benefit (5) Where a road has been for many years the boundary between two properties, and there is no evidence that either proprietor gave up the whole of the land, the presumption is that the land belongs to both adjoining proprietors, half to one, half to the other, up to the middle of the road (6) In India the title of possession must prevail, until a good title is shown to the contrary (7) A registered purchaser under section 50 of Act VIII of 1871 will have priority over an unregistered one, even though he has obtained possession, but this doctrine will not apply where the subsequent purchaser who registers, has actual notice of a prior unregistered purchase, possession itself having been under certain circumstances treated as sufficient notice (8) Where a tenant under a lease holds over after the expiration of the

(1) *Ismail Khan v Joygoon Bibee* 4 C W N 210 (1900), see also *Ismail Khan v Broughton* 5 C W N 846 (1901)

(2) *Caspers v Kedar Nath* 5 C W N 858 (1901) and see *Nanda Lal Goswami v Atarmani Dasee* (1908) 35 M 763 and *Grant v Robinson* (1906) 11 C W N 242

(3) *Ram Narain Singh v Chota Nagpur Banking Association* 43 C 332 (1916) *Raghoejrao Saheb v Lakshmanrao Saheb* P C 36 B 639 (1912)

(4) *Mohesh Lal v Mohun Bauan* L R 10 A, 62 71 (1833), s. c. 9 C, 961

(5) *Gokuldas v Purnamal* 10 C 1035 (1884), 11 I A 126, see also *Gopal Chunder v Herunbo Chunder* 16 C 523

(6) *Mobaruck Shah v Toofany* 4 C

706 (1878)

(7) *Haimun Chull v Coomar Guntheam* P C App 84 (1834), *Pedda Venkataiah v Aroosalla Roodrappa* P C App 112 (1834), *Burdacant Roy v Chunder Koomar* 12 Moo I A 145 (1868) *Trilochun Ghose v Kailas Nath* 3 B L R 292 (1869), 12 W R 175, *Selam Sheikh v Baidonath Ghatake* 3 B L R, (A C) 312 (1869) *Kalee Chunder v Adoo Sheikh* 9 W R 608 (1868) *Wali Ahmad v Ajudhia Kundu* 13 A 537 (1891) see also *Field's Evidence Act* 6th Ed 346

(8) *Fuzlooddeen Khan v Fakir Mahomed* 5 C 336 (1879), see 7 C 550 (1881) and cases there reviewed and *Narain Chunder v Dataram Roy* 8 C 597 (1882)

CHAPTER VIII.

ESTOPPEL.

THE subject partly dealt with is a personal proving peculiar facts whereas a presumption is a rule that particular inferences shall be drawn from particular facts whoever proves them (2) An estoppel is only a matter of proof (3) The *onus* of proving an estoppel lies of course on him who sets it up (4) An estoppel cannot be created either by an ambiguous document or an ambiguous act (5) It is not necessary that there should be any fraudulent intention established in connection with the misrepresentation which is the subject of estoppel (6) A man is estopped when he has said, done or permitted, some thing or act, which the law will not allow him to gainsay Owing to its use in ancient times in shutting out the truth against reason and sound policy, the doctrine of estoppel was not favoured and was characterised as "odious" In modern times the doctrine has lost all ground of odium and become one of the most important, useful and just, factors of the law At the present day it is employed not to exclude the truth, its whole force being directed to preclude parties, and those in privity with them, from asserting a principle which can in the case of one Court has to see

what their original rights are (8)

It has been pointed out by a text writer of the highest authority on the Law of Evidence (9) that the Courts formerly through the phraseology and under the garb of "evidence" accomplished results which they now attain by the principle of estoppel, the modern extension of the law by a direct and open application of which there were three kinds of estoppel, namely (a) by Record, (b) by Deed, and (c) *in pais*

Estoppel by Record is dealt with by the Code of Civil Procedure, sections 11—14, (10) and by sections 40—44 of this Act (*v ante*, pp 392—419) There is also Estoppel by Deed

(1) See as to the law of estoppel Bigelow's Treatise on the Law of Estoppel 6th Ed (1913) Everest and Strode's Law of Estoppel 2nd Ed (1907) Cabane Principles of Estoppel (1888) an Estoppel by Representation and *Res Judicata* in British India by A Caspersz being the Tagore Law Lectures 1893 4th Ed (1915)

(2) Steph Introd 175

(3) *Baski Chandra v Enayet Ali* 20 C 235 239 (1892)

(4) *Malaraja Birendra Kishore v Bakunta Chandra Deb* 46 I C 474, and the ordinary rules of proof apply There fore if an estoppel arising out of a written statement is produced it and not the judgment must be put in evidence *Annada*

Prosanna Lahiri v Badulla Mandul 47 I C 985 an estoppel can only be raised by pleading If it is not pleaded the Court will not go into the matter *Puran Pande v Dhanpat Tewari* 52 I C 739

(5) *Vamsa v Sallayjee* 46 I C, 609

(6) *Balbir Prasad v Jugul Kishore*, 3 Pat. L J 454 s c 46 I C., 473

(7) *Beglow op cit* 6th Ed 5 6

(8) *Juan Lal v Behari Lal* 45 I C 68

(9) Thayer's Evidence at the Common Law 318 cited in *Rup Chand v Sarbarnar Chandra* 10 C W N 747 (1906) s c 3 C L J 629

(10) Woodroffe & Ali's Code of Civil Procedure 2nd Ed. 99 -101

of a sutor may under particular circumstances be indicative of a consciousness on his part that what the opposite party claims is a true and proper amount (1) No presumption can be raised against a party to a suit from his refusal to withdraw his case from the determination of a properly constituted Court in order to submit it to private arbitration. Nothing which passes between the parties to a suit in any attempt at arbitration or compromise should be allowed to effect the slightest prejudice to the merits of their case, as it eventually comes to be tried before the Court (2) The return to a writ of *habeas corpus* is not necessarily conclusive, and does not preclude enquiry into the truth of the matters alleged therein (3) A witness sent by the police is presumably under restraint and a statement made by such witness and so recorded raises suspicion that it was not voluntarily made (4)

Partner
ship

In a partnership suit where one party does, but the other party does not allege a specific agreement that the shares in the said partnership were unequal the existing presumption as to the equality of partners' shares casts the burden of proof on those alleging the agreement who must therefore begin (5) In the case cited it was held by the Privy Council that where annual accounts between partners ceased and a final account showing divisions of capital and revenue was made out and some of the partners afterwards carried on the business for ten years without interference from the others there was a presumption of dissolution of partnership at the date of the final account (6)

Mortgage

The presumption, generally speaking, in the absence of any evidence to the contrary is that a person whose money goes to satisfy a prior mortgage intends to keep alive for his benefit that prior mortgage (7)

Religion

A child born in India must under ordinary circumstances be presumed to be of the Hindu status (8) With the consequence of the the question arises is to be determined not by ascertaining the law which was applicable to such person prior to the conversion, but by ascertaining the law or custom of the class to which such person attached himself after conversion and by which he preferred that his succession should be governed (9) Where it was found that the Catholic form of worship had been followed for more than sixty years in a certain church, it was held that the *onus* was on those who wished to establish that the church had originally been Syro Chaldean (10)

(1) *Mussamat Bibee v Sheikh Hanid* 10 B L R 45 54 (1871)

(2) *Molabier Singh v Dhujoo Singh* 20 W R 172 (1873)

(3) In the matter of *Khatiya Bibi* 5 B L R 557 (1870) contra *R v Vaughan* 5 B L R 48 (1870) the writ does not now issue the High Court has however conferred upon it certain powers of issuing directions in the nature of a writ of *habeas corpus* Cr Pr Code s 491

(4) *R v Jadab Das* 4 C W N 129 141 142 (1899)

(5) *Jadabram Dey v Bulloram Dey*

76 C 281 (1899) *ref Collector of Jaunpur v Jamna Prasad* 44 A 360 (1922)

(6) *Joopoodj Saravia v Lachman* 5 All P C 36 M 185 (1913)

(7) *Anar Chandra v Roy Golote* 4 C W N 769 (1900)

(8) *Skinner v Orde* 14 Moo I A 09 (1871)

(9) *Lastings v Coates* 23 B 539 (1899) in which (p 541) it was held that the lower Court had not drawn a correct presumption

(10) *Ambalan Pakhja v Bartle* 36 M 418 (1913)

authentication somehow imparted verity and gave to the instrument to which it was appended its peculiar efficacy (1) Written evidence was considered of a higher nature than verbal, and where the document was of a formal character executed under seal it was regarded as conclusive not merely as to the interests conveyed but also as regards matters of recital The principle was that where a man had entered into a solemn engagement by deed under his hand and seal as to certain facts he should not be permitted to deny in a matter which he had so asserted (2)

An estoppel by deed is a preclusion against the competent parties to a valid sealed contract and their privies to deny its force and effect by any evidence of inferior solemnity (3). The rule declares that no man shall be permitted to dispute his own solemn deed. In India, however, conveyancing is of a simple and informal character (4) and contracts under seal have no special privilege attached to them being treated on the same footing as simple contracts (5). But while the technical doctrine has no application in this country, statements in documents are as admissions always evidence against the parties. And the admissions may be *conclusive* if they work an estoppel that is if the statement has been *acted upon* by the party to whom it was made (6).

The the estop large clas purposes of a particular transaction to treat certain facts as true (7) In this country the technical doctrine is not recognised at all and a statement in a deed or other document can only give rise to an estoppel if the case is one which can be brought within the rule as to estoppel by conduct In some cases, such a statement amounts to a mere admission of more or less evidential value according to the circumstances but not conclusive In other cases namely, those in which the other party has been induced to alter his position upon the faith of the statement contained in the document such a statement will operate as an estoppel In this vie other instrument is only a or misrepresentation which An estoppel however in pais may arise in connection with a deed is in connection with any other instrument

In the case of *Paran Singh v. Lalji Mal*(8) the rule on this point was laid down as follows —

⁴ If a party to a deed is to be precluded from questioning his solemn act

The strictness of the rule of evidence to be used to promote justice, the force of the rule must be proportioned to the exigencies of the country in practice.

the degree of care and intelligence which the natives of the country in practice

(1) B gelow op cit 6th Ed 360 36?

291 Pollock on Contract 5th Ed 131—
143

(3) Begelow *op cit* 6th Ed 360—367
Bozman & Taylor 2 A & C 278 291

(4) See observations of Paul J in
Don elle v Kedarnath Chuckerbutty 7 M
L R 728-730 (1871) and see Kedarnath Chuckerbutty v Don elle 20 M R 353 (1873) and the deeds and contracts of the people of India are to be liberally construed Hanooman Prasad v Mussi Babooe 6 Moo I A 411 (1856), Ram lall Set v Kanaul Lall 12 C. 578 (1886)

(5) *Raja Sahib v Biddi Singh* 12
 Moo I A 275 (1869) s c 2 B L R
 P C 111 *Ra Gopal v Blaquiere* 1 B
 L R O C 37 (1867) *Tirumala v*

Sadhi Chitrn v Basude Parbary 9 C W N ccviii (1905)

(3) see *Carpenter v. Biller* 8 M W 207
212

(8) 1 A 403 410 (18") but see as to this case *Cheniraffa* v *Putappa* 11 B. 708 (1887)

a two fold estoppel arising by record, that is, from the proceedings of the Courts, first, in the record, considered as a *memorial* or entry of the judgment, and secondly, in the record considered as a *judgment*. In the first case mentioned the record has conclusive effect upon all the world. It imports absolute verity, not only against the parties to it and those in privity with them but against strangers also, no one may produce evidence to impeach it. Thus no one, whether party, privy or stranger, is permitted to deny the fact that the proceedings narrated in the record took place, or the time when they purport to have taken place or that the parties therein named as litigants participated in the cause, or that judgment was given as therein stated, unless in a direct proceeding instituted for the purpose of correcting or annulling the record (1).

The estoppel of a record as a *judgment* is of greater importance. The force and effect of a judgment depend first upon the nature of the proceedings in which it was rendered, i.e., upon the question whether it was an action *in rem* or *in personam* (2) and secondly upon the *forum* in which it was pronounced, i.e., upon the question whether it was a judgment of a domestic or foreign Court (3). The record of a judgment *in rem* is generally conclusive upon all persons. In other cases, so far as the record purports to declare rights and duties, its material recitals import absolute verity between the parties to it and those who claim under them. The estoppel arising from or fixed by the fact enrolled constitutes the estoppel of a judgment. And to the question whether the judgment necessarily creates an estoppel, the general answer is, yes, if it results in *res judicata* no, if it does not (4).

Estoppel must be distinguished from *res judicata*. Estoppel is part of the Law of Evidence and proceeds upon the Equitable principle of altered situation, while the doctrine of *res judicata* belongs to procedure and is based on the principle that there must be an end to litigation (5). The plea of *res judicata* prohibits the Court from enquiring into a matter already adjudicated, while estoppel prohibits a party from proving declarations or acts, to the prejudice of his position (6). *Res judicata* ousts the law, only shuts the mouth of a party (7).

Estoppel by Deed

The strict technical doctrine of estoppel by deed cannot be said to exist in India (8). Section 115 of this Act is exhaustive, and the Law of Estoppel in this country is contained in it (9). This species of estoppel originated by virtue of that which constituted a writing a deed, namely, the seal. It is to the fact that the seal was once the mark of authority and greatness, rather than to the fact that it was a seal, or that (as is commonly said) its use was a solemn act that is to be traced the origin of the effect of the instrument as matter of evidence. Later, the idea gained force that the seal itself, besides affording

(1) Bigelow *op cit* 6th Ed 8 36

(2) Bigelow *op cit*, 6th Ed 8 36 38
v *ante* pp 388-392

(3) v *ante* pp 388-392

(4) v *ib*

(5) Woodroffe and Ameer Ali *Civil Procedure* Second Edition p 101 See *Cassamally Jairajbhais v Sir Currimbhoy Ebrahim* 36 B 214 (1912) *Baishanther Nanabhai v Morarij Keshavji* 36 B 283 (1912)

(6) *Sitara v Asir Begum* (1886) S A 332

(7) *Cassamally Jairajbhais Peerbhais v Sir Currimbhoy Ebrahim* (1911) 25 B 215

(8) See *Gokuldas Gopaldas v Puranmal Precisukdas* 10 C 1035 (1884) *Zemin dar Serimain v Virappa Chetti* 2 Mad H C R 174 (1864) [The strict technical doctrine of the English law as to estoppel in the case of solemn deeds under seal rests upon peculiar grounds that have no application to the present bonds or the other written instruments ordinarily in use amongst natives] *Pam Gopal v Elaquire* 1 B L R O C 37 (1867) *Paras Singh v Lalji Mal* 1 A 403 (1877) *Donelle v Kedarnath Chuckerbutty* 7 B L R, 720 (1871) *Kedarnath Chuckerbutty v Donelle* 20 W R, 362 (1873)

(9) *Asmatunnessa Klatum v Harendra Lal Biswas* (1908) 35 C, 904

the circumstances such an estoppel by agreement or by such conduct as is provided for by section 116, *post* (1) In the case cited it was held by the Privy Council that a decree for partition in a suit by a member of a joint Hindu family is *res judicata* as between all co-sharers who are parties to the suit (2) In addition to the above forms of estoppel *in pais* which are now chiefly of historic interest only, there is the modern doctrine of estoppel *in pais* 'Indeed the estoppel *in pais* of the present day has grown up entirely since the time of Coke and embraces cases never contemplated in that character by him or by the lawyers of even much later times though the old lines are often visible in the newer pathways'

Estoppel *in pais* according to the modern sense of that term has been said to arise *firstly* (a) from agreement or contract *secondly* (b) independently of contract, from act or conduct of *misrepresentation* which has induced a change of the party against
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grows out of the performance of the contract by operation of law Estoppel by contract does not include cases of estoppel not arising by or by virtue of the contract itself though arising in the course of the contract, if the estoppel is not part of the contract itself or of its legal effect it belongs to the next head While there can be no estoppel by agreement where the justice of the case does not require it, such an estoppel may be found to exist where there is an agreement either express or to be implied from the conduct of the parties to or the nature of the transaction itself which justice requires should be enforced The question of the existence of such an estoppel must be dealt with on broad grounds of legal principle irrespective of whether there may be a decision in point or not The question in each case is—is there an agreement on which an estoppel should be justly founded (3) Sections 116 and 117 afford instances of the estoppel by agreement but they are not exhaustive of it (4) As has been well said some transactions there are which are so obviously based on a conventional state of facts that for that very reason the parties never in practice come to an express agreement about them at all and the term 'is but the carrying they thought about
 parties are deemed
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possession are taken to accept it upon the terms that they will not dispute the title of him who gave it to them and without whose possession they would not have got it The act of acceptance of a bill of exchange amounts to an undertaking to pay to the order of the drawer Though all are instances of estoppel by agreement the precise terms of the agreement and therefore of

where these cases are cited and considered and *Chobey Singh v Jote Singh* P C (1908) 31 A 73

(1) Cf *Greender Clunder v Troy lolkho Nath* 21 I A 35 (1892) *Ananta Balacharya v Damodhar Makund* 13 B 25 (1888) *Sr nati Siku ani v Malendra Nath* 4 B L R P C 16 (1869) *Cas persz of cit* 4th Ed (1915) s 321 p 306

(2) *Aal ni Ka ta Lahiri v Sarno oji Debja* 41 I A 247 (1914)

(3) *Rip Claud v Sarbesuar Clandra* 10 C W N 747 (1906), s c 3 C I, J, 629

(4) *id* Mr B gelow describes the

estoppel of tenant and licensee of land as an instance of estoppel growing out of the performance of the contract by operation of law (B gelow *op cit* 6th Ed 547, 586) The estoppel of a bailee and other licensee is analogous to that of landlord and tenant (ib 6th Ed 490 592 593 597) The estoppel in respect of negotiable instruments is also an instance of estoppel by contract but in this instance it is said to arise upon some fact agreed or assumed to be true ib 6th Ed 519)

(5) *Rip Claud v Sarbes ar Chandra* 10 C W N 747 (1906) citing with approval *Cababe on Estoppel* 12 21

bring to bear upon their transactions. What is ordinarily known in these provinces as a deed, is an attested agreement prepared without any competent legal advice, and executed and delivered by parties who are unaware of any distinction between deeds and agreements. Under these circumstances it appears to us that justice, equity, and good conscience required no more than that a party to such an instrument should be precluded from contradicting it to the prejudice of another person, when that other, or the person through whom the other person claims, *has been induced to alter his position* on the faith of the instrument, but where the question arises between parties, or the representatives in interests of parties, who at the time of the execution of the instrument were aware of its intention and object, and who have *not* been induced to alter their position by its execution, we consider that justice in this country will be more surely obtained by allowing any party, whether he be plaintiff or defendant to show the truth. As to the cases in which, in order to prevent fraud it may be shown that an apparent deed of sale is really a mortgage, see *ante*, s 92, *sub* *loc* 'Evidence of Conduct' and authorities there cited (1) As to estoppel by pleading *v ante*, pp 482-483 (2)

Estoppel
in pais

"Estoppel *in pais* under the ancient doctrine of the Common Law sprang from (i) livery of seisin, (ii) entry; (iii) acceptance of rent, (iv) partition, (v) acceptance of an estate. Aside from the mentioned instances mentioned by Coke,— at the present day, and even the character from what it was in his time. Estoppel by the acceptance of rent as known to Coke occurred where the landlord accepted rent from a tenant who held over after the expiration of a lease by deed. Such an estoppel depended upon the prior existence of a deed, while at the present day it is immaterial how the tenure arose (3). The estoppel by partition was a case of implied warranty. In the case of a partition of lands by writ of partition between co tenants the law imported a warranty of the common title, and held it to be incompatible with their duty to each other for either to become demandant in a suit to recover any portion of the land by a paramount title and thus to place himself in antagonism to his co tenants. No tenant after partition could set up an adverse title to the portion of another for the purpose of ousting him from the part which had been partitioned off to him (4). In this country the question whether will depend in the case of a partition re is an estoppel by judgment or *res* act of parties whether there is under

(1) See also *Bapuji v Senaraju* 2 B 231 (1877) *Mahadaji Gopal v Vithal Ballal* 7 B 78 (1881)

(2) And see *Bhugtandeen Daobey v Myna Baee* 11 Moo I A 487, 497 (1867) *Ran Suruj v Musst Pran* 13 M I A 551 559 (1870), *Krsto Preca v Puddo Lochan* 6 W R 288 (1866) *Raasta v Krstina* 1 Mad H C 77 (1862) *Dajal Jairol v Khatav Ladha* 12 Bom H C J 97

(3) Bigelow *op cit* 6th Ed 490 see Act IV of 1882 (Transfer of Property) s 116

(4) Bigelow *op cit* 6th Ed 445-447 In the case of partition *in pais* by conveyance between the parties there appears to be no estoppel apart from recitals unless there is an express warranty. And the rule itself has been subjected to some qualification 6th Ed 446

(5) As to the conclusiveness of partition proceedings see *Mussamut Oodia v Bhopal* 3 Agra Rep 137 (1868) *Glassco Khan v Kulloo* 1 Agra Rep 152 (1866) *Shitra v Narayan* 5 B 27 (1880) *Lakshmi Dada v Ranchandra Dada* 5 B 48 (1880) *Konneraj v Girra* 5 B 589 (1880) *Nilo Ranchandra v Gobind Balla* 10 B 24 (1885) *Sadu v Ba* 4 B 37 (1879) *Ananta Bala charya v Danodhar Makund* 13 B 25 31 (1888) *Krishna Behari v Brojcsuari Choudhram* 1 C 144 2 I A 283 (1875) *Rajah of Patapur v Siltja Garu* 12 I A 16 (1884) *Lenkatadri v Peda Venkayamma* 10 M 15 (1888) *Sheik Hossein v Sheik Musund* 18 W R 260 (1872) *Hari Narayan v Ganpatrav Daji* 7 B 272 (1883) *Kir'y Chunder v Anath Nath* 10 C 97 (1883) and *Caspersz op cit* 4th Ed 860-866

the circumstances such an estoppel by agreement or by such conduct as is provided for by section 115, *post* (1) In the case cited it was held by the Privy Council that a decree for partition in a suit by a member of a joint Hindu family is *res judicata* as between all co sharers who are parties to the suit (2) In addition to the above forms of estoppel *in pais* which are now chiefly of historic interest only, there is the modern doctrine of estoppel *in pais* "Indeed the estoppel *in pais* of the present day has grown up entirely since the time of Coke, and embraces cases never contemplated in that character by him or by the lawyers of even much later times, though the old lines are often visible in the newer pathways"

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possession are taken to accept it upon the terms that they will not dispute the title of him who gave it to them and without whose possession they would not have got it The act of acceptance of a bill of exchange amounts to an undertaking to pay to the order of the drawer Though all are instances of estoppel by agreement, the precise terms of the agreement and therefore of

where these cases are cited and considered and *Cholhey Singh v Jote Singh* P C (1906) 31 A 73

(1) Cf *Creeender Chunder v Troj lokho Nath*, 21 I A 35 (1892), *Anania Balacharya v Damodhar Makund* 13 B, 25 (1888), *Srimati Sukimani v Mahendra Nath* 4 B L R, P C, 16 (1869), *Cas persz of cit* 4th Ed (1915) s 321, p 306

(2) *Nahim Kanta Labari v Sarnowazj Dehya* 41 I A, 247 (1914)

(3) *Rup Chand v Sarbestwar Chandra* 10 C W N, 747 (1906), s c, 3 C L J, 629

(4) cf Mr Bigelow describes the

estoppel of tenant and licensee of land as an instance of estoppel growing out of the performance of the contract by operation of law (Bigelow, *op cit*, 6th Ed, 547, 586) The estoppel of a bailee and other licensee is analogous to that of landlord and tenant (ib, 6th Ed, 490, 592, 593, 597) The estoppel in respect of negotiable instruments is also an instance of estoppel by contract, but in this instance it is said to arise upon some fact agreed or assumed to be true' ib 6th Ed 519)

(5) *Rup Chand v Sarbest ar Chandra* 10 C W N, 747 (1906), citing with approval *Cababe on Estoppel*, 12, 21

the estoppel may vary according to the nature of the particular transaction in each case (1). Another instance of such an estoppel (which however has not been provided for in the Act) is the estoppel of a person taking possession under an instrument whether a will or deed *inter vivos*. Where such taking is in accordance with a right which would not have been granted except upon the understanding that the possessor should not dispute the title of him under whom the possession was derived there is an estoppel. This occurs where several persons take limited interests under the same instrument. In that case a party cannot say that the instrument is valid so as to enable him to take remainder who claim under a deed or will in question cannot

by such possession for more than twelve years acquire an interest in the property different from that which he would have taken if the deed or will had been valid and operative (3). Whether all the cases here referred to under this head ought to be called estoppels is a matter of doubt.

Secondly The next head which constitutes an important addition in recent times to the law of estoppel embraces the class of cases known and described as estoppel by conduct of misrepresentation the estoppel arising without regard to contract rather or the fact to be taken as true not being necessarily or ordinarily the subject or the effect of contract. This estoppel is dealt with in section 110 *post*.

Besides these two classes the name of estoppel has been extended to a variety of cases which are not estoppels at all in some of these cases there may perhaps be said to be a *quasi* estoppel in others the word is merely used as equivalent to bar in others it is an entire misnomer the free use of the term 'estoppel' in such cases giving rise to confusion and misapprehension of the real legal character of the act or declaration which is to be considered (4).

This Act deals with the subject of estoppel *in pars* in sections 115—117 but does not in terms preserve the above mentioned distinction between estoppel by contract and estoppel by conduct. The rules contained in sections 116 and 117 have been described as *act* Other cases which have been included under the purview of section 115 and to fall within the purview of section 116 to refer to what has been described above Hard and fast distinctions are not easily or profitably drawn in this branch of the law. Estoppels in the sense in which that term is used in English legal phraseology are matters of infinite variety and are by no means confined to the subjects dealt with in this Chapter of the Act (5).

In the case of the *Ganges Manufacturing Co v Sourymull* (6) Garth C J said — 'It has been further contended by the appellants that sections 115 to 117 contained in Chap. VIII of the Evidence Act lay down the only rules of estoppel which are now intended to be in force in British India that those rules are treated by the Act as rules of evidence and that by the second section the Act contains the only rules which would indeed be entertaining any

(1) *R v Clark & Sabers & Clark* supra

(2) *Id Dalton v Fitzgerald* 1 Ch D (1894) 440 2 Ch D (1897) 86 *Board v Board* L R 9 Q B 48 *Durga Das v Ismail & Co* 44 C 145 (1917)

(3) *Raja Ickla & Sons v Appa Rao v Rajai Sreant Gopala Row*

(1908) 31 M 321 and *Dalton v Fitzgerald* (1897) 2 Ch D 86

(4) *See Bageloff v Ed* 489

(5) 3 C 669 6 8 6 9 (1880)

(6) *Ganges Manufacturing Co v Sourymull* 5 C 669 (1880) and see *Jalak & Co v Khatia & Co* Mad H C R 263 (18 3)

questions in the nature of estoppel which did not come within the scope of sections 115 to 117 however important those questions might be to the due administration of the law. The fallacy of the argument is in supposing that all rules of estoppel are also rules of evidence. The enactment in section 115 is, no doubt, in one sense, a rule of evidence. It is founded upon the well-known doctrine laid down in *Pickard v. Sears*(1) and other cases that where a man has made a representation to another of a particular fact or state of circumstances, and has thereby wilfully induced that other to act upon that representation and to alter his own previous position, he is estopped as against that person from proving that the fact or state of circumstances was not true. In such a case the rule of estoppel becomes so far a rule of evidence that evidence is not admissible to disprove the fact or state of circumstances which was represented to exist. But estoppels in the sense in which the term is used in English legal phraseology are matters of infinite variety, and are by no means confined to the subjects which are dealt with in Chap. VIII of the Evidence Act. A man may be estopped not only from giving particular evidence, but from doing acts, or relying upon any particular argument or contention, which the rules of equity and good conscience prevent his using as against his opponent. A large number of cases of this kind will be found collected in the notes to *Doe v. Oliver*(2) and whatever the true meaning of the second section of the Evidence Act may be as regards estoppels which prevent persons from giving evidence we are clearly of opinion that it does not debar the plaintiffs in this case from availing themselves of their present contention as against the defendants."

So parties will not be allowed to vary their cases on appeal by receding from admissions made in the Court of first instance(3) and may be estopped

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award of interest, and the judgment-debtor, accepting his liability to pay this decretal debt as well as interest, obtained from time to time adjournments from the Courts to enable him to pay the amount. It was held that the judgment debtor could not at a later stage of the proceedings dispute the item of interest and was bound to pay interest from the date on which he admitted his liability to pay interest (6). Estoppels may also arise out of the compromise

(1) 6 A & E 469

(2) 2 Smith L C 8th Ed pp 775
et seq See Caspersz op cit 4th Ed
(1915) s 69, pp 78 79

(3) *Mohina Chunder v. Ram Kishore*
15 B L R 142, 23 W R 174 (1875).
Detay Goyaji v. Gadadhar Godebhai 2
Bom H C R, 28 (1865); *Stracy v.*
Blake, 1 M & W, 168, *Nidha Chou-*
dhy v. Bunda Lall 6 W R 289 (1886),
Doe d Child v. Roe, 1 E & B, 279,
Motichand v. Dadabhai 11 Bom H C
R, 186 (1874), *Hurechur Mookerjee v.*
Rajkishen Mookerjee 23 W R, 251
(1875), *Kanailal Khan v. Shoshi Bhoo-*
sun, 8 C L R, 117 (1881), see *Gopal*
Sahu v. Joyram Tewary, 9 C L R, 402
(1881)

(4) *Moonshee Amcer v. Maharanee*

Inderjeet, 14 Moo I A, 203, 9 B L R,
460 (1871) *Anant Das v. Ashburner &*
Co 1 A 67 (1876), *Protap Chunder*
v. Arathoon 8 C 455, 10 C L R, 443
(1882), *Bahur Das v. Nobin Chunder*, 29
C, 306 (1901). See also *Pisani v.*
Attorney General, L R, 5 P C 516, and
Rajmohun Gossain v. Gour Mohun, 8
Moo I A 91 4 W R P C 47 (1859),
where it was said that a decree of an
Appellate Court obtained after a com-
promise and an agreement not to prosecute
an appeal was an adjudication obtained
with fraud

(5) *Uttam Chandra v. Akhetra Nath*
29 C, 577 (1901)

(6) *Narayan v. Rastgi*, 6 Bom L R 417
(1904)

of legal claims *pendente lite* (1) Where a Court has in fact no jurisdiction to entertain a suit or application the consent of the parties thereto cannot give it jurisdiction. Where a person filed a claim in execution proceedings in the Small Cause Court and thereafter when such claim was disallowed brought a regular suit in which it was held that that Court had no jurisdiction to entertain the claim it was also held that the plaintiff was not estopped from saying that the Small Cause Court had no jurisdiction to deal with the matter because under wrong advice he originally filed a claim in that Court (2) In however an earlier case where a plaintiff put the Subordinate Judge's Court in motion to execute a decree and thus submitted himself to the jurisdiction of that Court, it was held that the plaintiff was by his own act estopped from saying that the same Court had no jurisdiction to retrace its steps by directing a refund of the sum realized under the order for execution and to replace the parties in the position which they occupied before the irregular execution was had (3) And where in a recent case the cause had been made over to the Joint Subordinate Judge without objection by either party it was held that they had waived enquiry as to jurisdiction and were bound by this tacit admission of it (4) The mere fact of a plaintiff in a suit for ejectment in a Civil Court having on a previous occasion applied to the Revenue Court for the ejectment of the defendant would not estop him from asserting that the defendant was unlawfully in possession that is as a trespasser (5) In the case cited pending a suit by the mother of the last Hindu male owner for a declaration of the invalidity of an alleged adoption made to him the mother died and on her death an application was made by the present plaintiffs who were remote reversioners to be brought

(1) Woodroffe & Als C. Pr. Code O. XVIII r. 3 2nd Ed. 1034
Ruttansey Ial v Poorba 7 B 304 (1883) *Aarupan v Ramasami* 8 M 482 (1885) *Appasami v Man kam* 9 M 103 *Hara Sundari v Kumar Dukkinessur* 11 C. 20 (1882) *Gocidas B labdas Co. Scott* 16 B 202 (1891) *Kally Nanth v Rajeeblochun Mosoomdar* 2 Ind. Jur. S. 343 127 (186) *Juggobundhoo Chatterjee v Watson & Co* 2 Bourke 162 (1865) *Scully v Lord Dundonald* L. R. 8 Ch D 658 *Fryer v Gribbl* L. R. 10 Ch D 534 *Holt v Jesse* L. R. 3 Ch D 177 *Pajena Na a Bja Gobnd* 2 M I 181 (1839) *S. Gajapathi v Sri Gajapati* 13 Moo I A 497 (1870) *Gholanb Koonwarre Esur Clandes* 8 Moo I A 447 2 W. R. P. C. 47 (1861) *Cherakunneth v Jengunat* 18 M I (1894) as to whether see *Dwarkanath Sarma v Unnoda Soondurce* 5 W. R. Misc. 30 (1866) *Shitalingaya v Vagajaya* 4 B 24 (1888) *Jank Ammal v Kamalatham nal* 7 Mad H. C. R. 203 (1873) abandonment *Man Gobnd v Jank Ram* W. R. 211 1864 as to agreements *contra cursum curia* see *Sadasa Pilla v Ramalinga Pilla* 15 B L R. 383 *Pisan v Attorney-General* L. R. 4 P. C. 516 *Sheo Golam v Beni Prasad* 5 C. 2 (1891) *Dinnonath Sen v Guruchurn Pal* 14 B. L. R. 287 (1874) 21 W. R. 310 *Stowell v Billings* 1 A. 350 (18) *Debi Rai v Gokul Prasad* 3 A. 585 (1881) *Ram*

la han Rai v Bakhtaur Ra 6 A 673 (1884) it has been held that a compromise which does not supersede the decree is no bar to the enforcement of the original decree *Darbha Jenkamma v Ra Subbarayudu* 1 M 387 (1878) *Ganga v Mul Dhar* 4 A 740 (1882) *Latafat Hasan v Badshah Husan* (P. C.) 8 O. C. 143 *Malla Redd v Arava Natha Redd* 15 M. L. J. 494 See *Ca persz op cit* 4th Ed. (1915) ss 454-459 pp 467-407 where these cases are discussed

(2) *Deno Nath v Adlor Chunder* 4 C. W. N. 40 (1900) 3 C. W. N. 591

(3) *Gonnd Janan v Sakharan Ramcha d a* 3 B 42 (1878) dissenting from *Ganesh Daji v Sakha an Panchandra* P. J. 187 p. 22 See also *Gyan Chandra Daga Clrn* 2 C 318 (1881) in which it was objected that partition proceedings could not be taken in execution of a decree and that the Court was in error in appointing the Amn as commissioners to effect partition s. 396 of the Code referring to Commissioners in the plural *Pontef J* however held that the order of the Judge was within the meaning of the section 396 of the Code. It may also well be that apart from questions of jurisdiction on a person who has acquiesced in proceedings may be estopped from calling them in question

(4) *Barotto v Roitguis* (1910) 35 B 4

(5) *Zafeda Ftee Sheo Charan* 22 A. 38 (1899)

on record as her legal representatives and to continue the suit, which application was dismissed on the objection raised by the present defendant in that suit and that suit was also eventually dismissed by the High Court in Second Appeal under Order 22, Rule 3 of the Civil Procedure Code. The present plaintiffs thereupon brought this fresh suit. *Held* that the defendant was estopped from contending in the second suit, that the decision in the previous suit was erroneous, that the plaintiff's proper remedy was to continue the first suit, and that the second suit was barred under the Order mentioned inasmuch as the first suit had abated (1)

Persons will not be permitted to take up inconsistent positions. (2) So in the case first cited, which was a suit upon a mortgage, the defendant contended that the suit was premature and the Court accepted that view. The plaintiff again sued and the defendant pleaded Limitation, but it was held that it was not open to him to raise the defence. Where a plaintiff having obtained a decree against one of two defendants, acquiesced in that decree, but the defendant judgment debtor appealed, making the other defendant also a party to his appeal with the result that the plaintiff's suit was dismissed, it was held that it was not open to the plaintiff in second appeal to contend that the Court below should have made a decree against that defendant with regard to whom he had acquiesced in the dismissal of his suit (3)

Nor will a party be permitted to approbate and reprobate in respect of the same matter (4). Where the property of a judgment debtor is sold in execution of the decree and the proceeds go in satisfaction of the decree and the judgment debtor accepts the payment of the decree he cannot impeach a part of the sale (5). Where a person against whom execution is taken out admits his liability he cannot subsequently repudiate it (6). If a person purchases an estate subject to a mortgage whether under a voluntary conveyance or under a sale *in invitum* and undertakes to discharge it, he cannot be heard to deny the validity of the mortgage subject to which he made his purchase (7). Where a person allowed execution to proceed for nearly a year without objection, having twice obtained a stay of

(1) *Arunachalam Pellai v. Vellaya Pellai* 25 M. L. T. 360, s. c. 52 I. C. 465

(2) *Musst. Efatoonissa v. Khandkar Khoda* 21 W. R. 374 (1874). *Brij Bhokun v. Mahadco Dobe* 17 W. R. 422 (1872). *Dabee Musser v. Mungur Meha* 2 C. L. R. 208 (1878). *Sonaollah v. Inamooddeen* 24 W. R. 273 (1875). *Sutyobhama Dasse v. Krishna Chunder*, 6 C. 55 (1880). Where a defendant allowed without objection a purchaser of a plaintiff's interest in the suit to substitute his name on the record he was estopped from contending that the suit had abated. *Bir Chandra v. Bhansi Dhar* 3 B. L. R. A. C. 211 (1869). *Manpal v. Sahib Ram* (1905) A. W. N. 94, 27 All. 544 (F. B.). *Kanshi Ram v. Badda* (1906), 23 P. L. R., *Muhammad Wali Khan v. Muhammad Mohi ud din* 24 C. W. N. 813

(3) *Lohore v. Deo Dans* (1907), 30 A. 48, *Farzand Ali Khan v. Bismillah Begam* (1904) 27 A. 23

(4) See *Kristo Indro v. Huromonce Dasse* L. R., 1 I. A., 84, 88 (1873). *Rup Chand v. Sarbeswar Chandra*, 10, C. W.

N. 747 (1906) s. c. 3 C. L. J. 629

It is a sound principle of law that as between the same litigants a defendant cannot defeat the claim of the plaintiff by a plea negating a contention successfully advanced by him in a former suit if he thereby approbates and reprobates. *Varajlal Salot v. Bhaisi Nagardas* 6 Bom. L. R. 1103 (1904). See *Cocentry v. Tulshi Pershad* 31 C. 822 (1904). See *Balbir Prasad v. Jugal Kishore*, 3 Pat. L. J. 454, s. c. 46 I. C. 473, *Lala Kanahi Lal v. Lala Brij Lal* 22 C. W. N. 914 (P. C.). *Shib Chandra Kar v. Dulchen* 28 C. L. J., 123, s. c. 48 I. C. 78. *Jogendra Nath Banja v. Mohendra Chora* 47 I. C. 978, *Basti Begam v. Sajjad Mirza* 21 O. C. 188, 47 I. C. 558, *Gauri Shankar v. Ganga Ram* 77 P. R., 1919, s. c. 52 I. C., 859 cited *sub voc.* Representation *post*

(5) *Annapurna Bai v. Rama Chandra* 43 I. C. 178

(6) *Balbir Prasad v. Jugal Kishore* 3 Pat. L. J. 454, 46 I. C., 473

(7) *Kalidas Choudhury v. Prosanna Kumar Das* 47 C., 446, 24 C. W. N., 269, 30 C. L. J., 496

sale on the plea that he would satisfy the decree if time were allowed and having t of the debt, induced he was held estopped against him (1) But conditions which are the essentials of an estoppel So to petition for the postponement of a sale in execution of a decree is not an intentional causing or permitting the decree holder to believe that the judgment debtor admits that the decree can be legally executed (2) And where a son, against whom a suit ought to have been instituted conducted on behalf of his mother a suit wrongly brought a t he and not the mother should have been s that it was by reason of representation o plaintiff was led to think that the mother was the right person to be sued it was held that the decree in that suit was not binding on the son, and did not estop him, in a subsequent suit against him from contesting the validity of that decree (3) It has been held that the test for determining whether there is an estoppel from a decree based on a compromise is whether the particular matter in doubt was decided by the parties in such compromise and embodied in the decree (4) If a landlord withdraws the amount deposited by the transferee of a non transferable holding to set aside its sale under section 310A of the Civil Procedure Code of 1882 without raising any objection he is not thereafter permitted to plead that the transferee did not by his purchase acquire a valid title to the holding (5)

appeal a lady whom he alleged to be the legal representative of the deceased plaintiff On this appeal an order was passed by consent of parties sending back the suit to be re-tried on the merits as between the defendant and the person nominated by him as plaintiff, and it was so re-tried and a decree was again passed in favour of the plaintiff Held that it was not thereafter open to the enquiry into the right of the repre pauper (7) In the undermentioned ed from raising the objection that the sale of the mortgaged property in execution of the decree in the mortgage suit was invalid by reason of the decree not having been made absolute if such objection was not raised at an early stage of the proceedings (8) In any objection on the lace on the postponed litv or irregularity of aking Held that he

(1) *Coventry v Tulshi Pershad* 31 C 822 (1904)

(2) *Mina Kon ars v Juggul Setani* 10 C, 196 (1883) s c L R 10 I A 119
 13 C L R 383, see *Musht Oodey v Mussamut Ladoo* 13 Moo I A 583 (1870) *Newton v Liddiard* 12 Q B 923
 See also as to petition for postponement *Girdhari Singh v Hurdeo Narain* 3 I A 230 (1876) distinguished in *Thakoor Mahtab v Leelanund Singh*, 7 C 613 6 C L R 398 (1881)

(3) *Mohun Das v Nilkomul* 4 C W

N 283 (1899)

(4) *Raja Kunjara Lakshmi Perumal Raja Bahadur v Thatha Ramasami Chetty* 33 M 75 (1912)

(5) *Gadadhar Ghose v Midnapur Zemindary Co* 27 C L J 385, s c, 43 I C 742

(6) *Janaki Ammal v Kalalathalal* 7 Mad H C R 263 (1873)

(7) *Akbar Hussain v Alia Bibi* 23 A. 117 (1903)

(8) *Chunindra Prasad v Baijnath Singh*, 41 C J 70 (1903)

could not be allowed to impeach the sale (1) There can be no estoppel arising out of legal proceedings when the truth of the matter appears on the face of the proceedings (2) In the case cited the plaintiff was held estopped by his own proceeding in an arbitration wherein he received his share of the property belonging to his father upon the footing of the exclusion of the mother, from claiming a share therein through his mother (3) No estoppel can arise from ignorance of law, which both parties must be presumed to know (4) A person can be precluded by his conduct from objecting to an irregularity in procedure which he himself invites (5)

Where a judgment-debtor who had appealed for reversal of an *ex-parte* money decree against him had consented to the attachment of his occupancy holding pending the re-hearing proceeding and subsequently, on the decree being confirmed, objected to the sale on the ground of non transferability of the holding without the landlord's consent; *held* that the attachment by consent did not estop the judgment-debtor from objecting to the sale. The primary object of an attachment is that pending the sale the right of the judgment debtor in the property attached shall be maintained intact for the benefit of any possible purchaser. On the judgment debtor objecting to the sale on the ground that the holding was not transferable by custom without the landlord's consent, the first Court held that the judgment debtor was estopped from resisting the objection as he had consented to the attachment and his decision was affirmed on appeal by the District Judge and the sale was held and confirmed pending second appeal to the High Court. *Held* that there was no question of estoppel involved. The judgment debtor was entitled to object.

High Court against the Appellate

To a suit filed on the Small
pleaded want of jurisdiction

and on his objection the Court returned the plaint for presentation on the ordinary Side. Against the decree of the District Munsif there was an appeal to the Subordinate Judge and against the appellate order of the latter a revision petition was filed in the High Court. The defendant raised the objection in the High Court that the suit was of a Small Cause Court nature and that no appeal lay to the Subordinate Judge. *Held* that the defendant was estopped from raising the objection (7) Generally as to admissions made in the course of judicial proceedings, *see* note below (8)

The law of estoppel *in pais* by misrepresentation "received in England its distinctive enunciation and form with the leading case of *Pickard v Sears* (9), a case which bears much the same relation to this part of the law of estoppel, as

(1) *Iakshi Prasonna Mojumdar v Rajendar Poddar* 47 I C 831

(2) *Tara Lal v Sarobar Singh* 4 C W N 533 (1899) There is no estoppel when the facts are known *Sarada Prasad Roy v Ananda Moji Dutta* 46 I C 228

(3) *Muhammad Wali Khan v Muhammad Mohi ud din* 24 C W N 321

(4) *Gurukul gasuani v Kamalaksha mamma* 18 M 58 (1894)

(5) *Timmanna v Putobhata* 2 Bom L R 90 (1899)

(6) *Bochar Mahton v Isri Jaji* 5 Pat 1 W, 185, s e 47 I C 29

(7) *Aiyathur Ali v Jnanaprakasha Oda* 52 I C 825

(8) *Tuedie v Poorno Chunnier* 8 W R 125 (1867) *Cira Ran v Jetana Ran* 2 Mad H C R, 31 (1864), *Tallabh*

Bhulee v Rama 9 Bom H C R, 65 (1872) See Caspersz *op cit*, 4th Ed (1915) Ch \ where the subject is discussed the conclusiveness or otherwise of such admissions being treated as by conduct referable to the general rule of estoppel which is explained in the notes herein to s 115 *post* As to estoppel by pleading see *Dinomoney Dabca v Doorga Pershad* 12 B L R 274 276 (1873), *Luchmun Chundar v Kali Churn*, 19 W R 292 297 (18 3)

(9) 6 A & E 469 (1837) [' But the rule of law is clear that where one by his words or conduct wilfully causes another to believe the existence of a certain state of things and induces him to act on that belief so as to alter his own previous position the former is concluded from

Bigelow's Treatise on the Law of Estoppel, 6th Ed (1913), Everest and Strode's Law of Estoppel, 2nd Ed, (1907), Cababe, Principles of Estoppel (1889), Estoppel by representation and *Res judicata* in British India, by A Caspersz, 4th Ed (1915) See also general text books on Evidence *sub voc* 'Estoppel'

COMMENTARY.

Scope of
the Section.

A general classification of estoppels and a short account of their position in the law of evidence has been given in the Introduction to this Chapter, to which reference should, if necessary, be made. In dealing with this and the following sections, it is to be remembered *firstly*, that they are not exhaustive (1),
 ons enact
 object of
 the pur-
 view of these sections *at all*, and those which are within such purview will (in the absence of an authoritative ruling of the Courts of this country) be determinable upon the principles which regulate English Courts, and which are to be found embodied in English decisions (3)

This section deals with estoppels by 'representation,' or 'misrepresentation,' that term including both express and implied statements. It may be described as estoppel by 'misrepresentation,' for though in strict legal theory the proposition that the representation must be untrue is probably not essential and the person is none the less bound to admit a fact because it is true still in practice the doctrine only obtains legal significance when there has been a *misleading*, or in other words when the admission exacted from A, by reason of his conduct, is of facts which are not capable of actual proof (4). It is not necessary that there should be an express statement, whatever word, action, or conduct conveys a clear impression as of a fact is embraced in the term. Indeed the term practically includes silence in certain cases, for silence where one is bound to speak is ordinarily equivalent to an admission of the fact (5). And so the section speaks not only of declarations but also of acts and omissions. As it is immaterial in what *form* the representation is made, so it be a representation, so also is it immaterial to know what the *motive* or the *state of knowledge* is of the party making the representation. The main determining element in every case is not the motive or the state of knowledge of the party estopped, but the *effect* of his representation or conduct as having induced another to act on the faith of such representation or conduct (6). The principle upon which the rule rests is that the situation of the one party having been changed by the representation, the person who made the latter shall not be permitted to disaffirm the statement which has induced such change. (7) Three

(1) *Ganges Manufacturing Co v Sourajmull* 5 C 669 (1880) v *ante* p 822

(2) *Sarat Chunder v Gopal Chunder* 19 I A 203, 215 (1892) s c 20 C 296 [The learned Counsel who argued the present case on either side were agreed that the terms of the Indian Evidence Act did not enact as law in India any thing different from the law in England on the subject of estoppel and their Lordship entirely adopts that view"]

(3) American decisions though not of course of authority may in so far as American law is founded upon English law also be referred to as aids to determination upon this or other question of evidence

See Preface

(4) *Cabales Estoppel* 60

(5) Bigelow *op cit* 6th Ed 648 *Carr v London Ry Co* L R 10 C. P. 307, 316 317

(6) *Sarat Chunder v Gopal Chunder* 19 I A 203 215 (1892) As to mistake of law see *Kuvery v Bobai* 19 B, 374 (1891) and mistake of fact *Nathubhai v Mul hand* 3 Bom L R 535 (1901), *Helan Das v Durga Das Mandal*, 4 C. L J 323

(7) *Sarat Chunder v Gopal Chunder*, supra Bigelow *op cit* 453 *Citizen Bank v First National Bank*, L. R. 6 E & I A 352, 360

things only are necessary in order to bring a case within the scope of this section—(a) there must have been a 'representation' (1) which amounts to an intentional causing or permitting belief in another, (b) there must have been belief on the part of that other, and (c) there must have been action arising out of that belief. When these facts are shown, an estoppel arises which consists in holding for truth the representation acted upon, when the person who made it or his privies seek to deny its truth and to deprive the party who has acted upon it of the benefit obtained (2). Assuming that all the conditions necessary to effect an estoppel are not fulfilled, a representation may still operate as an admission—that is, a statement which suggests any inference as to any fact in issue or relevant fact, and may be evidence, though not conclusive, against to an estop clear

legislative enactment like the fourth section of the Indian Companies Act, the

provisions of the Limitation Act (5). And thus O XXI, r 2 of the Civil Procedure Code enacts a special law for a special purpose and so over-rides the general law of estoppel, and where after an adjustment of decree which had not been certified or recorded, the decree-holder acted on the adjustment and then applied for execution, it was held that he was not estopped (6). It is an absolutely fundamental limitation on the application of the doctrine of estoppel that it cannot be applied with the object or result of altering the law of the land. The law, for instance, imposes fetters upon the capacity of certain persons to incur legal obligations and particularly upon their contractual capacity. It invalidates and renders null and void certain transactions, on the ground that they are illegal. It attaches certain incidents to property as, for instance, by

of property. The admission exacted must always be of something which can legally be done by the party from whom it is exacted (7). Estoppel cannot be pleaded where statutory requirements are disobeyed with full knowledge by the officers entrusted with the discharge of public duties (8). Estoppel, like acquiescence, is not a question of fact but of legal inference from the facts found (9). Though section 80 of the Civil Procedure Code (Act V of 1908), is

(1) In *Ananta Nalade v. Ganu Surulkar* 45 B. 80 (1921) it was held that the plaintiff had by his conduct permitted the defendants to believe that they would have a right of easement upon repair of a well. In *Bahadur Singh v. Mohur Singh* 24 A. 94, 107 (1901), the Privy Council held that there was no evidence of any representation on which to found an estoppel. So also in *Kuterji Shet v. Municipality of Lonavala* 45 B. 164 (1921).

(2) Bigelow *op cit* 6th Ed. 604.

(3) *ante* ss 17—23 31. See *Jashwant Putlu v. Radhabhai* 14 B. 312 (1889). *Pandit Hanuman v. Mufti Assadullah*, 7 N. W. P. 145 (1875).

(4) *Madras Hindu Mutual Fund v. Ragava Chetti* 19 M. 200 207 208 (1895), see *Jogini Mohan v. Bhoot Nath* 31 C.

146 (1903). Estoppel cannot be invoked to defeat the plain provisions of a statute. See 22 C. W. N. 89 23 C. W. N. 437, and parties to a consent decree are not estopped from objecting to it if the decree is contrary to statute, 50 I. C. 577.

(5) *Shridhar Balkrishna v. Babaji Wala*, 38 B. 709 (1914), *Chidambara Chettiar v. Vaidilinga Padayachi*, 38 M. 519 (1915).

(6) *Trivibhak Ramkrishna Ranade v. Hari Ixman Ranad*, (1910) 34 B. 575.

(7) *Calabes Estoppel* 123 124.

(8) *Shyam Chand Basak v. Chairman Dacca Municipality* 47 C. 524.

(9) *Narsing Das v. Rahimnabhai* 6 Bom. L. R. 440 (1904), s. c., 28 B. 440. "The question of estoppel is a mixed question of law and fact." *Vagindas Harjivandas v. Kara Jesang*, 6 Bom. L. R., 603 (1904).

imperative (1) the Secretary of State for India in Council can waive the notice ordered by it, and in that case he will be estopped by conduct from pleading the want of notice in a later stage of the proceedings (2)

And in an English case it has been held that a man may be estopped from domiciled abroad laws of England ed to assert that he was under the burden of an incapacity imposed by the law of the foreign domicile to do that which he, in fact did voluntarily and in due form according to the laws of England, and he cannot repudiate the marriage on the ground of such personal incapacity (3)

One person

A party may himself make the representation or it may be made by him through the agency of some other person by whose acts he is bound. In the first case there is no difficulty except when the representation is made by persons under a disability to contract (4)

It has been held by the Bombay High Court (5) that an infant is not excepted by the terms of this section and by the Calcutta High Court (Maclean C J, and Prinsep, J) (6) that the term "person" in this section is amply satisfied by holding it to apply to one who is of full age and competent to contract, and that this section has no application to the case of a minor. The

upon a contract or in respect of a fraud in connection with a contract, he cannot be made liable upon the same contract by means of an estoppel under this section in other words, that, as already stated, the general law cannot be altered by estoppel (7). Upon an appeal in the latter case to the Privy Council their Lordships said "The Courts below seem to have decided that this section does not apply to infants, but their lordships do not think it necessary to deal with that question now" (8). It may be that the judgments of the majority of the High Court should be read as applicable simply to cases such as that which was before it, but if not it is respectfully submitted in this, as it was in the earlier editions of this work that the broad assertion that the doctrine of estoppel *in pais* has no application whatever to infants, is incorrect (9). The

(1) Woodroffe and Ameer Ali on Civil Procedure Code second edition p 345

(2) *Blola Nath Roy v Secretary of State for India* 40 C 503 (1913). *Mamindra Chandra Nandi v Secretary of State* 5 C L J 148 (1907)

(3) *Cleith v Chetti* 1909 P 67 L J Quarterly Review April 1909 p 202

(4) See Bigelow *op cit* 6th Ed 670—679 where the question of the estoppel of parties under disability is discussed. A man cannot set up the incapacity of the party with whom he has contracted in bar of an action by that party for breach of the contract. Legal disability as e.g. in the case of an infant is a defence personal to him who is under it and cannot be made use of by another. Bigelow *op cit* 6th Ed 501 502

(5) *Ganesh Lala v Bapu* 21 B 198 (1895). Followed in *Dadasaheb Dasrao Rao v Bas Nahani* 41 B 480 (1917) and

the latter by *Jasraj Bastimal v Sadashiv Walekar* 23 Bom L R 975 s c 46 B 137

(6) *Brohmo Dutt v Dhurmodass Ghosh* 26 C 388 (1898) [dissenting from *Ganesh Lala v Bapu* 21 B 198 (1895)]

(7) 26 C at p 394

(8) *Mohori Bibee v Dhurmodass Ghose* 30 C 539 545 (1903) 7 C W N 441 5 Bom L R 421 [referred to with reference to s 41 of the Specific Relief Act in *Dattaram v Vinayak* 28 B 181 (1913)] Cf *Mohori Bibee v Dhurmodass Ghose*, 30 I A 114 (1903). This case was distinguished in a later Full Bench of the Madras High Court *Raghava Charar* 40 M

not do by deed (2) He cannot by his own act enlarge his legal capacity to contract or to convey He cannot be made liable upon a contract by means of an estoppel under this section if it be elsewhere declared that he shall not be liable upon a contract To say that by acts in pais that could be done in effect which could not be done by deed would be practically to dispense with all the limitations the law has imposed on the capacity to contract (3) So if a person sues an infant upon a contract such contract having been entered into on the faith of a representation by the infant that he was of full age, the infant will not be estopped from pleading his minority in answer to a claim to fix him with personal liability to a money decree notwithstanding his fraudulent representation (4)

In a case where a minor, not clearly a minor in appearance, bought a thing of age and causing him to believe and held that being 'a person' intentionally caused the vendor to believe that he was of age, he was estopped from denying the truth of his assertion (5) In this case it was said that the opposite view is based on a notion of 123 of persons where continued to do so after coming of age, it was held that his conduct while *sui juris* estopped him from denying as between himself and the Company that he was a shareholder (7)

But though this section may not apply, the Court may, in other cases, acting on well recognised principles of equity, relieve against an infant's fraud. An infant will not be permitted to take advantage of his own fraud, and he will

C W N clxxi cxxx viii So under section 116 a minor may be estopped *Kanis Mehdi v Rasul Beg* 5 O L J, 551 s c 48 I C 39

(1) Pollock on Contract 6th Ed 52 7th and cases there cited It is clear that an act on cannot be maintained on a contract made with an infant for falsely representing himself to be of age at the time the representation in such case not operating as an estoppel, *Bigelow op cit* 6th Ed 625—627 *Johnson v Pye*, Sid 258 *Barilett v Wells* 1 B & S, 836 *The Liverpool Adolphs Loan Associat on v Farhurst* 9 Lx 422 (1854) See as to infant's statement of account *Hedgley v Holt* 4 C & P 104 and disproof of allegation that goods supplied were necessaries *Bornes & Co v Toye* 1 Q B D 410 *Johnstone v Marks* 19 Q B D, 509 *Ryder v Wombuell* L R, 3 Ex.

90 dissented from

(2) *Brahmo Dutt v Dhurmodass Ghosh* 26 C 838 394 (1898)

(3) *Bigelow op cit* 6th Ed 621

(4) *Dharmul v Ramchunder Ghose* 1 C W N, 270 (1890) and cases there cited s c 24 C 265 Explained in *Sreenuttu Molun Bibee v Sarat Chunder* 2 C W N 18 (1897)

(5) *Dadasaheb Dasrajl rao v Bai Nalani* 41 B 480 (1917) following *Ganesh Lal v Bapu* 21 B 198 (1895) Follow in *Jasraj Bastinal v Sadashiv Mahadev Walekar* 46 B 137 (1922)

(6) See *Gulam Abdin Sarkar v Hem Chandra Majumdar* 20 C W N, 418 (1915) (to hold a minor liable on estoppel is indirectly to make him liable on contract)

(7) *Fazullbhoj Jaffer v Credit Bank of India* 39 B 331 (1915)

be estopped in answer to such equity from pleading his minority (1) Though a decree for personal payment on the contract express or implied in a mortgage cannot be made against an infant however fraudulent he might be the liability of a fraudulent infant to a decree for sale or foreclosure is it has been held a different thing So where an infant by fraudulent misrepresentation as to his age induced the plaintiff to advance him money on the security of a mortgage it was held that the plaintiff was entitled to a mortgage decree for the amount to be realised only from the mortgaged property (2) And in a case where an infant by misrepresenting his age obtained a loan on the security of a promissory note it was held that he was liable in equity on the note since there was an equitable liability resulting from the misrepresentation (3) But proof of fraud and deceit is essential Though it is unquestionably within the power of the

to deprive a fraudulent minor of the one who invokes the aid of that power and must further establish that a

fraud was practised on him by the minor and that he was deceived into action by that fraud (4) In a recent case the plaintiff sued to recover the principal and interest due on a bond executed by the defendant on the 4th February 1912 Defendant pleaded *inter alia* that he was not liable as he was a minor on that date Defendant was born on 10th December 1891 and he was therefore about twenty years and two months old when the bond was executed A guardian had been appointed for him but the guardian resigned and on the 18th May 1910 the District Judge passed an order that though the minor was eighteen or nineteen years of age and minority would continue till the age of twenty one that as the appointment of a fresh guardian was discretionary and as the minor did not want a fresh guardian to be appointed and was old enough by appearance to act for himself no fresh guardian need be appointed After that the defendant managed his own affairs and acted as a man who had attained majority would do The plaintiff alleged that the dealings were entered into on defendant's assurance that he had become an adult This was disputed by the defendant but the High Court found on evidence that the defendant did represent himself to be of full age and that the plaintiff was misled by the false representation Held that this section was applicable to the case and that the defendant's plea of minority could not be heard (5) Though in a case of contract or transfer of property a minor cannot be held to be estopped by his conduct with in the meaning of this section yet when he enters into possession of property on a lease obtained on his behalf by his guardian he cannot be allowed to set up his title to the property as a bar to a suit in ejectment on the expiry of the lease (6) This section does not apply to a case where the statement relied upon is made to a person who knows the real facts and is not misled by the untrue statement There can be no estoppel where the truth of the matter is known to both parties A false representation made to a person who knows it to be false is not such a fraud as to take away the privilege of infancy (7) But the party must be deceived

(1) *Cory v Gercken* 2 Mad 50 See *Sreenuttu Mohun v Sarat Chunder* 2 C W N 18 26 27 (1897) and cases there cited

(2) *Sreenuttu Mohun v Sarat Chunder* 2 C W N 18 (1897) on appeal 25 C 371 In *Turiston v Nottingham Permanent Benefit Building Society* 1 Ch (1902) at p 12 it was pointed out that no question of fraud arose in that case—see appeal to House of Lords (1903) A C 6

(3) *Leve v Broughton* (1908) Times

L R v 24 p 46

(4) *Dh Modass Ghosh v Brahma Dutt* 2 C W N 330 (1898) s c 26 C 381 and by Privy Council 30 C 539 (1902)

(5) *Hassanda Ram v Sita Ram* 1 Lahore 389 See *Bhola Singh v Babu* 1 Lahore 464

(6) *Ponnaiya Pilla v Subbanan* a Plla 53 I C 412

(7) *Moloor Bibee v Dhurmodass Gho* e 30 C 539 (1903)

So in the case cited the plaintiff sued to obtain a declaration that the sale

being a major when she must have known that she was a minor The question arose whether the plaintiff was estopped on account of the representations made by her as also whether under section 41 of the Specific Relief Act the Court should have directed the plaintiff to restore the consideration money Held that the plaintiff was not estopped there being evidence that the defendant was not deceived by what she told him inasmuch as he had made enquiries about plaintiff's age from the plaintiff's father and from other sources, and beyond that being himself the brother of her deceased husband A fair presumption arose that he must have known what the plaintiff's age was and secondly that there was no equity in favour of the defendant to direct the plaintiff to restore the consideration money (1)

An infant is liable for a tort committed by him And when an infant has induced persons to deal with him by falsely representing himself as of full age he incurs an obligation in equity to restore any advantage he has obtained by such representations to a person from whom he has obtained it (2) In cases of fraud separate from contract, a person under disability may estop himself to deny the truth of his representation (3) So if an infant having a duty to hold against the (4) As regards suits by a minor who represent

ing himself to be a major and competent to manage his own affairs collects rent and gives receipt therefor, is estopped by his conduct from recovering again the money once paid to him by instituting a suit through his guardian In the under mentioned case in the Privy Council where in a sale for arrears it had been found that the arrears by the agent of a minor mortgagee had been intentional with a view to buying the property on his behalf, it was held that he had a duty to perform through his representation which was inconsistent with their conduct in this, and that his title could not operate to exclude his co owners (6) And in a later case in the Allahabad High Court it has been held that minority is not a ground of exemption from the operation of section 48 of the Civil Procedure Code, as to limit of time for execution (7)

(1) *Gurisdhaswami v Parana* 44 B 175
(2) See Pollock on Contract 6th Ed 73 76 and cases there cited in particular *Stikeman v Dawson* 1 DeG & Sm 90 *Jagannath Singh v Lalit Prasad* (1908) 31 A 21 C see also *Dhanmul v Ramchander Ghose* supra Wharton Ev § 1151
(3) *Bigelow op cit* 6th Ed 628
(4) See *Savage v Foster* L C in Equity *Hatter v Cresswell* 9 Vin 415 [if an infant is old and cunning enough to contrive and carry on a fraud he ought to make satisfaction for it per Lord Cowper] and case cited in *Cory v Gerleken* 2 Mad 46 48—51 *Sugden Vendors* 43 14th Ed *Bigelow op cit* 6th Ed 62—629 the existence of an estoppel by conduct does not always depend upon the existence of a right of

action for deceit for while there may be an estoppel without this right of action in some cases the estoppel always arises where the action of deceit would be maintainable 1b 6th Ed 628
(5) *Ram Ratun v Sheo Vaidan* 29 C 126 (1901)
(6) *Deo Nandan Prashad v Janki Singh* P C 44 C 573 (1917) overruling *Doorga Singh v Sheo Pershad* 16 C 194 (1884) approving *Fazlar Rahman v Maimuna Khatun* 17 C W N 1233 (1913)
(7) *Prem Nath Tiwari v Chatarpal Man Tiwari* 37 A 638 (1915) dissenting from *Maro Sadashit v Visaji Raghu Nath* 16 B 536 following *Jhandu v Mehan Lal* 2 P R 1894 C J 489, *Raana Reddi v Babu Reddi* 37 M 186 (1912)

In the case cited the trustee of a temple who for his own private purposes mortgaged land which was afterwards sold in Court Auction at the instance of the mortgagee was, it was held, entitled to sue on behalf of the temple to recover the landlord's interest which was dedicated to the temple and was not estopped from setting up a claim against a *bona fide* purchaser for value that it was trust property (1)

The principle of estoppel by conduct applies to corporations (2) as well as to individuals, with this qualification, that if the act undertaken was in and of itself *ultra vires* (3) of the corporation no act of the body can have the effect of what was undertaken. Just by his act *in pais* create contractual liability, so the upon the Statute which the body itself, and the cannot make it other

In the case of corporations, particularly joint stock companies the application of the rule sometimes gives rise to difficulty, but such difficulty is met by bearing in mind the distinction between those things which the company can do if it goes the proper way to work to do them and those things which by virtue of its constitution the company can under no circumstances do at all (4). There is no representation made by the company in the missions of its directors, and it is not his

will work an estoppel against all, it being said that where there are several administrators or executors they must be regarded in the light of an individual person (6)

Secondly, a party may be estopped by reason of the representation of some person by whose acts he is bound (7). The rule of estoppel between parties covers,

(1) *Basu v Sahib v Ehanbara Aiyar* 3 M L J 698 s c 54 I C. 497

(2) See on this subject Bigelow *op cit* 6th Ed 497—508 and cases there cited (and see Index *ib*) Caspersz *op cit* 4th Ed s 141 p 149 and cases there cited where the subject will be found dealt with (a) as to membership and retirement (b) as to the register (c) as to the issuing of certificates of share (d) as to debentures irregularly issued (e) estoppel by issue of paid up shares (f) negligence on the part of members of a company (g) effect of the company's seal [see *Goodrich v Venkanna* 2 M 195 (1878)] Estoppels against corporations being of infrequent occurrence in this country it has not been here thought necessary to deal with this important subject at length. The Indian cases are scanty. But as the Indian Companies Act (Act VII of 1913) reproduces the English Act 25 and 26 Vic c 88 30 and 31 Vic c 131 40 and 41 Vic c 261 reference may and should be made to the English case law and the text books on the subject of the law relating to corporations. In the two following cases it was held that the estoppel was not

established *Rivett Carnac v New Mofussil Co* 26 B 54 (1901) [Sale of shares—voucher by company of title of vendor—pukka receipt issued by Company] *Sree Malant Coimbatore Spinning Co* 26 M 19 (1902) [application for rectification of register]

(3) *Farrille v Gilbert* 2 T R 169 Ex parte *Watson* L R 21 Q B D 301 *Barrows Case* L R 14 Ch D 441 [there can be no estoppel in the face of an Act of Parliament *per* Bacon V C]

Bigelow *op cit* 6th Ed 504
(4) *Cababes Estoppel* 125 126 For estoppel by signature of managing members of joint family firm see *Kunj Kishore v Official Liquidator* 36 A 416 (1914)

(5) *Toolsemon Dossee v Maria Margery* 11 B L R 144 (1873) In re *Purna andas Sewardas* 7 B 109 117 (1882) see this question of Estoppel against the State discussed Bigelow *op cit* 6th Ed 371 619n (i)

(6) Bigelow *op cit* 6th Ed 621 but see also p 231 ante note 11

(7) As to persons claiming through and under others see *Kali Dajal v Umash Prasad* 1 Pat 174 (1922)

of course, the misrepresentations of agents, even agents of corporations, when made in the scope of their employ. When an agency really exists, the principal is estopped to deny the truth of the agent's statements, express or tacit, just as much as if he himself had made them subject to the same limitations that himself estopped
duct was such as

master is liable; but only then (2) But it has been held that the commission of a crime by a servant severed the connection (3)

An estoppel against a principal is dealt with by section 237 of the Contract Act, which enacts that when an agent has without authority, done acts or incurred obligations to third persons on behalf of his principal, the latter is

to him (5) There may also arise estoppels against agents in favour of their principals or of third parties (6) Two cases of estoppel in the case of partners (a branch of the law of principal and agent) (7) have been dealt with in sections 245, 246 of Contract Act. When a man holds himself out as a partner or allows others to use his name, he is estopped from denying his assumed character, upon the faith of which creditors may be presumed to have acted, and becomes a partner by
trust-estate t
an innocent

(1) Bigelow *op cit*, 6th Ed, 619-620 as to agents of corporation see *Houlds v North v City of Glasgow Bank*, L R, 3 App Ca 331 As to the authority of agents see Contract Act ss 186 187, 188 189 a wife's representations will not affect the husband either as admissions or estoppels unless he has constituted her his agent The mere relation creates no agency *v ante* p 236, Bigelow, *op cit*, 6th Ed 619n (1) There must be a real agency Thus a widow is not estopped by presentations made in her absence by an administrator in selling land of the intestate that it is free from claims of dower (*ib*) As to sub agents see Contract Act ss 190-195 ratification *ib*, ss 196-200 revocation of authority, *ib*, ss 201-210 effect of agency on contracts with third person, scope of authority, *ib*, 226-238 effect of misrepresentation or fraud of agent *ib*, s 238

(2) *Malcolm Brunner & Co v Waterhouse and Sons* 1908 Times L R, V 24 p 855

(3) *Cheshire v Baley* (1905), 1 K B, 237

(4) See *Ramsden v Dyson*, 1 E & J A 129 158 and other cases cited in Caspersz *op cit*, 150-156 and Bigelow,

op cit, 457, 458 565 566 where the distinction between agency proper and estoppel is pointed out A person assuming to act in a contract as principal will afterwards be estopped from saying that he was in fact acting only as agent *ib*, 687, *Reigard v McNeill*, 38-III 400 (Amer) As to the effect of misrepresentations made by agents in the course of business as also in matters without their authority, see Contract Act s 238

(5) *Ram Pertab v Marshall* 26 C 701 (1898)

(6) See cases cited in Caspersz *op cit*, 4th Ed (1915) ss 100-106, pp 107-112

(7) *Chundee Churn v Eduljee Coomajee* 8 C 678 684 (1882)

(8) *Molluo March v Court of Wards*, L R 4 P C 419 435 see Lindley's Partnership, 5th Ed, 40-47 Pollocks Partnership 26-29 Caspersz *op cit* 162-166 Bigelow, *op cit* 6th Ed, 611, 612 as to evidence necessary to establish liability as partner by estoppel see *Porter v Incol* 10 C W N, 313

(9) Bigelow *op cit* 6th Ed 619-621, *Keate v Phillips*, 18 Ch D 560 577, as to the estoppel against a trustee see *Neusome v Flowers* 30 Beav 461, 470

trust is estopped against a *bona fide* purchaser for value without notice of the breach an innocent *cestui que trust* is not affected (1)

If a trustee takes upon himself to answer the inquiries of a stranger about to deal with the *cestui que trust* he is not under any legal obligation to do more than to give honest answers to the best of his actual knowledge and belief he is not bound to make inquiries himself. Provided he answers honestly he incurs no liability to the enquirer unless he binds himself by a statement amounting to a warranty or so expresses himself as to be estopped from afterwards denying the truth of what he has said (2). The estoppel against a trustee in favour of a *cestui que trust* has been likened to that between landlord and tenant. Trustees cannot set up as against their *cestui que trust* the adverse title of third parties. It is a common principle of law that a tenant who has paid rent to his landlord cannot say you are not the owner of the property the fact of having paid rent prevents his doing it. The same thing occurs where persons are made trustees for the owner of property if they acknowledge the trust for a considerable time they cannot say that any other persons are their *cestui que trust* or we will turn you out of the property. This is an analogous case (3). A creditor does not lose his right to sue the executors and to recover from them by mere laches. But if the creditor misleads the executors so that they are thereby induced to part with the assets in a manner which would be a *devastavit* then the creditor cannot complain of the *devastavit* (4). So if a *cestui que trust* concur in a breach of trust he is estopped from proceeding against the trustee for the consequences of the act and *a fortiori* a *cestui que trust* who is also a trustee cannot hold his co trustee responsible for any act in which they both joined (5). A trustee alleging that the trust property consisting of land was his own property mortgaged it. The mortgagee in consideration and without notice against the trustee for the sale of that decree. The trustee subsequently brought a suit to recover the land from the purchaser on the ground that it was trust property and that he had no power to transfer it. To this suit none of the beneficiaries under the trust were parties (6). Held that the plaintiff was estopped by his conduct from recovering possession of the land (7). But in a later case it was held that though the representation of a mortgagee cannot as such question the validity of a mortgage it may be open to those as *mutawallis* to plead that the property was *wakf* and the mortgage void (8). It may well be that a succeeding trustee should not be allowed to impeach a former trustee's act when it is one of that character without its following as a logical consequence that where the trustee avowedly acts in breach for repudiation of the trust such acts should be binding by estoppel upon his successors in the trust (9). In the undermentioned case the plaintiff was held

(1) *Sdhi Salu v Gop Charan Dass* 17 C L J 233 (1913)

(2) *Lo v Bouterie* L R 3 Ch (1891) 82 B revives *v Lock* 10 Ves 40

(3) *Newsome v Flowers* 30 Beav 461 470 per Sir John Romilly M R nor can he assert against the trust any title (paramount and adverse to the trust) which he may himself have. *Attorney General v Munro* 2 DeG & Sm 122 163 A trustee may not set up any title adverse to that of the *cestui que trust* B below Estoppel 6th Ed 589 590 Act II of 1882 s 14

(4) *In re Brel* L R 27 Ch D 622 627

(5) *Lewin Trusts* 8th Ed 918 *id* 12th Ed 1195 see *Griffiths v Hughes* L R 3 Ch (1892) 105 Act II of 1882 ss 23 67 68

(6) The Court observed We make no remark with regard to the beneficiaries under the trust as they having made no effort to figure in the suit do not appear to be interesting themselves in the matter

(7) *Gul ar Ali v Feda Ali* 6 A 24 (1883)

(8) *Nandan Sngi v Jmman* 34 A 640 (1917) *distinguish* *Gul ar Ali v Feda Ali* 6 A 24 (1884)

(9) *Sir Ganesh v Kesavrao Govind* 15 B 625 636 637 (1890)

bound by the conduct of his father, even though technically he succeeded as reversioner in his own right (1) As to the estoppels of tenants, licensees, bailees and acceptors of bills of exchange, see sections 116 and 117, *post*, and *notes* thereto

As already observed, the *form* of the representation is immaterial. The representation may be express or implied for whatever word, action or conduct conveys a clear impression as of a fact is embraced in that term. There is no necessity for an express verbal statement or indeed any verbal statement whatsoever. An act may involve and amount to a distinct declaration which

Declaration,
act or
omission.

and his acting as the attorney of that other in the matter of the mortgage may amount to a declaration that that other is the owner in possession of the property covered thereby (2) In the case cited in the Allahabad High Court it was held that where a person attests a sale-deed with the knowledge that it contains a recital that the lands which it purports to convey are in the executant's possession as owner he is thereby estopped from afterwards setting up a title to them (3) In this case it was said that, having regard to the usual course of business in the Madras Presidency, attestation by a person who may have claims to the property affected must be regarded, *prima facie*, as a representation that the recitals of title are true and

as a mere omission may involve a representation. Thus silence where one is bound to speak is ordinarily equivalent to an admission of the fact (5) So if a person stands by and allows another to advance or expend money on property by his conduct of his rights or creates or induces

in the mind of his tenant a mistaken belief that he has a permanent interest in the land and may build thereon and the tenant relying upon the act or representation so made, treats his interest as permanent and incurs expense in building which he would not otherwise have done, the owner is estopped

(1) *Vinayak v Govind* 2 Bom L R 820 (1900)

(2) *Sarat Chunder v Gopal Chunder* 19 I A 203 212 213 See also for similar cases *Kebul Kristo v Ram Coommar* 9 W R 571 (1868) *Sia Das v Gur Sahas* 3 A 362 (1880) *Ram Chunder v Hari Das* 9 C 463 (1882) *Rai Seeta v Kishun Dass* H C R N W P 1868 p 402 *Salamat Ali v Budh Singh* I A 303 (1876) and see *Kanshi Ram v Badda* (1906) 23 P L R

(3) *Kandasami Pillai v Nagalinga Pillai* 36 M 564 (1913) (*obiter per Sundara Ayyar*) no actual or verbal representation is necessary for an estoppel

(4) *Lakshpati v Raibodh Singh* 37 A 350 (1915) *Raj Lukhee Debia v Gokul Chandra Choudry* 13 M I A 209 (1869) *Deno Nath Das v Kolsurkar Bhattacharya* 21 I C 367 (1913) *Mena Singh v Bhagwant Singh* 5 I C 252 (1909) *Banga Chandra Dhur Biswas v*

Jagat Kishore P C 44 C 186 (1917) *Hari Kishen Bhagat v Kashi Pershad* 42 I A 64 (1914) *Pandurang Krishanji v Markandeya Tukaram* 49 C 334 P C (1922)

(5) *Bigelow op cit* 6th Ed 648—662 In 43 I C 908 silence was held not to be a misrepresentation

(6) *Ramsden v Dyson* I R I E & I App 129 140 Ex parte *Ford* L R 1 Ch D 521 528 *Nundo Kumar Bonomali Gajan* 29 C 871 (1907) [Assuming that quiescence amounts to a representation it must be found that it was intended that a party should believe or act upon it or that in point of fact they did act upon it] *Ralli v Forbes* 1 Pat 717 (1922) *Ananta Nalavde v Gani Surulkar* 45 B, 80 (1921) in *Kutcheri Shet v Municipality of Lonavala* 45 B 164 (1921) it was held that there was no estoppel here expenditure was before act relied on as Estoppel

from denying the truth of that which he represented (1) A duty to speak, which is the ground of liability, arises only where silence can be considered as having an active property, that of misleading (2) And conduct by negligence or omission where there is a duty to disclose the truth may often have the same effect (3) But whatever the form in which the representation be made, it must, in order to justify a prudent man in acting upon it, be not doubtful being an essential of all estoppels,

This does not mean that either that it cannot possibly be open to ist be such as will be *reasonably*

understood in a particular sense by the person to whom it is addressed (5) On the other hand, a plain representation cannot be cut down from its natural and proper import in the particular situation or transaction This import may be technical and peculiar or popular according to the business concerned, modified, of course, by any actual understanding of both parties A person who has made a representation cannot escape the consequences by showing that in a literal sense it is true, if in its natural sense it is untrue A half truth too, is generally a whole lie in effect, if the part suppressed would make the part stated false, there is a false representation, that is, the representation is taken to consist of the part stated and a denial of anything to the contrary (6) This assumes, of course, that the stated part is a clear, positive statement of fact Thus a representation that shares of stock are "paid up" must reasonably be understood, and so must be held to mean that they are paid up in cash (7) In like manner, however definite the representation, it cannot be enlarged or acted upon otherwise than according to terms or natural import and clear meaning, and the whole representation (as is indeed the rule with regard to all admissions (8), must be taken together One part, though sufficient alone to create an estoppel, cannot be separated from another part connected with

(1) *Rolls v Forbes* 1 Part 717 (1922)

(2) *Freeman v Cooke* 2 Ex 654, v post Besides fraud there may be an estoppel by negligence and by circumstances *Vinayek v Gobind* 2 Bom L R 820 829 830 (1900) And see as to negligence *Longin v Bath Electric Tramways* 1 Ch (1905) 646 663

(3) *Joy Chandra Bandopadhyaya v Srinath Chattopadhyaya* 32 Cal 357 1 C L J 23

(4) *Rani Meila v Rani Hulas* 13 B L R 312 (1874) 1 I A 161, [the nature of an estoppel being to exclude an inquiry by evidence into the truth those who rely upon a statement as an estoppel must clearly establish that it does amount to that which they assert] *Ricett Carnoc v New Mofussil Co* 26 B 75 (1901) s c 3 Bom L R 846 [certainty is essential to all estoppels] *Co Litt* 352, b [Every estoppel because it concludeth the man to acknowledge the truth must be certain to every intent and not to be taken by argument or inference] *Low v Bowter* 1 L R 1891 3 Ch 106 113 *Freeman v Cooke*, supra *Heath v Crealock* L R 10 Ch 22 *Bigelow op cit* 578 An estoppel to have any judicial value must be clear and non ambiguous

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(5) *Lox v Dounerie* supra at p 106

If a party uses language which in the ordinary course of business and the general sense in which words are understood conveys a certain meaning he cannot afterwards say he is not bound if another so understanding it has acted upon it. *Cornish v Abington* 4 H & N 549 555 per Pollock C B

(6) *Bigelow op cit* 6th Ed 642 643 citing *Peck v Gurney* 6 H L 377, 403, *Central Ry Co v Kisch* 2 H L 99 113 *Corbett v Brown* 8 Bing 33 though none of the cases cited are cases of estoppel that learned author submits that there can be no doubt that they are applicable to the present subject.

(7) *Burkinshaw v Nicholls* 3 App Cases 1004 1021

(8) v ante pp 224—226 and cases there cited

against whom the estoppel is sought to be raised (2) The representation must be of a nature to lead naturally, that is, to lead a man of prudence to the action taken, hence it must be of fact and material, having reference to a present or past state of things. Representations of law, opinion, or intention are generally insufficient (3) The reason of the doctrine of estoppel wholly fails when the representation relates only to a present intention or purpose of a party, because being in its nature uncertain and liable to change, it could not properly form a basis or inducement upon which a party could reasonably adopt any fixed and permanent course of action (4) A promise *de futuro* cannot be an estoppel (5)

But if a man, under a verbal agreement with a landlord for a certain interest in land, or under an expectation created and encouraged by the landlord that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord and without objection by him, lays out money upon the land, a Court of Equity will compel the landlord to give effect to such promise or expectation. The Crown too comes within the range of this equity. Thus equity differs essentially from the doctrine embodied in this section, which is not a rule of Equity but is a rule of evidence that was formulated and applied in Courts of Law, whereas the former takes its origin from the jurisdiction assumed by the Court of Equity, to intervene in the case of, or to prevent, fraud (6) In the case cited a lease was granted by a ryot who represented himself to be a tenure holder or ryot at fixed rate. Held that the grantee in such a case when his title as permanent lessee is challenged by his grantor may invoke the aid of the doctrine of estoppel and plead that the grantor cannot be permitted to prove the falsity of the recitals in the document on the faith of which he took the lease so as to enable him to derogate from his grant (7)

Assuming that there has been a representation in the sense mentioned and that that representation is clear and unambiguous, and the other party has been induced to act thereby, it is immaterial what the intention, motive or state of knowledge of the party making the representation was (8) But though the intention is immaterial so far as the creation of the estoppel is concerned representations may be, and have been, classified with reference to the intention with which they may be made. A person may be estopped, if he has made either a fraudulent misrepresentation, or made a false statement without fraud but negligently, or has made a false representation without fraud or negligence (9) In the case of *Carr v London and N-W Railway Company* (10), a very leading decision upon this subject, the following four recognised

(1) *Bigelow op cit* 6th Ed 645 646 as to enlargement of the representation see *Syed Nurmal v Sheo Sahai* 19 I A 221 226 227 (1892)

(2) *Jay Chandra v Sreenath Chatterjee* 32 C 357 (1904)

(3) *Ib* 572 574 582 *v post*

(4) *Langdon v Doud* 10 Allen 433 (Amer) *per* Bigelow C J *v post*

(5) *George Whitechurch Ltd v Caanagh* C W N cccxvii (1901) 1902 A C 117 at p 130 *Jellabhai v Nathabhai* 28 B 399 at p 407 See also with re-

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(6) *Municipal Corporation of Bombay v Secretary of State* 29 B 580 7 Bom. L R 27

(7) *Chandra Kanta Nath v Amjad Ali Han* 25 C W N 4

(8) *v ante* p 830

(9) *Seton Laing & Co v Lafone* L R 19 Q B D 70

(10) L R 10 C P 307 (1875)

from denying the truth of that which he represented (1) A duty to speak, which is the ground of liability, arises only where silence can be considered as having an active property, that of misleading (2) And conduct by negligence or omission where there is a duty to disclose the truth may often have the same effect (3) But whatever the form in which the representation be made, it must in order to justify a prudent man in acting upon it, be not doubtful being an essential of all estoppels,

This does not mean that either that it cannot possibly be open to different constructions, but only that it must be such as will be reasonably understood in a particular sense by the person to whom it is addressed (5) On the other hand a plain representation cannot be cut down from its natural and proper import in the particular situation or transaction This import may be technical and peculiar or popular according to the business concerned, modified of course by any actual understanding of both parties A person who has made a representation cannot escape the consequences by showing that in a literal sense it is true, if in its natural sense it is untrue A half truth too is generally a whole he in effect, if the part suppressed would make the part stated false there is a false representation, that is, the representation is taken to consist of the part stated and a denial of anything to the contrary (6) This assumes, of course, that the stated part is a clear, positive statement of fact Thus a representation that shares of stock are "paid up" must reasonably be understood and so must be held to mean that they are paid up in cash (7) In like manner however definite the representation it cannot be enlarged or acted upon otherwise than according to terms or natural import and clear meaning, and the whole representation (as is indeed the rule with regard to all admissions)(8), must be taken together One part, though sufficient alone to create an estoppel cannot be separated from another part connected with

(1) *Rolls v Forbes* 1 Part 717 (1922)

(2) *Freeman v Cooke* 2 Ex 654 v post Besides fraud there may be an estoppel by negligence and by circumstances *Imayek v Gobind* 2 Bom L R 820 829 830 (1900) And see as to negligence *Loig an v Bath Electric Transways* 1 Ch (1905) 646 663

(3) *Joy Clandra Bandopadhyya v Srinath Chattopadhyya* 32 Cal 357 1 C L J 23

(4) *Ra v Me ta v Rani Hulas* 13 B L R 312 (1874) 1 I A 161 [the nature of an estoppel being to exclude an inquiry by evidence into the truth those who rely upon a statement as an estoppel must clearly establish that it does amount to that which they assert] *Rittel Carnac v New Mofussil Co* 26 B 75 (1901) s c 3 Bom L R 846 [certainty is essential to all estoppels] Co Litt. 352 b [Every estoppel because it concludeth the man to acknowledge the truth must be certain to every intent and not to be taken by argument or inference] *Low v Bouverie* L R. 1891 3 Ch 106 113 *Freeman v Cooke* supra *Heath v Crealock* L R 10 Ch 22 *Bigelow op cit* 578 An estoppel to have any judicial value must be clear and non-ambigu-

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(7) *Barkshaw v Nicholls* 3 App Cases 1004 1021

(8) v ante pp 274—276 and cases there cited

it, which takes away its effect, though only by making the other part uncertain (1) The section does not apply to a case in which a belief otherwise caused has been only allowed to continue by reason of any omission on the part of the person against whom the estoppel is sought to be raised (2) The representation must be of a nature to lead naturally, that is, to lead a man of prudence to the action taken, hence it must be of fact and material, having reference to a present or past state of things Representations of law, opinion, or intention are generally insufficient (3) The reason of the doctrine of estoppel wholly fails when the representation relates only to a present intention or purpose of a party, because being in its nature uncertain and liable to change, it could not properly form a basis or inducement upon which a party could reasonably adopt any fixed and permanent course of action (4) A promise *de futuro* cannot be an estoppel (5)

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(6) *Municipal Corporation of Bombay v Secretary of State* 29 B 580 7 Bom L R 27

(7) *Chandra Kanta Nath v Amjad Ali Ha* 25 C W N 4

(8) *v ante* p 830

(9) *Seton Laing & Co v Lafone, L*, 19 Q B D 70

(10) L R 10 C P, 307 (1875)

propositions of an estoppel *in pais* or modes in which it may arise were laid down(1) —

(a) "One such proposition is, if a man by his words or conduct wilfully endeavours to cause another to believe in a certain state of things, which the first *knows to be false*, and if the second believes in such a state of things and acts upon his belief, he who knowingly made the false statement is estopped from averring afterwards that such a state of things did not in fact exist"(2)

This proposition deals with fraudulent representations (3)

(b) "Another recognised proposition seems to be that, if a man, either in express terms or by conduct *makes a representation* to another of the existence of a certain state of facts *which he intends to be acted upon in a certain way*, and it be acted upon in that way in the belief of the existence of such a state of facts to the damage of him who so believes and acts the first is estopped from denying the existence of such a state of facts"

This proposition deals with representations made without fraud (4)

(c) "And another proposition is, that if a man, whatever his real meaning may be, *so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts* and that it was a true representation and, that the latter was induced to act upon it in a particular way, and he with such belief does act in that way to his damage the first is estopped from denying that the facts were represented"(5)

The first two propositions deal with both "declaration" and "act", this deals with "act" only and the inferences which may be drawn from conduct (6)

(d) "There is yet another proposition as to estoppel. If, in the transaction itself which is in dispute, one has led another into belief of a certain state of facts by *conduct of culpable negligence* calculated to have that result, and such

(1) These propositions were approved in *Cotentry v Great Eastern Railway Co* 11 Q B D 776 and in *Seton Laing & Co v Lafone* L R 19 Q B D 68

Estoppels may arise in various grounds all of which the judgment in *Carr v The London & N W Ry Co* endeavours to state and each of the grounds on which an estoppel may arise there stated is intended to be independent and exclusive of the others *per* Brett M R in *Seton Laing & Co v Lafone* L R 19 Q B D 68 70 (1881) Both these cases were cited and approved by the Privy Council in *Sarat Chunder v Gopal Chunder*, 19 I A 203 217 (1892)

(2) See for examples of representations of this character giving rise to estoppels — *McCance v London and N W Railway Co* 7 H & M 477 [A person having wilfully made a false statement as to the value of certain horses in order to induce a railway company to carry them at a lower rate of freight held to be thereby estopped from proving their real and greater value in an action against the Company for the loss] *Cherry v Colonial Bank of Australasia* L R 3 P C 24 *Munoo Lall v Lalla Choonee* 1 I A 144 (1873) s c 21 W R 21 *Baboo Radha*

kssen v Mussum nat Shurcefunnissa W R 11 (1864)

(3) See as to fraudulent misrepresentations *Peek v Derry* L R 37 Ch D 541

(4) See *Howard v Hudson* 2 E & B 1 where Crompton J says — The rule as explained in *Freeman v Cook* takes in all the important commercial cases in which a representation is made not wilfully in any bad sense of the word not *malò animo* or with intent to defraud or deceive but so far wilfully that the party making the representation on which the other acts means it to be acted upon in that way. See *Madhub Chunder v Lai* 13 B L R 394 (1874)

(5) The case of *Sarat Chunder v Gopal Chunder* 19 I A 203 20 C 296 (1892) is an example of this proposition. In a case in the same volume somewhat resembling the former in its facts there was held to be no estoppel *Syed Nurul v Sheo Sahai* 19 I A 211 (1892)

(6) See *Cornish v Abington* 4 H & N 549 555 [Where a person has conducted himself so as to mislead another he cannot gainsay the reasonable inference to be drawn from his conduct] See *Khadar v Subramanya* 11 M 12 (1887)

culpable negligence has been the proximate cause⁽¹⁾ of leading, and has led the other to act by mistake upon such belief, to his prejudice, the second⁽²⁾ cannot be heard afterwards as against the first⁽³⁾ to show that the state of facts referred to did not exist⁽⁴⁾

This proposition deals primarily with what the section refers to as "omission." Not only must the neglect be in the transaction itself and be the proximate cause of leading the party into mistake but it also must be the neglect of some duty⁽⁵⁾ that is, owing to the person led into belief, and not merely neglect of what would be prudent in respect to the party himself, or even to some duty owing to third persons with whom those seeking to set up the estoppel are not privy⁽⁶⁾

With reference to these propositions, the Privy Council, in the case of *Sarat Chunder Dey v Gopal Chunder Laha*⁽⁷⁾ point out that there may be a statement made which have induced another party to do that from which otherwise he would have abstained, and which cannot properly be characterised as "misrepresentations" as for example, what occurred in that case in which the inference to be drawn from the conduct of the party estopped was either that the conveyance in favour of his mother was valid in itself, or at all events that he, as the party having an interest to challenge it, had elected to consent to its being treated as valid. It has been held that no representations can be relied on as estoppels if they have been induced by the concealment of any material fact on the part of those who seek to use them as such and if the person, to whom they are made, knows something which, if revealed would have been calculated to influence the other to hesitate or seek for further information before speaking positively, and that something has been withheld, the representation ought not to be treated as an estoppel⁽⁸⁾

Not much difficulty is usually experienced in the application of the first and second of the abovementioned propositions questions, however of difficulty may, and frequently do, arise as to whether or not a person has by his conduct brought himself within the scope of the third and fourth propositions. The determination of this question will largely depend upon the facts, which will

(1) In the subsequent case of *Seton Lang & Co v Lafone* L R 19 Q B D 68 Brett M R (with him Lopes L J concurring) stated that he would prefer to insert in the proposition the word 'real' instead of the word 'proximate' (ib 70 71) Fry L J however said I will not attempt to give any paraphrase of the word 'proximate' the doctrine of causation involves as much difficulty in philosophy as in law and I do not feel sure that the term 'real' is any more free from difficulty than the term 'proximate' (ib 74) See *Suan v North British Australasian Co* 2 H & C 75 'Proximate cause means "direct and immediate cause" *Coventry v Great Eastern Ry Co* 11 Q B D 776 780 In the case of *Longman v Bath Electric Tramways Co* (1905) 1 Ch 646 at p 663 it was held that mere negligence will not raise an estoppel. There must be negligence which is the real and immediate cause of the damage done.

(2) *Quare* "first the person referred to is the party guilty of negligence

(3) *Quare* second see last note

(4) For illustration of the estoppel by culpable negligence see *Carr v London & N W Ry Co* L R 10 C P 307 *Coventry v The Great Eastern Railway Co* L R 11 Q B D 766 *Seton Lang & Co v Lafone* L R 19 Q B D 68 *Suan v N B Australasian Co* 2 H & C 175 and cases referred to in these reports and in *McLaren Morrison v Verschoyle* 6 C W N 229 (1901)

(5) There can be no negligence unless there be a duty' per Brett M R in *Coventry v Great Eastern Railway Co* 11 Q B D 776 780

(6) *Suan v N B Australasian Co* 2 H & C 175 per Blackburn J A party on whom there is no duty to disclose a fact may of course by his misrepresentation estop himself under the preceding propositions *Munroe Lall v Lalla Choonce* 1 Ind App 144 156 (1873)

(7) 19 I A 203 217 (1892)

(8) *Porter v Moore* (1904) 2 Ch., *Cavanagh* (1902) A. C. 117 145 per Lord Brampton

vary with each particular case. Some, however, of the more obvious and frequently recurring estoppels may be here shortly alluded to.

A representation may arise not only (as already observed), by way of concealment of part of the truth in regard to a whole fact; but also from total but *misleading* silence (that is, silence where there is a *duty* to speak)(1). With knowledge, or passive conduct joined with a duty to speak, an estoppel will arise. The case must be such that it would be fair to interpret the silence into a declaration of the party that he has, e.g., no interest in the subject of the transaction. Indeed, silence, when resulting in an estoppel, may not improperly be said to have left something like a representation upon the mind (2). According to a succinct expression which has been often quoted, "where a man has been silent when in conscience he ought to have spoken, he shall be debarred from speaking when conscience requires him to be silent"(3). Further an *admission* by silence, of a representation made by the party claiming the estoppel may sometimes raise an estoppel.(4) And, when in answer to an enquiry a person gives an *active* misleading answer, it will estop even though it may not have been intended to deceive, if its effect was in fact to deceive the inquirer (5). Mere

an asserting a title of record in the no act is done to mislead the other h a case. Thus a patentee is not bound to warn others whom he may see buying an article which is an infringement of his patent (6). But if there be any misleading either by express rise an estoppel notwithstanding ated to speak by the mere fact his prejudice, if the true state of things is not disclosed. So long as he is not brought into contact with the person about to act, and does not know who that person may be, he is under no obligation to seek him out, or to stop a transaction which is not due to his own conduct as the natural and obvious result of it (9).

The commonest instance of inference from conduct arises in the case of conduct of acquiescence, for acquiescence under such circumstances as that

(1) Of course there can be no duty to speak without a knowledge of the existence of one's own rights or of the action about to be taken. Bigelow *op cit*, 595, *Chintaman Ramchandra v Dareppa*, 14 B 506 (1890) silence when there is a duty to speak is as expressive as speech. Story Eq Jur 1 § 385 cited in *Gheran v Kunj Behari*, 9 A 419 (1887), as to mere quiescence distinguished from a breach of duty to speak see *Basantappa v Bannu*, 9 B, 86 (1884), *Shiddeshwar v Ramchandrav*, 6 B 463 (1882). See 43 I C, 908 *Pandurang v Narayan Rao* 44 I C, 547, is an instance of legal duty to speak.

(2) Bigelow *op cit*, 6th Ed, 646 647. The subject of silence is illustrated by the case of *Pickard v Sears*, 6 A & E 469 and *Gregg v Wells* 10 A & E 90 in the latter of which cases Lord Denman said — "A party who negligently (see *Coventry v Great Eastern Ry Co*, 11 Q B D, 776, *Carr v London Ry Co* L R, 10 C P 30") or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute that fact in an

action against the person whom he has himself assisted in deceiving.

(3) *Per* Thompson J in *Niren v Bell* nap 2 Johns 573 (Amer).

(4) Bigelow *op cit* 6th Ed 653.

(5) *McConnel v Mayer*, 2 N W P, H C R. 315 (1870), where it was said that when inquiry was expressly made of the person he was bound under the circumstances to have given definite and full information.

(6) Bigelow *op cit* 6th Ed 660 661, *Proctor v Bennis* 36 Ch D 740. And see as to registration being notice of title *Chintaman Ramchandra v Dareppa* 14 B-506 (1890) *Agarchand Gumanchand v Rakhma Hanmani* 12 B 678 (1888) Act IV of 1882 s 3 (Transfer of Property), edited by Shepherd and Brown 3rd Ed., pp 12—23.

(7) *Munoo Lall v Lalla Choon* 1 Ind App, 153, 156 (1873).

(8) *Id* *Dullab Sircar v Krishna Kumar Bakshi* 3 B L R. 407, 408 (1869), in this last and kindred cases there was a duty to speak.

(9) Bigelow, *op cit* 6th Ed, 661 662

assent may be reasonably inferred from it is no more than an instance of the law of estoppel by another person about upon that right, st

no application to an *ex post facto* and inducing no action or omission in an act which is still in progress, and mere submission to it when it has been completed In the first case, it may

In the second Calcutta High d to retain as remuneration a percentage of the assets received by him, overstated his receipts in his accounts and overpaid himself on that basis, and these accounts were passed by the Court with the plaintiff's knowledge and without objection from him it was held that a suit afterwards brought by the latter to recover the balance thus wrongfully retained was not barred by estoppel, acquiescence or the ppel and no acquiescence since the accounts were misleading

If the owner of a piece of land stands by while another person professes to sell that land to a third party, and he does not interfere, but allows that other person to hold himself out to be the owner of the land and to make a transfer of it, he is not to be heard afterwards for the purpose of destroying that purchaser's title by asserting to the contrary, though he may upset that title if he can show either that the purchaser had notice of his title constructive or actual or that circumstances existed at the time of the purchase which, as a reasonable man, should have put him upon his guard and suggested enquiry, which enquiry if made would have resulted in his ascertaining the title of the true owner (5) The same principle applies when one person permits another to mortgage the

(1) *Duke of Leeds v Earl of Amherst* 2 Ph 117 123 *De Busche v Alt* L R 8 Ch D 286 314 For a case of acquiescence see *Rangama v Atchama* 4 Moo L A L (1846) *Egglew.* 6th Ed 166 662

(2) *Bisleshur v Muirhead* 14 A 362 364 (1892) A case may be founded on the equitable doctrine of acquiescence or the legal doctrine of estoppel by conduct (*Proctor v Benn* 36 Ch D 765 per Fry L J) When founded upon the first doctrine it has been said that the conduct relied on should be conduct with knowledge of legal rights and amounting to fraud (*Wilmott v Barber* L R 15 Ch D 96 105 *Russel v Watts* L R 25 Ch D 559 585 both cases cited and followed in *Baswantapa v Banu* 9 B 86 (1884)) When however the doctrine of estoppel is alone invoked there may be an estoppel by conduct of acquiescence where there is no fraud and where the person estopped has acted *bona fide* and unaware

of his legal rights *Gopal Chunder v Sarat Chunder* 19 I A 203 20 C 296 (1892)

(3) *Tiakoor Fatesingji v Bamanyi Dalal* 27 P 515 531 532 (1903) & c 5 Bam L R 274

(4) *Ossmond Beeby v Kistul Chandra Acharya Choudhury* 41 C 771 (1914) per Jenkins C J and Woodroffe J See *Redgrave v Hurd* 20 Ch D 1 (1881)

(5) *Rancoomar Koondoo v Macqueen* 11 B L R 46 (1872) I A Sup Vol 40 [followed in *Mahomed Moraffer v Keshori Mohun* 22 C 909 (1895)] *Uda Begu v Ismail* 2 A 87 (1851) *Bisleshur v Muirhead* 14 A 362 (1892) and see *Bhuro Dutt v Lehrane Koor* 16 W R 123 125 (1871) *Manmohinee Joginee v Jogobundhoo Sadhooka* 19 W R 223 (1873) *Baswantapa v Banu* 9 B 86 (1884) *Story Eq Jur* § 383 cited in *Gheran v Kunj Behari* 9 A 419 (1887)

property of the former (1) A mortgagee who causes the mortgaged property to be sold in execution gage, without notifying lien is estopped for e purchasers (2) Where some of the mortgagees led a subsequent purchaser of a portion of the mortgage property and a puisne mortgagee of the remainder to believe that the whole property was unencumbered, held that they were precluded by the doctrine of estoppel from setting up their rights under the prior mortgage as against the subsequent transferees and the effect of the estoppel was to postpone them in respect of their share of the original debt to the puisne mortgagee Held also that it was open to the Court to sever their interest from those of the mortgagees who were under no disability or disqualification and to make a decree in favour of the latter in proportion to their interest in the debt (3) If a person stands by and allows a Court to sell his property he cannot afterwards come forward and ask for possession (4) Where a plea of acquiescence or of standing by has been raised by a tenant in order to resist the claim of the landlord to eject him and it is proved that the tenant has been encouraged to spend money he can claim the protection given by a Court of equity In the absence of such a plea of standing by or acquiescence a Court of fact may if the circumstances of the case justify, come to the conclusion that the landlord had expressly or impliedly contracted to lease the land to a tenant whose reclamation of waste land has not been objected to for some years This however is not a presumption of law but a presumption of fact which may or may not arise in a case (5) If a person is allowed to expend money on that which is not his own, as where a stranger begins to build on land supposing it to be his own and the real owner perceiving his mistake, abstains from setting him right and leaves him to persevere in his error, in this case the Court will not afterwards allow the real owner to assert his title to the land (6) In the case cited a plaintiff and the defendant exchanged adjacent plots of land each worth more than a hundred rupees by means of an unregistered deed on the 4th March 1908 both believing that they had effected a valid transfer Possession was taken by each party and the defendant began to erect a very costly building placing a wall thereof in the land he had acquired in exchange While the building was in progress the plaintiff demanded and obtained Rs 525 from the merchant on the ground that the plot he parted

After the completion
for recovery of his
The defendant pleaded
inter alia that he had acquired a valid title to the plot that the plaintiff was
estopped by his conduct from recovering the plot and that if the plaintiff was

(1) *Ba ce Pershad v Baboo Maun* 8 W R 67 (1867)

(2) *Mal v ad Hanid ud d n v Shih* Salai 21 A 309 (1899)

(3) *Sakkidd n Saha v Sonaula Sarkar* 27 C L J 453 s c 22 C W N 641

(4) *Baldco Parshad v Fakir ud d n 1* All L J 402 (1904) See *Narayani v Nabim Chandra Chaudhuri* 44 C 720 (1917) *Deyamoy v Ananda Mohan Roy Choudhuri* F B 42 C 172 (1914) (non transferable occupancy holding)

(5) *Satjai Singhai Nathuram v Kallou* 44 I C 517

(6) *Raiden v Dyson* L R 1 E & I Ap 129 140 Case on principle commented in *Lala Beni v Kandan Lal* 3

C W N 502 (1899) 21 A 496 *Ismail Khan v Joygoon Bibee* 4 C W N 210 223 (1900) *Ismail Khan v Broughton* 5 C W N 846 (1901) *Caspera v Kedar Nath* 5 C W N 858 (1901) *Nundo Kumar v Banonali Gayan* 29 C 871 (1902) *Ahmed Yar v Secretary of State* 28 C 693 s c 5 C W N 634 (1901) *Secretary of State v Dattatraya Nayaj* 26 B 271 (1901) *Ralli v Forbes* 1 Pat 1 (1907) See as to these cases and as to the presumption of permanent tenancy in respect of homestead land an article in 5 C W N cccxxii See *Ex parte Ford* 1 Ch D 521 828 *Yeshwadas v Ramchandra* 18 B 66 (1893) See *Dattoji v Kalba* 21 B, 749 (1896)

to get a decree he must pay compensation as a condition of recovery. Held that the plaintiff was not estopped and that he was entitled to recover his plot owing to the absence of a registered deed of exchange and that the plaintiff must pay sufficient compensation before recovery under section 51 of the Transfer of Property Act (1). A person seeking to create title to real property by estoppel must satisfy the Court that he had neither actual nor constructive notice of the title of the real owner, and had not before him any circumstances which could have put him on reasonable enquiry to find out the truth. The Evidence Act affords no definition of estoppel to dispense with the necessity of the purchaser making a reasonable enquiry apart from section 41 of the Transfer of Property Act (2). But there is no estoppel when the party was not acting under any mistaken belief (3). An instance of an estoppel by omission occurs when a mortgagee, bringing the property to sale in execution of a money decree without giving the purchaser notice of his incumbrance, will be estopped from subsequently enforcing the lien of which he has given no notice. Having by his conduct led the purchaser to believe that the property was offered for sale free of encumbrances and to pay full value for it, he cannot as against the latter be heard to deny that the sale took place free of encumbrances (4). In a case in the Madras High Court it was held that while a person who does not raise an objection to an erroneous statement in a proclamation of sale which he ought to have raised is estopped from pleading an irregularity due to such statement, the rule of estoppel does not apply to a judgment debtor who is unaware of the error in it, and that where a judgment debtor's omission to object was due to a mistake of fact as to the property intended to

(1) *Romanathan Chetty v Ranganathan Chetty*, 40 M 1134

(2) *Venkatarama Aiyar v Venkatarama Aiyar* 50 I C 969

(3) *Paddu v Mahabur Prasad* 53 I C 683

(4) *Dillab Sircar v Krishna Kumar* 3 B L R A C 407 12 W R., 303 (1869) *McConnell v Mayer* 2 N W P H C R 315 (1870) *Doolee Chund v Oomda Begum* 24 W R 263 (1875) *Tukaram Aitaram v Ramchandra Budharan*, 1 B 314 (1876) *Tinnappa v Murugappa* 7 M 107 (1883) *Nursing Narain v Raghoobur Singh* 10 C 609 (1884) *Agarchand Gumanchand v Rakhma Hanmant* 12 B 678 (1888) *Jaganatha v Ganga Reddi* 15 M 303 (1892) *Kasturi v Venkatachulpathi* 15 M 412 (1892) the last case distinguishes *Banwar Das v Muhammad Mashiat* 9 A 690 (1887) in which (at p 702) and in *Gheran v Kunj Behari* 9 A 413 (1887) it was pointed out that it cannot be said that one person solely by bidding at an auction sale encourages another person (see *Civ Pro Code O XXI r 66 2nd Ed p 978*) to buy. As to legal representatives being bound by an execution sale see *Natha Hari v Jamne* 8 Bom H C R A C 37 (1871). It must always be shown that the circumstances of the case are such as bring it within the purview of the section. *Solano v Lalla Ram* 7 C L R 481 (1880). An estoppel may also arise where the mortgagee permits the property

to be sold by private sale. *Munnoo Lall v Lalla Choonsee* 11 A 144 (1873). In the case of *Dhondo Balkrishna v Raoji* 20 B 290 (1895) in which *Dullab v Krishna* supra was cited it was held that there was no estoppel registration (except in a case of fraudulent concealment) being notice according to the settled course of the previous Bombay decisions. For a case of a somewhat converse character to that in text see *Byjonnath Sahoy v Doolun Bisuanath* 24 W R 83 (1875). Where mortgaged property is sold in execution of a decree in a suit brought upon the mortgage the interest of the mortgagee at whose instance the sale is made is held to pass to the purchaser and the mortgagee is estopped from disputing that such is the effect of the sale. *Kheoraj Jusrup v Lingaya* 5 B 82 (1873) *Seshgiri Sha h bhoy v Salvador Vas* 5 B 5 (1873) *Shaik Abdulla v Haji Abdulla* 5 B 8 (1883) see *Narsidas Jitram v Joglekar* 4 B 57 and cases there cited. *Ramanath Doss v Bolaram Phookun* 7 C 67 *Hari v Ishshman* 5 B 614 (1881). Where a person claimed as his own property attached in execution of a decree against another person and his claim being rejected without enquiry purchased the property at the sale it was held that his so purchasing did not estop him from asserting as against a mortgagee prior to the sale that the property was his independently of the sale. *Hanuman Dat v Assadali* 7 N W F Rep, 145

be sold he was not estopped (1) And where a person had purchased *bond fide* and for value on the faith of a preceding transfer for which a Bank, being deceived by personation, had permitted it was held that the Bank was estopped from

able time that he had still an outstanding claim under the prior mortgage and the omission to give the information amounts to such an omission as is

and he subsequently acquires an interest sufficient to satisfy the grant the estate instantly passes. (5) If a person having right to a property takes no steps towards asserting his right against the person in possession but leave that person so in possession with all the indicia of ownership the former cannot afterwards assert his right against the vendee of the person in possession who takes without notice of his claim. (6) Section 41 of the Transfer of Property Act applying the general principle of estoppel deals with such transfers of property by ostensible owners. (7)

Connected with the doctrine of estoppel are the following actions which have to be taken by a person claiming a right in a property in order to prove that the title is in him. The law required the general rule in the absence of any statutory limitation (8) is to give effect to the real title and to allow the truth to be shown. The law of *benami* is merely a deduction from the Equitable doctrine of resulting trust and therefore the real owner may establish the truth against the *benamidar* or set it up as a defence to a suit by the *benamidar* if the latter attempts to enforce his apparent title against the beneficial owner. Similarly creditors of the real owner may have recourse to the *benami* property, but if creditors of the *benamidar* seize the property the real owner is entitled to have the property released. (9) But a third party will not be allowed to suffer by the voluntary

(1) *Raja of Kashi v. Mahara of Jodhpur* 10 M. W. (1915) see *Essa v. Kauri Guba v. Ramkanu Sen* 13 C. L. J. 192 (1917)

(2) *Bank of England v. Cutler* (1901) 1 K. B. 30 and as to effect of acquiescence under a mistaken belief see *Gowd v. Chandra v. Secretary of State* 9 C. W. N. 561 and *supra* note 1

(3) *Punurang v. Narayan Rao* 44 I. C. 47

(4) *Moreshwar v. Syed Ali* 5 W. R. 299 (1866) see s. 43 of the Transfer of Property Act explained in *Syed Nurul v. Sheo Saha* 19 I. A. 27 (1892) See next note

(5) *Tukeshwar Lal v. Akedon Lal* 25 C. W. N. 495 P. C.

(6) *Umesh Chander v. Issur Chander* 1 Ind. Jur. N. S. 766 (1886) citing *Boys v. Clies* 6 M. & S. 23 *Dyer v. Pears* 3 B. & C. 42 *Howard v. Hudson* 1 E. & B. 1 *Pickard v. Sears* *supra* *Freeman v. Cooke* *supra* *Ston v. F.*

Australasian Co. *supra*

(7) See the Act edited by Shephard and Brown and cases there cited. In *Jurram v. Narayan* 5 B. & L. R. 657 (1911) a mortgagor was held to be estopped from questioning his own right to mortgage. See also *Narayn Karda v. Karna's* 14 B. 40

(8) See Civ. Proc. Code Part II s. 66 2nd Ed. p. 12, s. 6 of Act XI of 1859 s. 184 of Act XIX of 1873 & now N. W. P. Act III of 1901 [where irrevocable property has been sold in execution of a decree or for arrears of Government revenue a stranger will not be allowed to claim the property on the ground that the certified purchaser were a purchased *benami* on his account and any suit brought on such an allegation will be dismissed with costs]

(9) See *Mavres H. v. Law* II 400—40 18th Ed. ss. 448—449 and cases there cited.

acts of owners of property. And it is not to be supposed that, because the existence of *benami* transactions has been judicially recognized, parties are at liberty to use the system to the injury of others, whether by direct fraud, or by

will be estopped from setting up the secret trust in his own favour against a title acquired without notice from the person who holds *benami* for him (3) The ground of the rule is obvious: it would be monstrous if it were allowed that a man should invest another with the apparent ownership of his property, and then after that other has raised money upon the property, resume it in his own name as owner of certain immovable property, and then sue the ostensible vendees in favour of himself. Consideration upon representation.

the manager of an unencumbered estate it was purchased *benami* on behalf of the zamindar of the estate, but no transfer to the benamidar was made. Thereafter the benamidar, on the instruction of the zamindar transferred the

those claiming under him were estopped from denying the title of the daughter, because as a result of the zamindar's acts her position had been changed, she

(1) *Lakshidoss Moduck v Bindoo Bashinee* 1 Marsh 293 295 (1863)

(2) See *Luchman Chunder v Kali Churn* 19 W R 297 (1873) distinguished in *Sarat Chunder v Gopal Chunder* 19 I A 209—211 (1892) And see *Chunder Kumar v Hurbans Sahai* 19 C 137 (1888) *Sarat Chunder v Gopal Chunder* 16 C 148 (1888) but there is no estoppel against the purchaser at a sale held in execution of a decree obtained against a person who would by his conduct be precluded from denying the title of third parties who have dealt with his benamidar

(3) *Ramcoo tar Koondoo v McQueen* 11 B L R P C 46 54 (1873) *Rakhaldas Moduck v Bindoo Bashinee* supra *Luchman Chunder v Kali Churn* supra *Bhugwan Doss v Upooch Singh* 10 W R 85 (1868), *Obhay Churn v Panchanon Bose* Marsh 564 (1863) *Kally Das v Gobind Chunder* 1 Marsh 569 571 (1863) *Renni v Gunga Naran* 3 W R 10 (1865) *Nundan Lal v Taylor* 5 W

C 173 (1888) *Sait v Mokhun Mahtoom* 18 W R 276 (1872) *Ram Molinee v Pran Koorarce* 3 W R 87 (1865) *Sarat Chunder v Gopal Chunder* 19 I A 203 (1892) cf *Sarat Chunder v Gopal Chunder* 16 C 148 (1888) where it was held that the mere fact of a *benami* transfer did not amount to a binding representation the contest must moreover be between the true owner of the property and a person claiming under his benamidar *Bashu Chunder v Enayet Ali* 20 C 236 (1892) in *Muhamnad Khan v Muhammad Ibrahim* 1 All L J 214 (1904) the Court referring to the principal case held that the party had no constructive notice of the real title See *Radha Madhab Paikara v Kalpataru Ray* 17 C L J 209 (1913) (innocent purchase in sale on collusive mortgage by benamidar) *Baburam v Madhab* 40 C 565 (1913) *Aisakar Das v Bairagi Saai* 19 C L J 330 (1914) *Magu Brahma v Bholi Das* 19 C L J 352 (1914)

(4) *Lakshidoss Moduck v Bindoo Bashinee* 1 Marsh 293 294 (1863)

(5) *Tulshi Ram v Mutsaddi Lal* 2 All L J 97 (1904)

thereby becoming liable for the revenue assessed upon the property (1) Third parties, however, dealing with a *benamidar* will be affected by notice, actual or constructive, of the real title (2), for if they are cognisant of the real facts they can in no way have been misled. Constructive notice will be imputed to a person who, for the purpose of avoiding notice, designedly refrains from enquiry, which by the exercise of ordinary intelligence would lead to a knowledge of the facts (3). And where a state of things exists which could not legally exist unless the property was subject to a burden, a purchaser has notice of that burden (4). Thus if a third party is in possession, a purchaser is put on enquiry as to his interest (5).

So far reference has been made to the rule that the Courts will not enforce the rights of a real owner where they would operate to defraud innocent persons. "A still stronger case is that in which property has been placed in a false name, for the express purpose of shielding it from creditors. As against them, of course, transaction is wholly invalid. But a very common form of proceeding is for the real owner to the *benamidar*, alleging, or the *evid* colourable one, made for the express words, the party admits that he has another to effect a fraud, but asks of the fraud is carried out. The rule where this state of things was made out, the Court would invariably refuse relief, and dismissing possession.

set it up in opposition to the persons whom he had invested with the legal title (7). And persons who take under the real owner, whether as heirs or as purchasers, were treated in exactly the same manner as he was (8). On the other hand, a contrary doctrine was laid down in more recent cases" (9).

(1) *Raja of Deo v Abdullah* 45 C 909 45 I A 97 (P C)

(2) *Ran coomar Koondoo v McQueen* 11 B L R P C 46 54 (1872) and cases cited in note 3 and in Mayne's Hindu Law 8th Ed s 444

(3) *Radia Madhab Paikara v Kalpataru Ray* 17 C L J 209 (1914)

(4) *Magi Brahma v Bholi Das* 19 C L J 352 (1914) *Allen v Seckhan* 11 Ch D 790 (1879)

(5) *Mancharji v Kongseoo* 6 B H C R 59 (O C J) (1869)

(6) *Ramndur Deo v Roop arain Ghose* 2 S D A Select Cases 149 (1814) *Roushun Akatoon v Collector of Mymensingh* S D A (1846) 120 *Brimho Mye v Ram Dulab* S D A (1849) 276 *Rajah Rajnarain v Juggunath Pershad* S D A (1851) 774 *Koonjee Singh v Jankoo Singh* S D A (1852) 838 *Bhowannysunkur Pandey v Purneen Bibee* S D A (1853) 639 *Ramsoonder Sandal v Anundnath Roy* S D A. (1856) 542 *Hurry Sunkur v Kali Coomar* W R 265 (1864) [whether any creditors were actually defrauded or not is immaterial], *Roy Rashbeharee v Roy Gourree*, 4 W R 72 (1865) *Roushun Bibee v Shaikh Aurrem* 4 W R, 12 (1865), *Bhowannee Pershad v Oheedun* 5 W R., 177 (1866),

Aloksundry Goopto v Haro Lal 6 W R 287 (1866) *Kesab Chunder v Vyas ionee Dossia* 7 W R 118 (1867) *Kalcanath Kurr v Dojal Kristo* 13 W R 87 (1870) [Plaintiff not permitted to plead fraud of his father from whom he derived title] On the other hand see *Ra v Surun v Pran Peary* 13 Moo I A 551 (1870) s c in lower Court 1 W R 156 (1864). In this case the distinction was taken which is to be found in the latter cases viz that no innocent party had been affected by the admission or representation. See also *Brij Mohun v Ram Nursingh* 4 S D A Select Cases 435 (1879) [cf *Nauab Azimut v Hurdaree Mull* 13 Moo I A 402 (1870) *Srimati Lakhmani v Mohendranath Dutt* 4 B L R 28 29 (1869)]

(7) *Oblozchurn Ghultuck v Treelochun Clatterjee* S D A (1859) 1639 *Ram Lal v Kishen Clunder* S D A. (1860) 439 [cf *Ramanugra Narain v Mahasundar Kuntwar* 12 B L R. 433 438 (1873)]

(8) *Lukhee Loran v Taramonee Dossee* 3 W R. 92 (1865) *Kalcanath Kur v Dojal Kristo* Deb 13 W R., 87 (1870)

(9) Mayne's Hindu Law 8th Ed s. 445 citing most of the above cases and

It is in the first case clear that where two persons have combined to commit a fraud upon a third, the transaction is wholly void as between those persons and the party defrauded (1) It has, however, been a question of some difficulty as to how far the parties may, as *between themselves*, show the truth of the transaction Whatever doubt there may be as to the plaintiff's right to avoid his own deed by setting up his own fraudulent act, it is open to the defendant to defend his possession by showing that the real transaction between himself and the plaintiff was to defraud, whether a third party or the defendant's creditors generally (2) Whether a plaintiff shall be so allowed to plead his fraud will depend upon the question whether the fraud has been carried beyond the stage of mere intention If the fraudulent purpose has been wholly or partially *carried into effect*, the real owner will not be permitted to succeed in a suit instituted by him for recovery of the property But, where the fraud has not been carried into execution he may succeed (3) It has been held by the Privy Council that where a *benami* conveyance of land is made for the purpose of fraudulently defeating the claim of an equitable mortgagee, and the claim of the latter is not defeated, the grantor can recover back the land from the grantee, and that the *benami* conveyance being in such circumstances an inoperative instrument, it is unnecessary to bring an action to set it aside (4) Where the ostensible transferee never had any exclusive possession of the property in question, which was for a great many years treated as part of the joint family property, and which was enjoyed by the joint family (of which the plaintiff was the sole surviving member) for more than twelve years before

see the following cases *Sreemutty Debia v Bimola Sondurce* 21 W R 422 (1874) [overruling *Kalcenath Kur v Doyal Krsto* 13 W R 87 (1870) *supra* also overruled by *Sham Lal v Amarendra Nath* 22 C 400 (1896)] followed in *Gopcenath Naik v Jadoo Glose* 23 W R 42 (1874) *Bykunt Nath v Goboollah Sikdar* 24 W R 391 (1875) See also *Paran Singh v Lalji Mal* 1 A 403 (1877) *Sreenath Roy v Bindoo Basinec* 20 W R 112 (1873) *Mussamut Phool v Gour Sarun* 18 W R 485 (1872) *Mukim Mullck v Ranjan Sirdar* 9 C L R 64 (1881) And see *Mahadaji Gopal v Vithal Ballal* 7 B 78 (1881)

(1) See *Nazab Sidhee v Ojoodhyaram Khan* 10 Moo I A 540 (1886) [followed in *Kalappa v Shwaya* 20 B 492 (1895) see *Eratat v Sidranappa* 21 B 424 448 489) *Byjnath Lal v Ramoo deen Chowdhry* 1 I A 106 (1873)] *Gopi Wasudev v Markande Narayan* 3 B 30 33 (1878)

(2) *Babaji v Krishna* 18 B 372 (1893) followed in *Preonath Koer v Kam Mahomed Shazad* (1903) 8 C W N 620

(3) *Jadu Nath v Rup Lal* 10 C W N 650 (1906) in which all the authorities are reviewed *Goberdhan Singh v Ritu Roy* 23 C 962 (1896) *Kali Charan v Rasik Lal* 23 C 26n (1894) *Chen v Putappa* 11 B 703 (1887) *Sham Lal v Amarendra Nath* 23 C 460 (1895) *Banku Behary v Raj Kumar* 4 C W N 289 (1899) 27 C 231 *Govinda Kuar v Lala Kishan* 28 C 370

(1900) *Mayne's Hindu Law* § 405 and cases there and in the preceding decisions cited The rule however appears to be stricter in the Madras High Court *Yasamati Krishnayya v Chundra Pappayya* 20 M 326 330 (1897) *Ranga mal v Venkataclari* 20 M 323 (1896) *Varada julu Naidu v Srinivasulu Naidu* 20 M 333 338 (1897) It is very doubtful whether in a case in which the maxim in *pari delicto* would otherwise apply any exception arises by reason that the illegal purpose has not been carried out] See however as to these cases *Jadu Nath v Rup Lal* 10 C W N 650 at p 661 (1906) In *Honapa v Narsapa* 23 B 406 (1898) *Farran C J* at p 409 was of opinion that the law applicable was that laid down in *Yasamati Krishnayya v Chundra Pappayya supra* but treats Calcutta decisions as being to same effect and *Fulton J* stated p 413 that when the fraud was not completed it might well be contended that as the collusive transaction had not really frustrated justice the original owner retained a good claim to the property See also *May on Fraudulent and Voluntary Dispositions of Property* 2nd Ed 470—472 as to fictitious sales made to evade process for recovery of arrears of revenue see *Ram Persad v Shita Persad* 1 N W P Rep 71 and see *Petherpermal Chetty v Muniandy Servai* (infra)

(4) *Petherpermal Chetty v Muniandy Servai* P C (1908) *Times L R v* 24 p 462

suit, it was held that the plaintiff was entitled to have a declaration of his right to the property and to confirmation of his possession (1). And in a case in the Calcutta High Court where property had been placed *benami* with a view to the purchase of a judgment-debtor's property, it was held that the plaintiff was entitled to the purchase money (3).

Estoppel by conduct may arise in the case of family arrangements, the decisions as to which extend not merely to cases in which arrangements are made between members of a family for the preservation of its peace but to cases in which arrangements are made between them for the preservation of its property (4). So where infants had, since attaining their majority, by their conduct adopted the acts of their mother and guardian and agreed to treat the will of a testator as valid, it was held that by their acquiescence in the disposition of the property they were estopped from disputing the provisions of the will (5). Not only may there be an estoppel giving effect to a family arrangement upon a family property where a person has been entitled to inherit, and where the arrangement is valid, as the mother had no interest to bequeath, and also that the bequest to unborn grandsons was ineffectual, and that the son's acquiescence did not in the circumstances suffice to raise an estoppel and that a grandson and a purchaser from him were not estopped (7).

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an invalid adoption has been represented, been led to and defendant actively participated in the adoption of the plaintiff by the defendant's brother, and by many acts signified to the plaintiff and to his adopting father the defendant's complete acquiescence in the adoption, and thereby encouraged the plaintiff, who was an adult, to assent to such adoption, and allowed the adopting father to die in the belief that the adoption was valid, and finally concurred in the performance by the plaintiff of the funeral ceremonies, it was held that the defendant was estopped from disputing the validity of the adoption (8). Where the defendant who challenged the adoption was the grandson of a party to the compromise under which the adoption was made and under which he received a material benefit and who was present and consenting when the ceremonies were performed, the defendant was held to be estopped from disputing the adoption.

(1) *Govinda Kuar v Lala Kishun* 28 C. 370 (1900)

(2) *Nisakar Das v Baragi Samal* 19 C. L. J. 330 (1914) not following *Hari v Ramchandra* 31 B. 61 (1906)

(3) *Obloy Churn v Nobin Chunder* 23 W. R. 95 (1874) *Soroop Chunder v Trojlokhnath Roy* 9 W. R. 230 (1868)

(4) *Hilliams v Hilliams* L. R. 2 Ch. Ap. 294 304 cited in *Lakshmidas v Ganpat* 5 Bom. H. C. R. 128 (1868) See 50 I. C., 812

(5) *Lakshmidas v Ganpat* 5 Bom. H. C. R. 128 (1868) See also *Sia Das v Gur Sahai* 3 A. 362 (1880) *Rajender Narain v Bijai Govind* 2 Moo. I. A. 233 234 (1839) *Damodar Dass v Mahiram Pandah* 13 C. L. R. 96 (1833)

(6) *Janaki Ammal v Kamalathammal* 7 Mad. H. C. R. 263 (1873)

(7) *Durga Das Khan v Ishan Chandra Dey* 44 C. 145 (1917), see *Board v Board* 9 Q. B. 48 (1873) (acceptance under a will) *Rup Chand Ghose v Sarbeshwar Chandra* 3 C. L. J. 629 (1906), *Amulya Ratan Sircar v Tarini Nath Day* 42 C., 254 (1915) (heir at law)

(8) *Sadashiv Moreshekar v Harimoreshekar* 11 Bom. H. C. R., 190 (1874); *Chintu v Dhonda* ib. 192 note (1873); *Ravi Vinayakrav v Lakshmidas* 11 B., 381 (1817) *Chitko v Janaki* 11 Bom. H. C. R., 199 (1874) *Kannammal v Virasami* 15 M., 486 (1892), see however also *Tayammal v Sashachalla* 10 Moo. I. A. 429 (1865) See also next note

and was bound by his grandfather's action (1) But in order that estoppel by conduct may raise an invalid adoption to the level of a valid adoption, there must then become

Madras High Court it was held that an invalid adoption does not *per se* change the adoptee's rights in his natural family, and that in such a case no estoppel arises unless as a consequence the position of the party setting up the estoppel is an adoption and thereby,

and by the subsequent conduct of the adopter, the person adopted is induced to abstain from claiming a share in the inheritance of his natural family so as to prevent a person claiming through the adopter from impugning the validity of the adoption But the construction which was placed by this decision on the word "intentionally," in section 115 was overruled by the Privy Council in *Sarat Chunder Dey v Gopal Chunder Laha*, in which case their Lordships said of the Madras case cited that they would have "great difficulty in holding as the High Court did that a series of acts by which an adoption is professedly made and subsequently recognised constitute a representation in law only, and not of fact" (5) In a case in the Punjab High Court, where a second son had been adopted in the lifetime of the first, and the first had permitted him to share the inheritance, it was held that the first adopted son and his representatives were not estopped from denying the validity of the second adoption though they would not have been allowed to deny the fact of such adoption (6) In this case the decision in *Sarat Chunder Dey v Gopal Chunder Laha* was distinguished on the ground that the Madras case overruled by it was on matters of fact and that the Privy Council did not suggest that the section covered not only facts but also representations in law (6) When in a suit to set aside an adoption brought by the adoptive mother against her adopted son, it was found that the plaintiff had represented that she had authority to adopt, and this representation was acted on by the defendant, and that the ceremony of adoption was carried out on the faith of this representation, that the marriage of the defendant was likewise on the strength of it celebrated, and that the defendant performed the *Sradh* ceremony of his adoptive father, and had been obliged to defend a suit brought against him by an alleged reversioner to the estate of his adoptive father it was held by the Allahabad High Court that the plaintiff was estopped from maintaining a suit for a declaration that the adoption was without authority and void (7) And this decision has been upheld by the Privy Council, which declared that the estoppel was personal and would not bind anyone claiming by an independent title (8) As to estoppel arising by reason of the recognition by one member of a joint Hindu family of

(1) *Moman v Mussan at Dhanni* 1 Lahore 31

(2) *Paratibayamma v Ranakrishna* 18 M 145 (1894) following *Gopalayyan v Raghupati Ayya* 7 Mad H C R 250 (1873), *Kuvers v Babai* 19 Bom 374 (1894) For cases in which it was held there was no estoppel see *Gurulingsami v Ramalakshminamma* 18 M, 53 (1894) *Santapayya v Rangappayya* 18 M 397 (1894), *Yashvanti Puttu v Radhabai* 14 B 312 (1889) and see *Tarini Charan v Saroda Sundari* 3 B L R 145 (1889) *Gurulingsami v Ramalakshminamma* 18 M 53 58 (1894)

(3) *Vaithilingam Mudali v* 14 M 37 M 529 (1914)

(4) *Eranyoli Vishnu v Eranyoli* 7 M 3 (1883)

(5) L R 19 I A 203
as to estoppel on a point of law see *Lall v Chandraballee* 11 M 100 R 391 395 (1872)

(6) *Tek Chani v Mus* 47 P R 100 (1912)

(7) *Dhara v* 30 All 54 (1908)

(8) *Rani Durga* 30 All 54 (1908) *Singh P C* (1911) 5 A., 399

another as being also a member(1), or by reason of plaintiff treating defendant as being in certain relationship to a common ancestor (2), see the undermentioned cases

In the last mentioned case it was pointed out that, though a course of conduct may not amount to an estoppel in point of law it may nevertheless be strong evidence and throw upon the party, whose conduct is in question a heavy burden of proof

Where it had been understood by the parties for some time that a certain mortgage had been converted into a sale, and that the property had passed to the defendant by purchase, it was held that mere admissions that it had been converted into a sale did not operate as an estoppel or prevent the mortgagor from redeeming the property (3) Where two members of a joint Hindu family had held out another as the manager of the estate so as to induce outsiders dealing with him to believe that he had authority to mortgage the whole interest in the property, those members were estopped from contending that the mortgages effected by that other were not binding on their shares if that other did as a matter of fact, borrow the money for the benefit of the family (4) An estoppel may arise in the case of inconsistent positions. So where a Hindu reversioner compromised with the widow and benefited by such compromise, he was held estopped from claiming the estate when the succession opened (5) So also a reversioner who has voluntarily signed the deed executed by a widow cannot legally claim in opposition thereto (6) So in the case last cited, where some of the sons of a Hindu widow who had only a daughter's interest in the property joined in the mortgage executed by her and thus represented that the property was being mortgaged by their mother for legal necessity, Held that the sons could not be allowed to go back upon those representations when dealing with a party - n-
tations of fact and were - e-
to which they were p - or
relinquished his rights to a portion of the inheritance in favour of the widow in consideration of receiving a relinquishment from the widow of all her interest in the remaining portion of the inheritance Held that neither the reversioner nor any person claiming through him could set up that the relinquishment was not binding on him and did not operate on the portion of the inheritance relinquished in favour of the widow (7) Where a suit to enforce a security bond filed in a Privy Council appeal was dismissed on the grounds (a) that the necessary parties had not been impleaded and (b) that the claim was barred by section 47 of the Civil Procedure Code and, an application for execution to enforce the said security being made the decree holder was met with the plea that the order passed before the institution of the above suit in a previous execution proceeding referring him to seek his remedy by suit operated as a bar -
that the order passed in the suit had passed in the execution proceedings -
to take up a position inconsistent with that on which he had succeeded in in -
Held
order
allowed

(1) *Lala Muddun v. Kishinda Koer* 18 C 341 (1890)

(2) *Agraual Singh v. Foujdar Singh* 8 C L R 346 (1880)

(3) *Abdul Rahim v. Madhav Rao Apaji* 14 B 78 (1889)

(4) *Krishnaji v. Moro* 15 B 32 (1890) as to standing by during alienation by father see *Surab Narain v. Shew Gobind* 11 B L R App 29 (1873) as to acquiescence of Hindu minor after

attaining majority see *Gopalnarain v. Muddun* 14 B L R 32 (1874)

(5) *Lala Kanah Lal v. Lala Brij Lal* 2 C W N 914 (P C) In *Asa Ravi v. Karuppan Chetty* 41 M 365 the person releasing was held not estopped

(6) *Shub Chandra Kar v. Dulcken* 23 C L J 123 s c 48 I C 78

(7) *Jogendra Nath Bunya v. Mohendra Chora* 47 I C 978

defeating a claim in a previous proceeding brought to enforce it (1) One out of two plaintiffs joined in an application with the defendant to the Court for the case to be referred to arbitration On the next day G R the other plaintiff made an oral application before the Court to the effect that he accepted the arbitration The arbitration lasted for over a year and G R conducted the proceedings throughout on behalf of the plaintiffs An award was duly filed but G R objected to it on the ground that he had not signed the original

possession order or disposition under such circumstances as to enable him by means of them to obtain false credit the owner who has permitted him to obtain that false credit must suffer the penalty of losing his goods for the benefit of those who have given the credit (3) Where an offer of sale was made to a pre-emptor and he refused to avail himself of it and consented to a sale to a stranger it was held that after a sale to a stranger he could not set up his right of pre-emption (4) See for the effect of an admission as to the rate of interest in an account stated by a banker case below (5) The service of notice of foreclosure on the occupant of mortgaged property (a party who claimed as purchaser from the mortgagor but who had not established his title) does not stop the mortgagee from disputing the occupant's title to redeem the mortgaged premises (6) If a person takes out probate of a will his heirs are not estopped from disputing the will (7) *Semble* that a tenant may be estopped from objecting to the terms of a *potta* where he has accepted *pottas* containing similar terms for a series of years previously in respect of the same holding and has by his conduct led the landlord to suppose that the *potta* would not be objected to (8) In the case cited *A* sold a share in the equity of redemption of certain property to *B* and in a suit by *B* to redeem the mortgage *A* applied to the Court stating that he also had a right in the equity of redemption and asked to be joined with *B* as a co plaintiff This was allowed and the redemption suit fought out by the two co plaintiffs Subsequently *A* sued for cancellation of the sale of the equity of redemption to *B* on the ground of fraud *Held* that as by his conduct in the redemption suit *A* had elected to affirm the sale and to act upon it he was not entitled to the relief he was now seeking (9) Where a party to a suit agreed to a decree in favour of his opponent on certain conditions which were not afterwards fulfilled and the compromise fell through the admissions made by him for the purpose of compromising the litigation do

prevent the parties representing other litigation (10) Where a party gives him the exact amount of information and retains that amount out of the purchase money for paying off the mortgage the mortgagee is estopped from recovering any larger amount from the vendee (11) Where a mortgagee takes a mortgage from a person in possession and obtains possession from him he is not permitted to question the mortgagor's title (12) A mortgagee

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(1) *Bast Beg n v Sajjad M r a* 21

O C 188 47 I C 558

(2) *Gaur Shanker v Ganga Ra* 77

P R 1919 52 I C 859

(3) *Bordea v M ller* 10 C L R 591

(1882)

(4) *Braja K s l o r v K t s Chandra* 7

B L R 10 (1871)

(5) *Mah nd s K ar v Balk shen Das* 3

A 528 (1880)

(6) *Prannath Roy v Rookhea Beg m*

7 Moo I A 323 394 (1859)

(7) *Mal on ed Mud n v Khode un n ssa*

2 W R 181 (1865)

(8) *Sree Sa ka ac ar v Varada P lla*

27 M 332 (1903)

(9) *Cl a han v Belar Lal* 52 I C

513

(10) *T kaya Ra s v Hass t M ser* 50

I C 564

(11) *Secreta y Cl ef A ol sa Deuan v*

Punjab Nat onal Bank 141 P R 1919

(12) *Surendra Natl M tra v Kh tendra*

Mohan M ira 29 C L J 434 s c 52

I C 59

brought a suit for possession of the mortgaged property against a person whom he treated as a successor of the original mortgagor and obtained a decree. Subsequently when the said representative of the mortgagor sued the mortgagee for redemption of the mortgage, the mortgagee disputed his right to represent the original mortgagor. *Held* that the mortgagee was estopped from raising the plea (1)

As already observed it makes no difference what the form is which the representation takes, or whether it be written or verbal (2) and further that in

to note some of the general principles touching estoppels in writing and the cases decided thereon (3). The intention of the deed as appearing on the face of it must be regarded. A recital will be binding if it was a bargain on the faith of which the parties acted (4). The deeds and contracts of the people of India ought (the Privy Council have said) to be liberally construed. The form of expression, the literal sense, is not to be so much regarded as the real meaning of the parties which the transaction discloses (5). A party will be precluded from contradicting an instrument to the prejudice of another only where that other has been induced to alter his position upon the faith of the statement contained in the instrument. Recitals, therefore, which have not had this effect cannot operate as estoppels. So a statement of consideration in a deed is not conclusive evidence of the existence of such consideration, but it is only evidence as far as it goes (6), and so also a receipt may be contradicted or explained (7) (*v. post*). Estoppels must be made out clearly, and this is an ancient rule as to estoppel by statements in a deed (8). Those who rely upon a document as an estoppel, the nature of an estoppel being to exclude an inquiry by evidence into the truth, must clearly establish that it does amount to that which they assert (9). It may be aided by looking at the plaintiff's deed and the sale of certain of the defendant's property.

(1) *Gowind v. Chokla* 49 I C 356

(2) *v. ante* p. 830. As to certain classes of documents which (amongst others) may raise an estoppel see Caspersz *op cit* 4th Ed s. 377—383. *Invoices* *Holding v. Elliot* 5 H & N 117. Document representing goods such as warehouse receipts and delivery orders—*Ganges Manufacturing Co. v. Sourujmul* 5 C 689 (1880). *Knight v. Wiffen* L R 5 Q B 660. *Coventry v. The Great Eastern Ry. Co.* L R 11 Q B D 776. *Seton v. Lafone* L R 19 Q B D 68. *Farmloo v. Ban* L R 1 C P D 445. Railway receipts *G. I. P. Railway Co. v. Hanmandas Ramkisan* 14 B 57 (1899). Bills of lading *Lishman v. Christie* 19 Q B D 333. 340. *Grant v. Norcross* 10 C B 665. *Cox v. Bruce* 18 Q B D 147. Difference note *Sindh etc., Bank v. Mudoosadun Choudhry Bourke* O C 372 (1865). See as to accounts and awards Caspersz *op cit* 4th Ed ss. 386—399.

(3) See Caspersz *op cit* 4th Ed Ch. xiv. where the Indian cases will be found collected.

(4) *South Eastern Railway Co. v. Wharton* 6 H & N 520. 526.

(5) *Hanoo an Jersaid v. Musst Babooee Moo* I A 411 (1856). *per* Knight Bruce L J. and see *Ramlall Sett v. Kanai Lal* 12 C 578 (1886). *Sripot Singh Dugar v. Prodjat Kumar* P C 44 C 527 (1917). 41 I A 1. *Mahabir Pershad v. Moheswar Nath Sahai* 17 I A 11 (1889). *Kasturchand Lakhmaji v. Jakhia Padia* 40 B 74 (1916).

(6) *Paran Singh v. Lalji Mall* 1 A 403. 410. See this case considered and on certain points dissented from in *Chen Tirappa v. Puttappa* 11 B 708 (1887).

(7) See s. 92 *Prov.* (1) *ante* and cases there cited and *Ram Surun v. Pran Pearce* 13 Moo I A 551. 559 (1870). *Zairundar Scrimatu v. Tirappa Chetti* 2 Mad H C R 174 (1864).

(8) *Tuccedie v. Poorno Chunder* 8 W R 125 (1867). *Mamsa v. Sallajjee* 46 I C 609.

(9) *Loi v. Bouterie* L R 1891 3 Ch. 113. 106.

(10) *Rani Metta v. Rani Hulas*, 13 B L R 312 (1874). See *Sita Ram v. Ali Baksh* 3 A 805 (1881) where the estoppel was held to have been clearly made out.

property in the legal possession of the defendant, and both the plaintiff and the defendant professed to receive their title by virtue of a document which the Court found was invalid according to Mahomedan law, it was held that the defendant was not estopped from denying its validity, and the Court was not bound to hold that the document, as between the parties was valid. The defendant being in possession, it was for the plaintiff to establish her right to attach and sell the property by showing superior title in herself whatever might be the rights of the defendant (1). In a case in the Calcutta High Court it was held that since a non transferable occupancy holding cannot be bequeathed the heir at law is not estopped from denying the validity of a devise in a will which purported to bequeath such a holding (2). In this case it was said that the Court was not prepared to accept as an inviolable principle of law the rule that in every case of gift the doctrine of estoppel may be applied and it was pointed out that in this instance the beginning of the heir at law's right and of the operation of the will were simultaneous (3).

A receipt signed by a party like any other statement made by him and produced afterwards to affect him is evidence but evidence only and is not conclusive but capable of explanation (4). It may however like any other statement be conclusive evidence in favour of any person who may have been induced thereby to alter his condition (5). Thus when in a registered deed of sale it was recited that the vendor had received payment in full and there was also an acknowledgment by the vendor to that effect and the vendor parted with the title deeds it was held that she was estopped from claiming a lien for an unpaid balance of purchase money against a mortgagee for value without notice (6). It has been an ancient practice among Hindus of indorsing payments on bonds (7). It is also very customary to stipulate that no payment will be recognised except "after causing the payment to be entered on the back of the bond or after taking a receipt for the same". But such a stipulation is no estoppel and the obligor of the bond may prove by other means that the debt, or a part of it has been satisfied (8). The mere absence of an indorsement of payment on the back of a *kistbandi* cannot prevail against positive proof of payment and evidence of such payment must be admitted (9), though of course in deciding whether the alleged payments were made, the omission of indorsements is a most important circumstance to be considered (10).

A recital in a deed or other instrument is in some cases conclusive, and in all cases evidence (11) as against the parties who make it and those who claim

(1) *Ib* and see s 97 Prov 6
(2) *Au arbai v Mir Alam* 7 B 170 (1883)

(3) *Am Iya Rata Srekar v Tar : Nath Dey* 47 C 254 (1915) see *Durga Das Alan v Islan Clandra Dey* 44 C 145 (1917)

(4) *Farrar v Hittelson* 9 A & E 641 a receipt is nothing more than a *prima facie* acknowledgment that the money has been paid *Skaf v Jackson* 3 B & C 421 *Graves v Key* 3 B & Ad 318 see s 91 ill (e) *ante* and cases at pp 606 607 *ante*. On the other hand while a receipt is only evidence of payment a release annihilates the debt *Bowes v Foster* 2 H & N 779

(5) *Crates v Key* 3 B & A 318 see *Rice v Rice* 2 Drew 73 (unpaid vendor) *Shropshire Union etc Co v R L R* 7 E & I app 496 510 (the same) *Bchertou v Walker* L R 31

Ch D 151 and *Potell v Braime* C A (1907) Times L R v 24 p 71 W N 778 (mortgagor acknowledging receipt of mortgage money estopped as against assignee of mortgage who has given full value)

(6) *Tel Iram Grdlarisid v Kashiba* (1908) 33 B 53

(7) *Narayan Undir v Motilal Ram das* 1 B 45 (1875)

(8) *Kalce Das v Tara Chund* 8 W R 316 (1867) *Narayan Undir v Motilal Ram das* 1 B 45 (1875)

(9) *Grdlaree Singh v Lalloo Koonwur* 3 W R Misc 23 (1865)

(10) *Saskaellun Cletty v Gobindappa* 5 Mad H C R 451 (1870) *Nagar Mall v A cemoallah* 1 N W P H C R 146 (1869)

(11) See *Sarkis v Prasomoyee Dossee* 6 C 794 (1881) *Gour Monce v Krishna Chauder* 4 C 397 (1878),

under them(1), and it is of more or less weight against them according to circumstances. It is a statement deliberately made by those parties, which, like any other statement, is always evidence against the persons who make it. But it is no more evidence against other persons than any other statement would be (2). A recital by one party of a state of facts on the faith of which the other party was induced to change his situation, as for instance by entering into a contract, is an estoppel in favour of the party whose position is thus altered (3). Though the recitals will be evidence, there is no authority to show that a party to an instrument will be estopped in an action by the other party, not founded on the deed and wholly collateral to it, to dispute the facts admitted in the deed (4).

The question whether one of the parties to a fraud against third persons can show the truth as against the other has already been discussed in connection with the subject of *benami* transactions (5). The rule of title by estoppel has been the subject of enactment in section 43 of Transfer of Property Act (IV of 1882) and the 18th section of the Specific Relief Act (I of 1877) to which as also to the undermentioned cases reference should be made (6). The mere fact of a person attesting a deed is no evidence in itself that he consented to it or knew its contents, that is, the mere attestation does not necessarily import concurrence, though it may be shown by other evidence that when he became an attesting witness he fully understood what the transaction was and that he was a concurrent party to it (7). As to documents executed by *pardanashin* women, Hindus or Mahomedans, *v. ante*, section 111 (8). There is not necessarily any inconsistency in a party who has unsuccessfully tried to rescind an

Nimhoo Sahoo v Hoothoo Ju imadar 13 W R 2 (1870) *Teluram v Kashibai* (1908) 33 B 53 [recitals in deeds of sale] *Sikher Chand v Dulputty Singh* 5 C 363 375 (1879) [recitals of necessity for contracting debt] *Sunkar Lal v Juddobans Sahaye* 9 W R 285 (1868) [that money was borrowed for husband's *shraddh*] *Maloneed Hamidoolah v Madhoo Soodun* 11 W R 298 (1869) [possession] *Gopal v Narayan* 1 Bom H C R 331 (1863) [separation] *Bheeknarain Singh v Nicol Koorer Marsh* 373 (1863) [*Mooktearnamah*] *Rao Kurun v Mehtab Koonwar* 3 Agra 150 (1868) [previous marriage] as to recitals in wills see *Nilmonee Choudhry v Zuhcer unissa Khanum* 8 W R, 371 (1867) *Romanjee Munchurjee v Rossain Abdoolah* 5 W R P C 61 *Lakshman Dada v Ran Chandra* 1 B, 511 (1877) *Vasants Morari v Chanda Bibi* P C 37 A 369 (1915)

(1) *Banga Chandra Dhur Biswas v Jagat Kishore*, P C 44 C 186 (1917) *Dry Lal v Inda Koonwar* P C 36 A 187 (1914) (recitals of legal necessity ordinarily inconclusive on mortgages or sales by Hindu widow) and see *Khub Lal Singh v Ajodhya Misser*, 43 C 574 (1916) See notes on Burden of Proof and Presumptions

(2) *Brayeshwar Peshkar v Rudha nuddi* 6 C 268 (1880), *Monohar Singh v Sumrit Kumar*, 17 A 428 (1895) and a recital does not estop in favour of third persons who did not contract on the faith

of it *Stronghill v Buck* 14 Q B 781 794 787

(3) *Stronghill v Buck* *supra* and see *ib.* as to circumstances in which an estoppel operates on all or is confined to a single party *South Eastern Railway Co v Hurlston* 6 H L 520 527

(4) *Croft v Buller* 8 M & W 209 212

(5) *v. ante*

(6) *Deoli Chand v Aerban Singh* 5 C 253 (1879) *Pranjitan Gozardhandas v Bai* 4 B 34 (1879) *Radley Lal v Mahesh Prasad* 7 A 864 (1885) *Sheo Irasad v Uday Singh* 2 A 718 (1880)

(7) *Rum Chander v Hari Das* 9 C 463 466 (1882) *Rajlakhe, Debi v Gocool Chunder*, 3 B L R (P C) 57 63 (1889) *v. ante* p 201 note (11), as to attestation by reversioners of estates held by Hindu females see last case and *Gopaul Chunder v Gour Monce* 6 W R 53 (1866) *Madhub Chunder v Gobind Chunder* 9 W R 350 (1868) See also *Mahadevi v Vellamoney* 20 M 269, 273 (1896) *Collier v Baron* 2 N L R 34, see *Kandaram Pillai v Nagalinga Pillai* 36 M 564 (1913) (attestation in Madras) *Lakshpati v Kambodh Singh* 37 A 350 (1915) *Deno Nath Das v Kotiswar Mallickarjya* 21 I C 367 (1913), *Banga Chandra Dhur Biswas v Jagat Kishore* P C 44 C 186 (1917) *Hari Kishun Bhagat v Kashi Pershad* 42 I A 64 (1915)

(8) *ante* s 111 and cases there cited

agreement afterwards claiming performance of it (1) In the case cited the plaintiffs, occupancy tenants of a village, were held estopped from claiming to pre-empt a sale which the vendees succeeded in obtaining through the active instrumentality of two of the villagers as representatives of the whole village (2)

To constitute an estoppel it is necessary that the statement or conduct charged should have been intentional, with the object of inducing the other party to change his situation in consequence. Mere loose talk does not usually estop. A party informally, as a matter of contractual relation with the parties asking him of him, that they intended to act upon his answers. At the same time a party by negligence in asserting a claim may be afterwards estopped from setting up such claim against strangers (3) The representation must have been made with the intention, either actual, or reasonably to be inferred (4) by the person to whom it was made, that it should be acted upon. A third person to whom the representation was not made cannot claim the estoppel, unless it was intended or apparently intended that he should act upon it (5) The term "wilfully" as used in the case of *Pickard v Sears* (6) is in effect equivalent to "intentionally" (7) or "voluntarily" (8) And by the term "wilfully" we must understand "if not that the party represents that to be true which he knows to be untrue at least that he means his representation to be acted upon, and that it is acted upon accordingly, and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth" (9) Therefore intention to have the representation acted upon may be *presumable* as well as *actual*, so that a man would be bound as well when his conduct or the circumstances of the case justified the inference of intention as when he actually intended the result. Negligence, when naturally and directly tending to indicate intention, will therefore have the same effect in creating the estoppel as actual intention (10) But mere want of care towards preventing an unauthorized transfer of one's property, or the like act creates no estoppel; otherwise a man might be precluded from alleging that his signature has been forged on the ground that he had negligently employed a dishonest clerk. It is

(1) *Srish Chundra v Roy Bonomali* 6 Bom L R 501 (1904)

(2) *Idris v Skinner* 82 P R 1919 P C

(3) Wharton Ev §§ 1079 1155 as to fact stated as hearsay offered to prove an estoppel see *Roe v Ferrars* 2 B & P 548 *Stephen v Vroman* 16 N Y 381 (Amer) In general where there is nothing reasonably indicating that the representation was intended to be acted upon as a statement of the truth or that it was tantamount to a promise or agreement that the declaration made is true so as to amount to an undertaking to respond in case of its falsity the party making it is not estopped from proving the truth *Bigelow op cit* 6th Ed 685

(4) *op post*

(5) *Mayerberg v Haynes* 50 N Y 675 (Amer) *Bigelow op cit* 6th Ed 686 *Carr v London & N W Ry Co* 10 C P 317

(6) 6 A & E 469 *op ante*, p 827,

note (9)

(7) *Sarat Chunder v Gopal Chunder*, 19 I A 203 219 (1892)

(8) *Cornish v Abington* 4 H & N 549 (*Sarat Chunder v Gopal Chunder supra*) Park B perceiving that the word willfully might be read as opposed not merely to involuntarily but to unintentionally showed that if the representation was made voluntarily though the effect on the mind of the hearer was produced unintentionally the same result would follow *Bigelow op cit* 6th Ed 690 n

(9) *Freenan v Cooke* 2 Ex R 654 *per Baron Parke cited in Sarat Chunder v Gopal Chunder supra*.

(10) *Freenan v Cooke* 2 Ex R 654 *Gregg v Hells* 10 A & E 90 97 *Carr v London Ry Co* L R 10 C P 307, *Arnold v Cheque Bank* 1 C P D 578, *Vagliano v Bank of England* 33 Q B D, 243 *Seton Laing & Co v Lafone* L R, 19 Q B D 68 *Bigelow op cit* 6th Ed, 686 687

or omission, has caused another to believe a thing to be true and to act upon that belief must be held to have done so "intentionally" within the meaning of the Statute, if a reasonable man would take the representation to be true and believe it was meant that he should act upon it (2). It is not necessary, however, to prove an intention to deceive in order to make a case of estoppel, nor is it necessary to an estoppel that the person whose acts or declarations induced another to act must have been under no mistake or misapprehension himself. Section 115 does not make it a condition of estoppel resulting that such person was either committing or seeking to commit, a fraud, or that he was acting with a full knowledge of the circumstances and under no mistake or misapprehension (3). It is not necessary that fraudulent intention should be established. (4) Where however it was found that the plaintiffs had successfully combined with another to defraud possible pre-emptors by having a sale transaction entered in the deed in the form of a mortgage they were of course held to be estopped from setting up their own fraud and pleading that the transaction which was ostensibly a mortgage was really a sale (5). What the section mainly regards is the position of the person who was induced to act, and not the

but it would be unjust, even though he acted under error, to throw the consequences on the person who believed his statement and acted on it as it was intended he should do (6). It has been held in America that the representation must have been a free voluntary act, and if obtained by the party who has acted upon it, it must have been obtained without artifice. If it has been procured by duress or by fraud, there will be no estoppel upon the party making it, it would seem, though he made it with the full intention that it should be acted upon; indeed, it is said that where the conduct supposed to have created an estoppel, was brought about or directly encouraged by the party alleging the estoppel, no estoppel is created. But that must probably be understood of something in the way of artifice or other questionable endeavour (7).

Caused or
permitted

The representation and the action taken must be connected together as cause and effect. Not only must it be shown that there was belief in a particular fact, and action taken upon such belief, but also that the action and belief were induced by a representation of the plaintiff intended or calculated to

(1) Bigelow *op cit* 6th Ed 687 688 citing *Suan v North British Australasian Co*, 2 H & C 175 as to silence as to the fact of a forged signature see *McKenzie v British Linen Co* 6 App Cass 82.

(2) *Sarat Chunder v Gopal Chunder* supra. The High Court of Madras had previously [*Vishnu v Krishnan* 7 M 3 (1883)] expressed the view that by the substitution in this section of the word 'intentionally' for 'wilfully', in the rule stated in *Pickard v Sears* 6 A & E 469 it was possibly the design to exclude cases from the rule in India to which it might be applied under the terms in which it had been stated by the English Court. But the Privy Council disagreed with this view and held that on the contrary the substitution was made for the purpose of

declaring the law in India to be precisely that of the law of England.

(3) *Sarat Chunder v Gopal Chunder* 19 I A 203 215 218 (1892), overruling *Ganga Sahai v Hira Singh* 2 A, 809 (1880) *Vishnu v Krishnan*, 7 M, 3 (1883).

(4) *Balbir Prasad v Jugul Ashore*, 3 Pat L J 454, 46 I C, 473.

(5) *Tikaja Ram v Wassu Musir*, 50 I C 564.

(6) *Ib* citing *Cairncross v Lorimer* 3 Macq 829, *Pickard v Sears* supra, *Freeman v Cooke*, supra, *Cornish v Abington*, supra, *Carr v London & North Western Railway Co* L R, 10 C. P. 316, *Seton Laing & Co v Lafone*, 19 Q B D. 68.

(7) Bigelow *op cit* 6th Ed, 646 647; as to admissions under duress see Wharton, *Ev* § 1099.

enough, though other inducements operated with it. And the law will not undertake, in favour of a wrong doer, to separate the various inducements presented and ascertain precisely how much weight was given to the representation in question (2). But though the representation need not be exclusively acted upon, there can be no estoppel where the party claiming one is obliged before changing his position, to enquire for the existence of other facts to make the inducement sufficient and to rely upon them also in acting (3). In such a case it is clear that the inducement was not adequate to, and therefore not the cause of the result viz the action taken. If the party is absent at the time of the transaction, his silence or other conduct must at least be of a nature to have an obvious and direct tendency to cause the omission or the step taken (4). The section uses the word "permitted" as the expression apt to cases of omission and negligence. Conduct of omission or negligence may be the cause of the action taken such conduct raising inferences which are often as casually effective as any positive declarations may be.

There can be no estoppel if the party to whom the representation is made does not believe it to be true, for in such case the resulting conduct is in no sense the effect of the preceding declaration, or if the party deceived does not act on that belief so as to alter his previous position (5). This section does not apply to a case where the statement relied upon is made to a person who knows the real facts and is not misled by the untrue statement. A person cannot use as an estoppel a statement by which he has been in no way misled or induced to alter his position to his own detriment (6). There can be no estoppel arising out of legal proceedings when the truth of the matter appears on the face of the proceedings (7). The person who claims the benefit of an estoppel must show that he was ignorant of the truth in regard to the representation (8). When both parties to refer to acquainted no misrep're act or to alt

To be-
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(1) *Solano v. Ialla Ram* 7 C L R 481 (1880). *Molunt Das v. Nilkanal Deuan* 4 C W N 283 (1899) in *Beni Prasad v. Mukhtesar Pasi* 21 A 316 322 (1899), it was held that that which really induced the party to abandon a portion of his claim was not the acts of the other party relied upon as an estoppel but an extraneous cause independent of such party v post To Act p 863 and ante p 821.

(2) *B gelow op cit* 6th Ed 646 647 v post

(3) *Ib* 6th Ed 696—698

(4) *Ib* 6th Ed 662

(5) *Collier v. Baron* 2 N L R 34. *Cf. Kuterji Shet v. Municipality of Lonavala* 45 B 164 (1921).

(6) *Grish Chandra v. Iswar Chandra* 3 B L R A C 337 (1869), s c 12 W R 226. *Karali Charan v. Mahtab Chandra Sev* Rep July—Dec 1864 p 29. *Jhinguri Tetari v. Durga* 7 A 878 (1885). *Narayan v. Raoji* 28 B 393 397 (1904). So in an action for deceit if it

is proved that the plaintiff did not rely upon the false statement complained of he cannot maintain the action. *Smith v. Chadwick* 20 Cl D 27. *Sarada Prasad Roy v. Ananda Moy Dutta* 46 I C 228.

(7) *Bigelow op cit* 6th Ed 681—683 and cases there cited as to the presumption of knowledge v ib pp 677 611 and ante s 114. *Intention Knowledge* as to circumstances which may necessitate enquiry see *Bisheshur v. Muirhead* 14 A 362 (1897). *Ramcoomar Koondoo v. Macqueen* 11 B L R 46 (1872).

(8) *Tara Lal v. Sarobar Singh* 4 C W N 533 (1899) s c 27 C 413. *Narayan v. Raoji* 28 B 393 (1904) at p 397.

(9) *Ranchodlal Vandravandas Patwari v. Secretary of State for India* 35 B 183, *Beni Ram v. Kundun Lal P C* (1890), 22 A 496. *Honapa v. Narsapa* (1898) 23 B 406. *Ramsden v. Dyson* (1855) 1 E & I A C 129.

(10) *M. Oodcy Koorar v. Mt Ladoo* 13 Moo 1870.

the person making the representation to another does not "cause or permit" that other to believe the representation to be true. The representation in order to of it,

frankness is essential to all estoppels. The Courts will not readily suffer a man to be deprived of his property when he had no intention to part with it (2). Again to say that the representation must be such as would naturally lead a prudent man to act upon it is also to say that it must be material. That is equally essential to the estoppel (3). This however, does not mean that the representation in question must have been the sole inducement to the change of position, if it were adequate to the result,—that is, if it might have governed the conduct of a prudent man,—and if it did influence the result, that will be enough, though other inducement operated with it. And the law will not undertake, in favour of a wrong doer, to separate the various inducements presented, and ascertain precisely how much weight was given to the representation in question (4).

"A thing" A proposition of law is not "a thing" within the meaning of the section and this expression refers to a belief in a fact (5). So also an admission on a

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person to whom the statement is made knows as much about the matter as the other (8). In the undermentioned case the Court expressed an opinion that a grantor might possibly be estopped from questioning the permanent character of a lease by reason of misrepresentations even on a point of law which was not clear, and free from doubt (9). The fact must be a fact alleged to be at the time actually in existence or past and executed. The representation must have references to a present or past state of things, for, if a party make a representation concerning something in the future it must generally be either a mere

(1) *Bigelow v. Pritchard* 6th Ed. 634

(2) *Id.* 578. see *S. v. Chadwick* 20 Ch. D. 27. [If a statement by which the plaintiff says he has been deceived is ambiguous the plaintiff is bound to state the meaning which he attached to it and cannot leave the Court to put a meaning upon it.]

(3) *Bigelow v. Pritchard* 6th Ed. 645. 646. *Smith v. Chadwick* supra. [If a statement although untrue is so trivial that it could not in the opinion of the Court have influenced the conduct of the plaintiff it will not support an action for deceit.] See *Taylor v. Taylor* 19 Ex. 38.

(4) *McAlister v. Macfarlane* 35 Ind. 439. (Amer.), *Bigelow v. Pritchard*, 6th Ed., 646, *Narayan v. Rao*, 23 B. 393, 397 (1904).

(5) *Pajnarain Dose v. Universal Life Assurance Co.* 7 C. 594 (1881). see *Goffe Lal v. Chundrabaloo Bhoojor* 11 B. L. R. 395 (1872). s. c. 19 W. R. 12. *Surendrakant Roy v. Durgasundari Dose* 19 I. A. 115, 116 (1882). *Tagore v. Tagore* I. A. Sup. Vol. 71 (1872). *Morgan v. Couchman* 14 C. B., 180, as to admissions of law see p. 224 ante, *Tek*

Chand v. Musst. Gopal Devi (1912), 47 P. R. no. 46 p. 171. See *Mark D. Cruz v. Jitendra Nath Chatterjee* 46 C. 1079 s. c. 10 C. L. J. 94 as to the meaning of the word "thing", see *Ma Pyn v. Maung Po Ciet* 39 I. C. 385.

(6) *Dungarisa v. Aand Lal* 3 All. L. J., 534.

(7) *Bigelow v. Pritchard* 6th Ed. 634—636 states that to be the general rule adding that it can seldom happen that a statement of opinion or of a proposition of law will conclude the party making it from denying its correctness except where it is understood to mean nothing but a simple statement of fact, that statements of opinion however often approach to representations of fact the whole suggestion in regard to real opinion treading on delicate ground and that it seems probable that the rule against representations of law has been pressed too far. See cases cited in *Jethabhai v. Nathabhai* 23 B., 399 (1904) at p. 407.

(8) *Bigelow v. Pritchard* 6th Ed. 635.

(9) *Narsing Dyal v. Ram Narain*, 30 C. 883 (1903).

statement of intention or opinion uncertain to the knowledge of both parties(1), or it will come to a contract, with the peculiar consequences of a contract, or to a waiver of some term of a contract, or of the performance of some other kind of duty (2)

It is essential to an estoppel that one party has been induced by the conduct of the other to do or forbear(3) doing something which he would not, or party to the true,

the part of the defendant, which representation was intentionally made, in order to produce that result (4) To establish an estoppel it is not sufficient to find that it may well be doubted that the plaintiff would have acted in the way he did, but for the way in which the defendant had acted It must be proved as a fact that the plaintiff could not have acted in the way he did, and that the defendant by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief (5) As the foundation of the doctrine is the changed situation of the parties referable to the representation as its cause, a person cannot use as an estoppel a statement by which he has been in no way misled or induced to alter to his own detriment(6) his previous position (7) Upon this essential of an estoppel Mr.

(1) The intent of a party is necessarily uncertain as to its fulfilment No person has a right to rely on it A person cannot be bound not to change his intention nor can he be precluded from showing such a change merely because he has previously represented that his intentions were once different from those which he eventually executed *Langdon v Doud* 10 Allen 433, s c 6 Allen 423 (Amer) per Bigelow C J

(2) *Bigelow op cit* 6th Ed 637 *Madison v Alderson* 8 App Cas 467 473 5 Ev D 293 *Jordan v Money* 5 H L Cas 185 213—215 *Citizens Bank v First National Bank* L R 6 E & I A 352 360 *Jethabai v Nathabhai* 28 B 399 407 (1904) *Pollock on Contract* Appen dix note K and cases there cited

(3) The damage need not be shown to be a positive step taken to one's prejudice it is enough to show that the party claiming the estoppel was induced by the other party to refrain from obtaining a particular benefit which he would otherwise have been reasonably sure of acquiring *Bigelow op cit* 6th Ed 703 citing *Knights v Liffen* L R 5 Q B 360

(4) *Solano v Lalla Ram* 7 C L R 481 (1880) or which being intentionally made has the effect of producing that result v *supra* and see *Jhinguri Tewari v Durga* 7 A 878 (1885) *Mohunt Das v Nil Komal Dewan* 4 C W N 283 (1899) Cf *Kuteryi Shet v Municipality of Lonazala* 45 B 164 (1921) There must have been prejudicial acting on faith of representation and change of position *Gusawn Mal v Ram*

Rakha Mal 50 I C 128, *Har Lal v Basa-*
ia Sing 75 P W R 1918

(5) *Narsingdas v Rahimanbhai* 28 B, 440 (1904)

(6) Prejudice to the party claiming the estoppel should be shown *Schmalts v Avery* 16 Q B 155 *Bigelow op cit* 6th Ed 701 702 it is not enough that the representation has been barely acted upon, if still no substantial prejudice would result by admitting the party who made it to contradict it he will not according to the American cases be estopped to It does not prejudice one in law to do something one was bound to do to 638 n (1)

(7) *Grish Chandra v Issar Chandra* 3 B L R A C 137 341 s c 12 W R 226 (1869) *Sev Rep* July—Dec (1864) p 29 In re *Purmanandas Jeeuandas* 7 B, 109 (1882) *Mt Oodey Koowar v Mt Ladoo* 13 Moo I A 585 (1870) *Kuvers v Babai* 19 B 374 389 (1894) *Durga v Jhinguri* 7 A 511 515 (1885) (the altering of his position by the person pleading the estoppel is an essential part of the rule) *Poddamuthulay v Timma Reddy* 2 Mad H C R 271 (1864) In re *Purmanandas Jeeuandas* 7 B 109 117 (1882), *Mt Oodey Koowar v Mt Ladoo* 13 M I A 585 598 (1870) *Muhammad Samud din v Manu Lal* 4 A 386 (1889) The

Bigelow observes as follows(1) —“The rule is fundamental that unless the representation of the party to be estopped has also been *really acted upon*, the other party acting differently, that is to say, from the way he would otherwise have acted, so that to deny the representation would be to *prejudice* him, no estoppel arises. Neither a statement of any kind nor an admission *in pais* can amount of itself to conclusive evidence. But if, on the other hand, the representation has been acted upon promptly, under circumstances, such as those already detailed, the party making the statement or guilty of the conduct in question will be precluded from alleging the contrary of that which he has given the other party to understand to be true. And it matters not, if the party acting upon the representation was justified in so doing, *how* he has changed his position, whether by the purchase of property, the surrender of possession, the erection of improvements or other outlay upon land or goods about which the estoppel be claimed, or the expenditure of money in litigation, or it is held even by being induced to refrain from steps which would otherwise probably have been taken. But unless the representation is in some way acted upon, unequivocally, as tests will any estoppel arise only what he was legally

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acting. In other words, though the party may, no doubt, act upon any one of several representations or inducements from different sources, it will not answer for him to put together two severally insufficient inducements from different and independent sources.” Where it is plain that the representation has been substantially acted upon there is, of course, no question (supposing the existence of other elements) that an estoppel arises but the general rule is that only the person to whom the representation was made or for whom it was designed, can act upon and avail himself of it (2). Where a person purchases property subject to a mortgage he is not by that sole fact estopped from disputing the validity of nor consideration for, the mortgage. But if the mortgagee has been thereby induced to suffer some detriment or if he forgoes a portion of his money then the purchaser may be estopped from disputing the mortgage (3).

Representative

Representatives and also persons claiming by gratuitous title are bound by estoppel (4). It is necessary to an estoppel that there should be privity between the parties, that is to say, an estoppel is only available between the parties to the representation and those claiming under them. The section only says—“neither he (that is, the person making the representation) nor his representative shall be allowed.” Therefore only parties and their privies are bound by the representation and only those whom the representation is made

v. Smith 78 Ch D 700 Carr v. London N H R Co 10 C. p. 317 Mahadevi v. Neelamani 20 M 269 273 (1896) Aristo Moni v. Secretary of State 3 C W N 99 105 (1898) Tara Lal v. Sarobur Singh 4 C W N 533 538 (1899) Falmunissa Begum v. Soondar Das 4 C W N 565 (1900) Manohar Lal v. Nanak Chand 52 I C 479 Nanak Chand v. Chameli Kunwar, 17 A. L. J., 228 s. c. 50 I C 721 where the defendant did not act on the belief

(1) Op cit 6th Ed 674—697

(2) Bigelow op cit 6th Ed 707 708 where the question of statements at second hand is discussed. See Nallappa v. Virajachala 37 M 270 (1914) (equitable estoppel from contract to indemnify)

(3) Bala Parshad v. Surjan Singh 49 I C 997

(4) Jagannath Prasad Singh v. Syed Abdullah 22 C W N 891 (P C) s. c. 28 C I J 167

(5) Bigelow op cit 6th Ed 61* 61*, Taylor L.v. § 99

judgment(1) this estoppel is not mutual. The party to whom the misrepresentation though bound has nothing *inter alios* there can be no the person making it as an estoppel will equally bind those who claim through him (4) A man is estopped not only by his own representations, but also by those of all persons through whom he claims. Upon the principle *qui sentit commodum sentire debet et onus* if the predecessor in title is not at liberty to contradict what he has formerly said or done his privy is subject to a like disability, for the latter stands in no better position than the party through whom he derives title (5) As to the meaning of the term "representative," see s 20 "*Persons from whom interest is derived*," s 22 "*Representative in interest*," see ante. The purchaser of an estate sold for arrears of revenue is not privy in estate to the defaulting proprietor. In the case of a private sale in satisfaction of a decree the purchaser derives title through the vendor. But a purchaser at an execution sale is not as such the representative of the judgment debtor within the meaning of this section (6) A privy exists between an execution creditor and a purchaser at a Court sale. So when a plea of estoppel is available to a decree holder, it is likewise available to the purchaser at the execution-sale as his representative or as one claiming under him (7) Where in any question with the person estopped or his representatives another may be held to have obtained a valid conveyance to himself then as the latter has himself through the estoppel a valid title he can give good title to a purchaser from him whatever might be the state of knowledge of the person purchasing (8) Where in execution of a money decree certain property was purchased and this property was subject to a mortgage not executed by the judgment debtor, although he would have been estopped from denying liability under it on account of his conduct in the mortgage transaction, it was held that the purchaser was bound equally with him inasmuch as the right title and interest of the judgment debtor had passed to the purchaser and that the purchase was therefore subject to the mortgage (9) And in another case it was held that a purchaser claiming under a title which had been at least partly created by the mortgagor, was estopped from raising the plea of non transferability of the holding (10) In a case in the Allahabad High Court it was held that where a mortgagee purchased the mortgaged property in execution of

(1) *Spencer v Williams* L. R. 2 P. & D. 230 237

(2) *Beelow* op cit 6th Ed. 618 n (1)

(3) *R v Ambergate Ry Co* 1 E. & B. 372 *Moxatt v Castle Steel Co* 34 Ch D. 58

(4) See *Board v Board* L. R. 9 Q. B. 48 *Middleton v Pollock* L. R. 4 Ch D. 49 *Siva Ram v Ali Baksh* 3 A. 805 (1881) [vendor—vendee] *Moonshee Ameer v Syed Ali* 5 W. R. 289 (1866) [heir] *Monmohinee Joginee v Jugobundhoo Sadhookha* 19 W. R. 233 (1873) [guardian and minor] *Luckman Chunder v Kali Churn* 19 W. R. 292 (1873), [heirs] *Chunder Coomar v Hurbans Sahai* 16 C. 137 (1888)

(5) See *Taylor* Ev. § 90

(6) v ante notes to s 20 sub voc "*Persons from whom interest is derived*" and cases there cited *Vasanji Haribhai v Lalla Akhu* 9 B. 285 288 (1885) but see *Banee Pershad v Manu Singh* 8 W.

R. 67 (1867)

(7) *Arslanbhapati Devi v Iskrama Devi* 18 M. 13 (1894)

(8) *Sarat Chunder v Gopal Chunder* 19 I. A. 203 220 (1892) strictly speaking it is not the office of an estoppel to pass a title. The title remains but it cannot be asserted against the party who acted upon the false representation *Beelow* op cit 6th Ed. 631

(9) *Prayag Rai v Sidhu Prasad Tewari* (1908) 35 C. 877 followed in *Tota Ram v Hargobind* 36 A. 141 (1914) See *Deo Nandan Prasad v Janki Singh* P. C. 44 C. 573 (1913) (sale for arrears caused by representation of minor mortgagee) and see *Sarat Chandra Dey v Gopal Chandra Laha* (1892) 20 C. 296 and *Carr v London North Western Railway* (1875) 10 C. P. 316

(10) *Radhika Kanta Chakravarti v Ramnanda Shaha* 39 C. 513 and *Krishna Lal Saha v Bhairab Chandra* (1905) 9 C. W. N. ccxlviii

purchased at a sale in execution of his decree on the mortgage is bound by an estoppel that would have bound his mortgagor (3). It has been held that where a landlord in execution of a money decree causes the sale of an occupancy holding and purchases it himself, he is not estopped from pleading non transferability without his consent in a subsequent suit brought by the mortgagee of the occupancy raiyat, for since this section is exhaustive, the English law of mortgage and a consequent estoppel is not applicable in such a case (4). In the case cited it has been held that where a landlord decree holder applies under section 162 of the Bengal Tenancy Act and obtains an order under section 163 of that Act, there is an assertion by him that the property is at least an occupation holding and he is bound by such representation (5). There is no estoppel.

for a suit, a mortgagee (7). Where an alienation by a Hindu widow of her husband's estate, for purposes other than those sanctioned by the Hindu law may be made with the consent of the reversioners interested in opposing the transaction, the consent of the next reversioners at the time of alienation will conclude another person not a party thereto who is the actual reversioner upon the death of the widow (8), or, at least throw on him the onus of rebutting the inference of legal necessity (9).

When a person claims property as the representative of another, the doctrine of estoppel cannot apply to representations made by any one except that other person (10). An estoppel can be availed of by the parties and their privies. The privy cannot be deprived of such benefit by the fact that since the time the representation was made and the privy of estate commenced the person to whom the representation was made and the person who made the representation have come to an arrangement contrary to the representation (11).

Not only, as has been already seen, is the representative of the person estopped bound by the same estoppel as that which affects his predecessor in title, but the estoppel conversely also enures not only for the benefit of the person to whom the representation was actually made but also for the benefit of his successors in title. Therefore not only may the heir be bound by an estoppel affecting his ancestor, but he may also claim the benefit of an estoppel which his ancestor might have claimed.

The estoppel by conduct operates by nature that is wherever it can so operate, specifically, and gives to the party entitled the rights he would have against the person estopped supposing the representation true. So if the

(1) *Tota Ram v. Hargobind* 36 A. 141 (1914) *Bakshi Ram v. Laldhar* 35 A. 353 (1913) *Bishambher Dyal v. Parshadi Lal* 10 A. L. J. 112 (1910)

(2) *Arunachellam Chetti ar v. Narayan Chetti ar* 36 M. L. J. 301

(3) *Kalidas Choudhury v. Prasanna Kumar Das* 24 C. W. N., 269 s. c. 30 C. L. J. 496, 47 C. 446

(4) *Asmatunessa Khatun v. Harendra Lal Barua* (1908) 35 C. 904

(5) *Abdul Sobhan Shaikh v. Natar Mandal* 17 C. L. J. 652 (1913)

(6) *Prasanna Kumar Mookerjee v. Sri Kantha Row* 40 C. 173 (1913)

(7) *Ramchandra Dhondo v. Malkaji* 40 B. 679 (1916)

(8) *Bagranji Singh v. Manikarnika Baksh Singh* P. C. (1907) Times L. R. v. 24 p. 46. For representation of reversioners by Hindu widow in *Res Judicata* see *Rual Singh v. Balwant Singh* 37 A. 496 (1915)

(9) *Debi Prasad Clowdry v. Golap Bhagat* F. B. 40 C., 721 (1913)

(10) *Runga Rao v. Bhajamm* 17 M. 473 (1894)

(11) *Badr Bhai v. Bajnath* S. O. L. J., 458 s. c. 47 I. C. 934

Between himself and such person or his representative

To deny the truth of that thing

representation is made on the sale of a security which the seller did not own, the buyer's rights are not limited to the recovery of the consideration paid but the purchaser will be entitled to recover what he would have received had the representation been true (1) If a person is entitled to avail himself of an estoppel, he is entitled to use that estoppel as *matter of proof*, that is, as a means of showing that the facts covered by the representation were those which did in fact become its truth

says that the party sought to be estopped is not to be allowed to deny the truth of the representation It is of course, open to him to deny that he made the representation itself Lastly (3), this estoppel, arising as it does from mis conduct, is not mutual like other estoppels, and cannot be used against the party in whose favour it has arisen (4)

116. No tenant of immovable property, (5) or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and no person who came upon any immovable property by the license of the person in possession thereof, shall be permitted to deny that such person had a title to such possession at the time when such license was given

estoppel of tenant,

and of licensee of person in possession

Principle—These are instances of estoppel by agreement based on permissive enjoyment If *A* being in possession of land deliver the possession to *B* upon his request and upon his promise to return it, with, or without rent, at a specified time or at the will of *A*, *B* cannot be allowed while still retaining possession to dispute *A*'s title, because to allow him to do so would be to allow him to work a wrong against *A* by depriving him of the advantage which his possession afforded him and with which he would not have parted, but for the promise (or perhaps to speak more aptly the implied agreement) of *B* that he would hold it from him and in his place and stead (6) The estoppel of a tenant is founded upon the contract between him and his landlord The former took possession under a contract to pay rent as long as he held possession under the landlord, and to give it up at the end of the term to the landlord and having taken it in that way he is not allowed to say that the man whose title he admits and under whose title he took possession has not a title (7) There is no distinction between

(1) Bigelow *op cit* 6th Ed 710

(2) *Luchman Chunder v Kali Churn* 19 W R 292 297 (1873) v also *ib re* marks as to the necessity of pleading an estoppel In *Shahkh Hauf v Jagabandhu Shaha* 8 C W N ccxxvii (1904) a plea of estoppel was disallowed which had not been pleaded and as to which no issue was raised in the Court of first instance and see *Narsingdas v Rahimnabai* 28 B 440 (1904)

(3) Bigelow *op cit* 6th Ed 710

(4) v *ante* p 865

(5) A fishery is an incorporeal hereditament and is real or immovable property for the purposes of this section *Lakshman*

Nakhwa v Ramji Nakhwa 23 Bom L R 939 (1921)

(6) *Franklin v Merida* 35 Cal 558 (Amer) *per* Sanderson J cited in Bigelow *op cit* 6th Ed 569—571 The broad principle is that a person who has received property from a other will not be permitted to dispute the title of that person or his right to do what he has done Bigelow *op cit* 6th Ed 589 590 As to setting up of a *jus tertii* see *Mathura Prasad v Gobul Chand* 41 A 654 sc 17 A L J 805

(7) In *re Stringer's Estate* L R 6 Ch D 9 10 see *Duke v Ashby* 7 H & N, 602 Bigelow *op cit*, 506

a decree in his favour and was afterwards defendant in a suit on a prior mortgage of the said property, he was estopped from pleading that the mortgagor had been incompetent to execute the prior mortgage (1). An endorser cannot plead the validity of a Hundi as against the endorsee (2). The mortgagee who purchased at a sale in execution of his decree on the mortgage is bound by an estoppel that would have bound his mortgagor (3). It has been held that where a landlord in execution of a money decree causes the sale of an occupation holding and purchases it himself, he is not estopped from pleading non transferability without his consent in a subsequent suit brought by the mortgagor of the occupancy riyat, for since this section is exhaustive the English law of mortgage and a consequent estoppel is not applicable in such a case (4). In the case cited it has been held that where a landlord decree holder applies under section 162 of the Bengal Tenancy Act and obtains an order under section 163 of that Act, there is an assertion by him that the property is at least an occupation holding and he is bound by such representation (5). There is no estoppel when a grantor has only accepted an after acquired title temporarily and for this purpose of vesting it in another (6). Where a title arose prior to suit a mortgagor having only an equity of redemption cannot represent the mortgage (7). Where an alienation by a Hindu widow of her husband's estate for purposes other than those sanctioned by the Hindu law may be made with the consent of the reversioners interested in opposing the transaction, the consent of the next reversioners at the time of alienation will conclude another person not a party thereto who is the actual reversioner upon the death of the widow (8). Or, at least throw on him the *onus* of rebutting the inference of legal necessity (9).

When a person claims property as the representative of another the doctrine of estoppel cannot apply to representations made by any one except that other person (10). An estoppel can be availed of by the parties and their privies. The privy cannot be deprived of such benefit by the fact that since the time the representation was made and the privy of estate commenced the person to whom the representation was made and the person who made the representation have come to an arrangement contrary to the representation (11).

Between himself and such person or his representative Not only as has been already seen is the representative of the person estopped bound by the same estoppel as that which affects his predecessor in title, but the estoppel conversely also enures not only for the benefit of the person to whom the representation was actually made but also for the benefit of his successors in title. Therefore not only may the heir be bound by an estoppel affecting his ancestor but he may also claim the benefit of an estoppel which his ancestor might have claimed.

To deny the truth of that thing The estoppel by conduct operates by nature that is wherever it can so operate, specifically, and gives to the party entitled the rights he would have against the person estopped supposing the representation true. So if the

(1) *Tota Ram v Hargobind* 36 A 141 (1914) *Bakshi Ram v Lildhar* 35 A 353 (1913) *Bishambher Dayal v Parshadi Lal* 10 A L J 112 (1910)

(2) *Arunachellam Chettiar v Varayan Chettiar* 36 M L J 301

(3) *Kaldas Chaudhurs v Prasanna Kumar Das* 24 C W N., 269 s c. 30 C L J 496, 47 C 446

(4) *Asmatunnessa Akatun v Havendra Lal Bisar* (1908) 35 C 904

(5) *Abdul Sobhan Shakk v Nalabar Mandal* 17 C L J 652 (1913)

(6) *Prasanna Kumar Mookerjee v Sri Kanika Kout* 40 C 173 (1913)

(7) *Ramendra Dhondo v Malkapa* 40 B 679 (1916)

(8) *Bagrany Singh v Man born to Baksh Singh* P C (1907) Times L R v 24 p 46 For representation of reversioners by Hindu widow in *Res Judicata* see *Risal Singh v Ballant Singh* 37 A. 496 (1915)

(9) *Debi Prasad Chowdry v Golap Bhagat* F B 40 C., 721 (1913)

(10) *Runga Rao v Bhayamma* 17 M. 473 (1894)

(11) *Nalri Fial v Bajnath* S O L J. 454 s c 47 I C 934

representation is made on the sale of a security which the seller did not own, the buyer's rights are not limited to the recovery of the purchase money. If the purchaser will be entitled to recover representation been true (1) If a person estoppel, he is entitled to use that estoppel as *matter of proof*, that is, as a means of showing that the facts covered by the representation were those which did in fact actually exist (2) The representation, being a statement made by the other party, is evidence by way of admission of the fact to which it relates. It becomes conclusive evidence because the party claiming the estoppel affirms its truth, which the party estopped is not permitted to deny. The section only says that the party sought to be estopped is not to be allowed to deny the truth of the representation. It is of course, open to him to deny that he made the representation itself. Lastly (3), this estoppel, arising as it does from misconduct, is not mutual like other estoppels, and cannot be used against the party in whose favour it has arisen (4)

116. No tenant of immovable property, (5) or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and no person who came upon any immovable property by the license of the person in possession thereof, shall be permitted to deny that such person had a title to such possession at the time when such license was given

Estoppel of tenant,

and of licensee of person in possession

Principle—These are instances of estoppel by agreement based on permissive enjoyment. If A being in possession of land deliver the possession to B upon his request and upon his promise to return it, with, or without rent, at a specified time or at the will of A, B cannot be allowed while still retaining possession to dispute A's title, because to allow him to do so would be to allow him to work a wrong against A. If A has afforded him possession and B has taken possession (or perhaps to speak more fully, if A has afforded him possession and B has taken possession upon the contract under a contract and to give it up to A, and B has taken it to the landlord and having taken it in that way he is not allowed to say that the man whose title he admits and under whose title he took possession has not a title (7). There is no distinction between

(1) Bigelow *op cit* 6th Ed 710

(2) *Luchman Chunder v. Kal Churn* 19 W R 292 297 (1873) v also in remarks as to the necessity of pleading an estoppel. In *Shaikh Hanif v. Jagabandhu Shaha* 8 C W N 600 (1904) a plea of estoppel was disallowed which had not been pleaded and as to which no issue was raised in the Court of first instance and see *Narsingdas v. Rahumanbai* 28 B 440 (1904)

(3) Bigelow *op cit* 6th Ed 710

(4) v *ante* p 865

(5) A fishery is an incorporeal hereditament and is real or immovable property for the purposes of this section *Lakshman*

Nakha v. Ramji Nakha 23 Bom L R 939 (1921)

(6) *Franklin v. Merda* 35 Cal 558 (Amer) per Sanderson J cited in Bigelow *op cit* 6th Ed 569—571. The broad principle is that a person who has received property from another will not be permitted to dispute the title of that person or his right to do what he has done. Bigelow *op cit* 6th Ed 589 590. As to setting up of a *jus tertii* see *Mathura Prasad v. Gobul Chand* 41 A 654 sc 17 A L J 805

(7) In *re Stringer's Estate* L R 6 Ch. D 9 10 see *Duke v. Ashby*, 7 H & N, 602 Bigelow *op cit*, 506

the relation of a tenant and that of a licensee in whose case the law itself implies a tenancy and to whom the same principles apply (1)

Bgelow on Estoppel 6th Ed. Ch XVII Estoppel by Representation and *Res Judicata* by A Caspersz 4th Ed Ch XII Everest and Strode on Estoppel 208 Taylor Ev §§ 101—103 Cababé Principles of Estoppel

COMMENTARY.

Estoppel of tenant

As already stated this and the following section give instances of estoppel by agreement as the last deals with estoppel by misrepresentation. They are, however not exhaustive of this form of estoppel (2). A minor may be estopped. So where a minor has derived a benefit from a lease executed on his behalf by his *de facto* guardian the minor is estopped under this section from denying the title of the man in whose favour the lease has been executed (3). It has long been a well settled rule that neither a tenant nor any one claiming under him can dispute the landlord's title (4). And a person who has been let into possession as tenant by a plaintiff is estopped from denying the latter's title without first surrendering possession (5). This rule was acknowledged and acted upon in India prior to this Act (6) and is contained in this section. Enjoyment by permission is the foundation of the rule. Two conditions therefore are essential to the existence of the estoppel (i) possession (ii) permission. When these conditions are present the estoppel arises (7). It follows therefore that when there is no permissive enjoyment where the occupant is not under an obligation express or implied that he will at some time or in some event surrender the possession as in the case of the grantee in fee there can be no estoppel (8). It has been held by a Full Bench of the Madras High Court that a tenant who has executed a lease but has not been put in possession by the lessor is estopped from denying the lessor's title unless he can prove that he executed the lease in ignorance of some flaw in such title or through coercion misrepresentation or fraud (9). By the terms of the section the rule applies not only to the tenant but to his representatives and is operative throughout the continuance of the tenancy. The rule applies in favour of a landlord with an equitable title

(1) *Doe d Johnson v Bayt* 3 A & E 188

(2) *R v Clend* *Sarber-ar Clendra* 10 C W N 747 (1906) s c 3 C L J 102. As to co-sharers estoppel see *Baldeo Salai v Eaj Na dai Sala* 3 Pat I W 266 43 I C 359

(3) *Kanal Melis v Rasul Beg* 5 O L J 551 s c 48 I C 39

(4) Bgelow *op cit* 6th Ed 549 Taylor E §§ 101—103 *Doe d Knight v Smythe* 4 M & S 347 *Alchorne v Gomme* 2 Bing 54 see cases cited in W Hams Saunders i 55 ii 876 (Ed 1871) Bgelow *op cit* Ch XVII Caspersz *op cit* 4th Ed Ch XII *Lokorani v Bidya Ram Mahto* 53 I C., 43 (but he was just on landlord's status) As to adverse possession see *Kristomoni v Secretary of State* 3 C. W. N. 99 (1893)

(5) *Mithurajan v Sanna Samavayan* (1905) 28 M 526 15 M L J., 55 *Hiss Hunter v Ranjit Singh* P. C. 37 A 557 (1915) 4 I A 20 *Ganpat P. Mulian* 38 A 276 (1916) *Makham Singh v Basakhi Ramshah* 50 I C., 591

(6) *Jarajay Bose v Kadanb* 1 Dast 7 B L R 723 n (1869) *Farudet Dey v Babaj Ranu* 8 Bohn H C A C 15 (1871) *Ba ee Madh b v Thakoor Dass* B L R Sup Vol 588 F B (1866) *B rn & Co v Dusho Moyce* 14 W R 80 (1870) *Gourree Dass v Jaguna h Roy* 7 W R 25 26 (1867) *Moheet Chunder v Cooroo Prosad Marsh* 277 (1863) *Tr bah Ra clandra Pandit v Shekh G la Z lani H a ker* S C (1909) 34 B 379

(7) Bgelow *op cit* 6th Ed 550 *Bhaganta Bewa v Hummat B dyator* 24 C L J 101 (1916) *Panan Das Bhattacharjee v A Inadhub Saha* 44 C 71 (1917) B t see *I enkata Chetty v A yanna Goundan* F B 40 M 561 (1917) (estoppel from execution of lease before possession given)

(8) *Rup Chand v Sarber-ar Chand* 5 supra

(9) *I enkata Chetty v A yanna Goundan* F B 40 M 561 (1917) (Alalur Rah J I sent 22) See also *Makham Singh v Basakhi Ramshah* 50 I C., 591

only (1), an unnamed landlord letting by means of an agent (2), and one of several co sharers. If a person take a lease from one of several co sharers, he cannot dispute his lessor's exclusive title to receive the rent or sue in ejectment (3). The estoppel will also enure for the benefit of a lessor who has no title whatever, and the person let into possession will not be permitted to set up this want of title (4). The question of the lessor's title is foreign to a suit for rent or in ejectment against a lessee. And this is so, though the ostensible lessor is merely a trustee and liable to account to the *cestui-que trust* (5). But in another case, where a person acting as trustee of a temple assigned part of its lands on *lanam* and it was afterwards found that he had never been such trustee, it was held that the assignee was not estopped from denying his right to assign though estopped from denying the temple's title (6). In this country the principle that a tenant cannot dispute his landlord's title has been made to yield to the influence of the *benami* system. The tenant allowed to prove that the person for whom he was only a *benamidar* for a third party. And conversely where a landlord had accepted rent continuously from persons in whose names a lease had been taken for the benefit of their husbands, when the *benamidars* were unable to pay he was allowed to sue the persons really interested in the lease (8). A plaintiff having sued to obtain possession of certain land which the defendant held as tenant and in respect of which he had for some time when he became tenant to him the premises lease was found to be a mere *ben* estopped from asserting the tenancy, and under the circumstances was entitled to recover (9). And it was held by the Madras High Court that where a deed is executed by a tenant in favour of a person *benami* for another, the real owner and not the *benamidar* is the landlord whose title the tenant is estopped from denying under this section, and that in a suit by such *benamidar* for rent the tenant can deny

(1) *Board v Board* L. R. 9 Q. B. 53. See *Bigelow op cit* 362 363 538 539.

(2) *Fleming v Gooding* 10 Bing. 549.

(3) *Jais dji Sorabji v Lakshmiran Rajaram* 13 B. 323 (1888).

(4) *Tad an v Hennan* L. R. 2 Q. B. (1893) 168 170 and this is so though the tenancy be created by a deed which shows that the landlord possessed no legal estate. *Bigelow op cit* 6th Ed. 587—585 609 610. *Jolly v Arbuthnot* 4 DeG. & J. 274. *Morton v Woods* L. R. 4 Q. B. 293. *Duke v Ashby* 7 H. & N. 600. As to objection to validity of lessor's title on the ground of want of registration see *Shums Ahmad v Goolam Moheemood deen* N. W. P. H. C. 153 (1871).

(5) *Ja narain Bose v Kadambini Das* 7 B. L. R. 723 724 note (1869). *Mussamat Purna v Torab Ali* Wyman's Rep. 14.

(6) *Thuppan Nabudripad v Itichur Amma* 37 M. 373 (1914).

(7) *Donelle v Kedarnath Chuckerbutty* 7 B. L. R. 720 720 V. R. 352 (1871) but see contra *Ja narain Bose v Kadambini Das* 7 B. L. R. 723 note (1869). It is to be noted that the first mentioned case was decided prior to this Act and proceeded on the ground that the

technical doctrine of estoppel was not applicable to this country. But that doctrine has been sanctioned by the present section and according to the principle upon which it rests the question of the lessor's title is wholly foreign to a suit instituted against the lessee for rent. See *Moresh Chunder v Gooroo Pershad Ghose* Marsh. 377 (1863). *Cuthbertson v Irving* 4 H. & N. 758. *Mussamat Purna v Torab Ali* Wyman's Rep. 14. The principle however laid down in *Donzelle v Kedarnath Chuckerbutty* supra was reaffirmed in *Mussamat Indurbuttee v Shakh Mahboob* 24 W. R. 44 (1875). When there is a *benami* and real tenant the latter may be sued for the rent. As to suits by landlord when the ostensible tenant is a *benamidar* see *Heeralal Bukhshee v Rajkishore Moosoomdar* W. R. Sp. No. 58 (1862). *Judooath Paul v Prosunnath Dutt* 9 W. R. 71 (1863). *Prosunno Coomar v Koylash Chunder* 8 W. R. 429 F. B. (1867). *Bepinbehari Chowdhry v Ramchandra Roy* 5 B. L. R. 234 (1870). *Field Ev* 6th Ed. 397.

(8) *Debnath Roy v Gudadhur Deb* 18 W. R. 537 (1872).

(9) *Subuktulla v Hari* 10 C. L. R. 199 (1882).

his right to sue on the ground that he is not the person entitled for a *benamidar* as such has no right to sue unless he can show a legal right to sue under the general law (1)

Where the plaintiff sued for possession of a house, alleging the expiry of the lease on which the defendants held as tenants and the lower Court dismissed the suit being of opinion that the plaintiff had no title to the house when he granted the lease, and that it belonged to the defendants when they passed the lease, it was held, reversing the decree of the lower Court, that the defendants (tenants) having executed the lease could not deny the plaintiff's title as a ground for refusing to give up possession and the lower Court itself therefore could not go into the question (2)

A lease like other contracts is binding only on parties *sui juris*, and persons under disability not being bound by the contract, are not estopped to deny its validity (3) The estoppel of the tenant may rest upon the sole ground that he has received possession from the landlord. It is perforce an admission of some title in him, and by reason of the landlord's change of position the act is deemed a binding admission that he had sufficient title to make a lease. Where however the tenant *being already in possession* has made an attornment or acknowledgment of the tenancy, he may show that he did so through ignorance mistake or the like (4) The doctrine that the tenant cannot dispute his landlord's title is not confined to the action of ejectment (5) The estoppel applies to all matters connected with or arising out of the contract by which the relation of landlord and tenant was created. Where in a suit for rent of land the plaintiff alleged that he bought the land from the defendant and then after leased it to him year by year and the defendant totally denied the sale and the lease no question of title was held to arise on the pleadings because if the lease were proved the defendant would be estopped by this section from denying his landlord's title (6) The estoppel cannot, however, extend further and affect matters quite outside that contract (7)

The relation

In regard to the relation of mortgagor and mortgagee, without attempting to define it it is sufficient to say that when the mortgagor retains possession a relation is created similar to that of landlord and tenant, and the mortgagor is estopped to deny the title of the mortgagee (8) unless after a distinct disclaimer brought to the knowledge of the latter he has acquired a title by adverse possession (9) or unless the mortgage is void by Statute (10) Thus except where a mortgage is void by Statute, a mortgagor, is estopped from asserting that the property in question was trust-property which he had no right to mortgage (11) And this applies to a trustee for a public purpose (12) As between a mortgagor and a mortgagee neither can deny the title of the other for the purposes of the mortgage (13) The same principle applies in the case of trust (14) and to certain relations between vendors and purchasers (15) And

(1) *Kuffu Konan v Thirugnana Sano nandan Pillai* (1908) 31 M 461 following *Kith Pommall Rajali v Secretary of State for India* (1906) 30 M 745

(2) *Patel Kishor v Hargovan Man sukhi* 19 B 133 (1894)

(3) *Bgelow of cit* 6th Ed 533 534

(4) *Bgelow of cit* 6th Ed 565

(5) *Delany v Fox* 2 C B N S 768

(6) *Kaur v Hla Pru v C B N S 3 L R R 90*

(7) *Madras Hindu &c Fund v Ragun Chetti* 19 M 200 207 (1895)

(8) *Bgelow of cit* 6th Ed 588

(9) *Dee d Hgg netham v Barton* 11 A & E 307 314 *Partridge v Pere* 5

B & Ald 604 *Hichman v Hattman* 4 M & W 409 *Moss v Salmon* 1 Doug 29 727 *Pirch v Wright* 1 T R 323

(10) *Bgelow of cit* 6th Ed 589 589

(11) *Mahamaya Devi v Haris Haddar* 4 C 455 (1915)

(12) *Id*

(13) *Hulaya Subbaya v Vary-nappa* 1 Mmaja 36 B 185 (1912)

(14) *Bgelow of cit* 6th Ed 589 590

(15) *Id* 6th Ed 590 597 *Caswell of cit* 4th Ed Ch M Cen 180

Act ss 98 109 734 B Idomoye Dabee v Sistrum 4 C 47 (18 3)

Shankar Vural dhar v Molan La 11 B.

it may be broadly asserted that the assignee or licensee of any right accepted and acted under may be estopped to deny the authority from which the right proceeds (1). A landlord is also estopped from asserting that he had no title to let his tenant in. It is an application of the maxim that no man shall derogate from his grant. It must be taken against him that he had power to do what he purported to do. Hence the estoppel upon a vendor which precludes him from setting up his own want of title to defeat his own grant or sale, and hence the same estoppel upon the mortgagor of property (2).

The existence of a tenancy may be established by proof of a written or verbal contract under the terms of which the tenant was let into possession (3), or it may be inferred from the circumstances of the case such as the payment of rent (4), admission of the relation in a deposition in a former suit (5),

The terms
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for any term exceeding a year and a lease reserving a yearly rent (8). The fact that a rent is reserved at a stated sum per year does not conclusively prove that the tenancy is from year to year (9). No difficulty arises where an actual demise is proved and it is shown that the tenant has taken possession thereunder. The permissive occupation raises an estoppel. But other acts of the tenant such as payment of rent stand on a different footing. Though such an act operates as an admission, it is like all other admissions rebuttable and not conclusive (10).

704 *Ganges Manufacturing Co v Souruj mull* 5 C 669 (1880) *Greenwood v Holgate* 12 B L R 42 *LeGey v Harvey* 1 L R 8 Bom 501 (1884) *G I P Ry v Hamandas Ramkison* 14 B 57 (1889) *Premji Trikamdas v Madhavji Munji* 4 B 457 *Br Bhaddar v Sarju Prasad* 9 A 681 20 I A 103 *Purnanundass Jirandass v Cormack* 6 B 326 (1881)

(1) *Below of cit* 6th 9d 597 598 *Caspersz op cit* 4th Ed s 190 See *La ergne v Hooper* 8 M 149 (1884)

(2) *Cababe Estoppel* 43 44
(3) See the judgment of Field J in *Loda Mollah v Kally Dass* 8 C 238 241 (1881) where the various ways in which the relation may exist are fully discussed as also the defences to an action for rent

(4) *Rajk shore Surma v Girja Kant* 25 W R 66 (1875) *Vasudev Daji v Babaji Ranu* 8 Bom H C R 175 (1871) *Banee Madhub v Thakoor Dass* B L R Sup Vol F B 588 590 (1866) *Durga v Jhngiri* 7 A 511 515 (1885) *Vithaldas v Secretary of State* 26 B 410 (1901) *Gravenor v Woodhouse* 1 Bing 38 43 [payment of rent in all cases furnishes a strong presumption against the tenant and it is always a good prima facie case for the landlord] *Rogers v Pulcher* 6 Taunt 602 *Cooper v Blandy* 1 Bing N C 45 *Harvey v Francis* 2 Maclean & Robnson s Sc App 57 *Loda Mollah v Kally Dass* 8 C 238 241 (1881) See as to the establishment of tenancy by acceptance of rent *Durga v Jhngiri* 7 A 51 878 (1885) *Mohesh*

Clunder v Ugra Kant 24 W R 127 (1875) *The Government v Greedharee Lall* 4 W R 13 (1865) the acceptance of rent must be with notice and knowledge to bind the landlord *Murtunjaya Sircar v Gopal Chundra* 2 B L R A C J 131 (1868) *Gour Lal v Rameswar Bhumk* 6 B L R App 92 (1870) but a landlord will be estopped by acceptance of rent with full knowledge of the facts *Gunga B shen v Ram Gut* 2 Agra 48 (1867) Contract to pay a certain rent may be implied from payment for a number of years *Venkatagopal v Rangappa* 7 M 365 (1883) The service of notice of ejectment under s 36 Act XII of 1881 is a conclusive admission of the existence of a tenancy *Baldeo Singh v Imdad Ali* 15 A 189 (1893) See now N W P Act III of 1901

(5) *Ohboy Gobind v Beejoo Gobind* 9 W R 162 (1868)

(6) *Loda Mollah v Kally Dass* 8 C 238 241 (1881) *Cooper v Blandy* 1 Bing N C 454

(7) *Loda Mollah Kally Dass supra* *Fenner v Diplock* 2 Bing 10 *Trimbak Ra chandra Pandit v Sheikh Gulam Zila i Wa ker* A C (1909) 34 B 329

(8) *Sarat Chandra Dutt v Jadab Chandra Gosuan* 44 C 214 (1917) per Sanderson C J and Mookerjee J

(9) *Durga v Coberdhan* 20 C L J 448 (1914) *Gobinda v Duarkanath* 20 C L J 455 (1914)

(10) *Banee Madhub v Thakoor Dass* B L R F B Sup Vol 588 (1866)

And though the tenant is often required to make out a strong case he may show that the payment of rent or other act on his part was done through ignorance fraud misrepresentation mistake or coercion, and thus rebut the inferences arising from his act which tend to prove the existence of the relation asserted. He may show on whose behalf the rent was received and when it has been paid under a mistake or misrepresentation the tenant is not estopped from resisting further payment after discovery of the misrepresentation or mistake (1)

In order to make the payment of rent operate as an estoppel it is essential to show that the payments have been made all for rent due in respect of land held as a tenant, and if upon the facts of the case it is plain that the payments have been made not for rent but on another account the doctrine of estoppel arising from payment of rent has no place (2) A tenant may always explain, and thereby render inconclusive acts done through mistake or misapprehension (3) So a person is not estopped from showing that a person to whom he has paid rent is not the legal representative of the person from whom he took possession (4) But a person will be concluded by the unexplained payment of rent from disputing the title of the person to whom rent has been so paid (5)

The relation of landlord and tenant once created between certain parties continues as between them and their representatives in title until it is proved to have ceased (6) The ordinary case of a tenant holding over after the expiry of his tenancy is not in itself and in the absence of special circumstances treated as a case of adverse possession (7) And the Privy Council has held that the estoppel applicable to a tenant holding over after notice to quit (8) The possession of a tenant is being adverse to the title of his landlord in its own nature and can be applied in a suit by the latter against the former (9) Where a plaintiff sues to eject a defendant alleged that he had been a tenant but was holding over and failed to prove the tenancy which the defendant denied it was held that the possession was adverse and the suit barred by limitation (10) But in

1. *See* *Chas. v. W. v. W.* 10 Q.B. 100 (1891) *per* Lord Esher M.R. and Lord Macnaghten. *See also* *W. v. W.* 10 Q.B. 100 (1891) *per* Lord Esher M.R. and Lord Macnaghten. *See also* *W. v. W.* 10 Q.B. 100 (1891) *per* Lord Esher M.R. and Lord Macnaghten. *See also* *W. v. W.* 10 Q.B. 100 (1891) *per* Lord Esher M.R. and Lord Macnaghten.

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6. *See* *W. v. W.* 10 Q.B. 100 (1891) *per* Lord Esher M.R. and Lord Macnaghten. *See also* *W. v. W.* 10 Q.B. 100 (1891) *per* Lord Esher M.R. and Lord Macnaghten. *See also* *W. v. W.* 10 Q.B. 100 (1891) *per* Lord Esher M.R. and Lord Macnaghten.

7. *See* *W. v. W.* 10 Q.B. 100 (1891) *per* Lord Esher M.R. and Lord Macnaghten. *See also* *W. v. W.* 10 Q.B. 100 (1891) *per* Lord Esher M.R. and Lord Macnaghten. *See also* *W. v. W.* 10 Q.B. 100 (1891) *per* Lord Esher M.R. and Lord Macnaghten.

8. *See* *W. v. W.* 10 Q.B. 100 (1891) *per* Lord Esher M.R. and Lord Macnaghten. *See also* *W. v. W.* 10 Q.B. 100 (1891) *per* Lord Esher M.R. and Lord Macnaghten. *See also* *W. v. W.* 10 Q.B. 100 (1891) *per* Lord Esher M.R. and Lord Macnaghten.

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a case in the Calcutta High Court where the plaintiff sued to eject the defendant as a trespasser holding over after notice to quit and the defendant alleged a settlement under which he had been in possession for fourteen years it was held that on this plea his possession had never been adverse to the extent of the entire interest of the owner (1) An alleged tenant who is in fact a trespasser may set up a case of tenancy and also raise the issue of limitation (2) The possession of a tenant is in the eye of the law the possession of his landlord (3) Where land is leased to a person for life, and upon the latter's death, his heirs continue in possession without obtaining a fresh lease or paying any rent to the landlord, the heirs, though not in possession as tenants, are not trespassers. Their possession is permissive and not adverse until they expressly set up a title of ownership in the property (4) And in the undermentioned case it was held by the Allahabad High Court that possession acquired during the continuance of a lease will not ordinarily be adverse possession as against the lessor, until at any rate, such time as the lessor becomes entitled to possession (5) When the relationship of landlord and tenant has once been proved to exist the mere non payment of rent though for many years is not sufficient to show that the relationship has ceased, and a tenant who is sued for rent and discontinuance of payment of rent does not constitute a dispossession within the meaning of the ninth section of the Specific Relief Act (7) The mere resumption of a *lakhtay* tenure by Government does not dissolve the contract between the zemindar and tenant. The latter has the option to determine his tenancy, or he may consent that the amount of revenue which the landlord must pay to Government or a portion of it shall be added to his original *jumma* (8) Where a tenant has by the direction of his landlord paid rent to a third person, the landlord is estopped from recovering so much of the rent as the tenant has paid or made himself liable to pay in consequence of that representation (9) A land whom he has required self (10) In the under ng accepted rent from ' them (11) According to English law term even less than the existing one, s tenancy, and by the acceptance of

(1) *Moti Lal v. Kali Mondur* 19 C L J 321 (1913) *per* Mookerjee J

(2) *Dinanoyce v. Doorga Pershad* 12 B L R 274 (1873)

(3) *Gursh Chunder v. Bhagwan Chunder* 13 W R 191 (1869)

(4) *Krishnaji Ra chandra v. Antaji Pandurang* 18 B 256 (1893) *Hellicr v. Silcox* 16 L J Q B N S 295 Dis claimer of a landlord's title after suit brought in the pleading does not of itself determine the tenancy and render notice to quit unnecessary *Ambabai v. Bhanu Bin* 21 B 759 (1895) See *Venkaji Krishna v. Lukshan Desai* 20 B 354 (1895)

(5) *Tiaman Pande v. Malaraja of Langanagram* (1907) 29 A 593 following *Muhamad Husan v. Mut Chand* (1904) 27 A 395 dissenting from *Gobinda Naha Saha Choudry v. Surja Kantha Lalari* (1899) 26 C 460

(6) *Rango Lal Abdool Guffoor* 4 C 317 (1878) 3 C L R 119 *Tiru Cluran Perumal v. Saigudic* 3 M 118 (1881) *Tutia v. Sadasiw* 7 B 40 (1882) *Troylucklo Tarinee v. Mol na Chandra* 7 W R 400 (1867) [the mere omission to pay rent does not constitute adverse possession] *Poresk Narain v. Kasi Chander* 4 C 661 (1888)

(7) *Tarini Molai v. Singa Prosad* 14 C 649 (1883) *Dhansput Singh v. Mahomed Kasan* 24 C 296 304 (1896)

(8) *Mt Farlar v. Amnissa* B L R Sup Vol F B 175 (1865)

(9) *White v. Greenish* 11 C B N S 209 as to conduct not sufficient to bar landlord's rights see *Ramblat v. Bababhat* 18 B 260 (1893)

(10) *Douglas v. Cooper* 2 Q B 256

(11) *Chanda Coondar v. Hari Das* 4 C W N 608 (1900)

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 ... as con-
 firmatory of the tenure, and the fact of the tenure being an old one is occasion-
 ally, though not always, mentioned therein. Surrender, however, both express
 and implied, has been recognised by the Transfer of Property Act (IV of 1882,
 section 111), and it is conceived that what may amount to a surrender in any
 particular case will always in this country be a question of intention, and that
 if in fact the tenant by his acceptance of a fresh lease intended to, and did
 surrender his old lease, the ordinary rule of estoppel will apply, but there
 will be no estoppel if the fresh lease be, and was intended to be, confirmatory
 only of the preceding one (3)

"Persons
 claiming
 through
 such
 tenant"

As in other cases the estoppel binds the tenant's privies as well as the
 tenant(1) so if the title of the original possessor of land by
 possession of land by also persons claim-
 undertenant(7), or as yet third persons, not claiming possession of the land under the tenant, are not
 so estopped. A person therefore who lets premises, to which he has no title,
 to a tenant, cannot distrain for arrears of rent due from the tenant the goods of
 a third person which happen to have been brought on to the premises by the
 tenant's license (10)

"Persons
 claiming
 through
 landlord"

The question whether the relation of landlord and tenant exists may have
 to be decided under one of two possible cases, (i) where the plaintiff has let the
 defendant into possession of the land, (ii) when the plaintiff is not himself the
 person who lets the defendant into possession, but claims under a title derived
 from the person who did. This section applies to the first case and stops the
 title. In the second case of derivative title, sale, devise, lease or by inheritance,
 when the plaintiff claims by derivative title, really in
 the against
 the claiming
 under the original lessor. Thus in the case cited below(12) the defendant hired
 apartments by the year from one W, who afterwards let the entire house to the
 plaintiff. In an action by the latter against the defendant for use and occupa-
 tion, it was held that the defendant having used and occupied the premises under
 a lease from W was not competent to impeach his title or that of the plaintiff

(1) As to surrender, see *Bigelow op cit.*, 6th Ed 567, 568 *Reed v Lyon*, 13 M & W 285

(2) *Fiell Iv*, 6th Ed 398 referring to *Ram Chunder v Jugheschunder*, 12 B L R., 22 (1873), *Roy Odooyte v Ubhurun Roy*, 4 W R., Act X, 1 (1865) *Puddo Monce v Jholla Polly*, 7 W R 283 (1867)

(3) See *Caspersz, op cit.*, 4th Ed, p 253

(4) *Bigelow op cit* 6th Ed 534 the doctrine of privity is illustrated by *Doe d Bullen v Mills* 2 A & E. 17, *Rennie v Johnson* 11 Ing 147, *London & F R Ry Co v West*, L. R., 2 C P., 553 (1867)

(5) *Barwick v Thomson* 7 T R 488
 (6) *Doe d Bullen v Mills* 2 A & E, 17
 (7) *Taylor v Needham*, 2 Taunt 278

(8) *Doe d Spencer v Beckett* 4 Q B., 601

(9) *Doe d Johnson v Bayly* 3 A. & E 189

(10) *Pasupati v Narayana* 13 M 335 (1889)

(11) *Tadman v Henman* L. R. (1893) Q B., 163 See L. Q R Vol 16, 507

(12) *Lodai Mollah v Kally Dass* 8 C., 238 241 243 (1891) See *Mahara v Jai-fur v Surjan* 44 V 671 (1922)

(12) *Kennel v Robinson* 1 F R 147

who claimed through him. Further an attornment to one claiming under the original lessor leaves the tenant ordinarily in precisely the same position (so far as the question of the estoppel to deny the title of the lessor is concerned) as he was with the original landlord, he cannot dispute the title in the one case more than the other (1). Whether, however, there be an attornment or not, the tenant may always show that the claimant has no *derivative* title from his original lessor or that the derivative title is defective, or that an attornment made by him to the person claiming under the original lessor was made under the influence of fraud, or mistake or the like (2). Thus though the lessee of *A* will be estopped to deny the title of *A* from whom he received possession he will not be so estopped should *A* assign the premises to *B*, from disputing *B*'s title by showing either that *A*'s title was not such a one as would enable him to pass a legal estate to *B*, or that even if it was such, *A*'s title had determined (3). In such cases the title of the landlord who let the tenant into possession is not impeached, but only the title of him who claims to be the successor of the landlord. Without denying the landlord's title, the derivative title of his alleged successor may be impeached in several ways. It is clear, firstly, that if a man takes land from one person and afterwards pays rent to another, believing that other to be the representative of the person from whom he took the land, he is not estopped from proving that the person to whom he so paid rent was not the legal representative of the person from whom he took, for example if a man pays rent to another believing him to be the heir at law of his deceased landlord, and afterwards discovers that he is not the heir at law, or that the landlord left a will the tenant in a suit for subsequent arrears of rent would not be estopped from showing that he paid the former arrears under a mistake, and that the person to whom he so paid had no title (4). It may be shown that the claimant is a stranger to the premises, and that the person to whom again the tenant in possession will not validate the title of his original landlord may transfer thereof to the claimant (6). So also it may be shown that the original lessor's title was not such a one as would enable him to pass the legal estate to the plaintiff (7), or that the original lessor's title had determined (8). If again a tenant being already in possession of the premises executed a lease in favour of a stranger to the title or a person claiming a derivative title from the last owner, he so given the cases above mentioned that the person whose title is disputed is not the person who let the tenant into possession, and is not therefore a person in favour of whose own title the estoppel operates. The words "at the beginning of the tenancy" in this section, only apply to

(1) *Trimbak Ramchandra Pandit v Shekh Gulam Zilani Waiher* A C (1909) 34 B 329

(2) *Bigelow op cit* 6th Ed 577—579
580 *Gourie Dass v Jagunnath Roy* 7 W
R 25 26 (1867) *Lall Mahomed v Kalla*
nus 11 C 519 (1884)

(3) *Doe d. Higginbotham v Barton* 11 A & E 387 the tenant may always show that the assignment was ineffectual to pass the lessor's title *Hibourn v Fogg* 99 Mass 1 (Amer) citing the last and other cases *Bigelow op cit* 6th Ed 580 581 *note*

(4) *Barce Madhub v. Thabur Dass B*
L R Sup Vol F B 588 590 (1866)
Gouree Das v Jagunnath Roy 7 W R
25 26 (1867)

(5) Bigelow *op cit* 6th Ed 578 579
580 cf *Cornish v Seagrell* 8 B & C 471

(6) *Accidental Death Ins Co v Mac kenzie* 10 C B N S 810 *Ranee Tilles sree v Ranee Asmedh* 24 W R 101 (1875) [A tenant is not prevented from questioning the title of the alleged assignee of his admitted landlord]

(7) *Doc d Higginbotham v Barton* 11
A & E 307

(8) *Doe d Higginbotham v Barton* 11 A & E 307 *Lall Mahomed v Kallanus* 11 C 519 (1884) in this last case it was alleged that the title of the person under whom the *Jote* had originally been held had expired owing to the execution of a deed of : : *angsatatra*

(9) *Lali Malomed v. Kallanus* supra

cases in which tenants are put into possession of the tenancy by the person to whom they have attorned, and not to cases in which the tenants have previously been in possession (1). A tenant further is not estopped to allege that he was let into possession under a title since acquired by him, under which subordinately the landlord claims (2). When moreover the tenant being already in possession has attorned or paid rent or otherwise acknowledged the tenancy, he may show that he did so through ignorance (3), fraud (4), misrepresentation (5) mistake (6) or coercion (7), and if induced to attorn and take a lease by these means, he may dispute the title of the person claiming to be his lessor (8). In a case in the Bombay High Court where the defendant had purported to resign his occupancy rights in a *khots* to the plaintiff who was one of the *khots*, and had at the same time attorned to him, accepting a lease for five years, it was held that the resignation and lease were part of the same transaction and tainted with illegality and that the parties were in *pari delicto* and the plaintiff could not estop the defendant from showing the illegality of his title, since there is no estoppel against an Act of Parliament or in this country against an Act of the Legislature (9).

* Continuance of the tenancy

Although a tenant may not, during the continuance of the tenancy, deny that his landlord had a title at the beginning of such tenancy, he may show that his landlord's title has expired or determined, (10) for this section only refers to the title at the beginning of the tenancy and operates as an estoppel during the continuance of the tenancy (11). In such a case he does not dispute the title but confesses and avoids it by matter *ex post facto* (12). Justice requires that the tenant should be permitted to raise his plea, for a tenant is liable to

(1) *Ib* see *Sietarasia Paju v Bayan Lal Pantidlu* 17 M 278 (1894) Bigelow on est 6th Ed 569 571. As to what constitutes a letting into possession see Taylor Fv § 103.

(2) *Ford v Ager* 2 H & C 279.

(3) *Jew v Wood* Cr & P 185. *Fenner v Diplock* 2 Bing 10. *Gregory v Dodge* 3 Bing 474 followed in *Ketu Dass v Surendra Nath* 7 C W N 596 (1903) see *Jesungbis v Hatays* 4 B 79 (1879) *Brijonath Choudhry v Lall Meel* 14 W R 391 (1870).

(4) Bigelow on est 6th Ed 569. *Franklin v Merila* 35 Cal 558 (Amer). *Doe d Barlow v Higgins* 4 Q B 367.

(5) *Doe d Pletyn v Brown* 7 A & E 447. *Gratenor v Woodhouse*, 1 Bing 38 43.

(6) *Jew v Wood* supra. *Rogers v Pitcher* 6 Taunt 207 followed in *Ketu Dass v Surendra Nath* 7 C W N 596 (1903) followed *Doe d Pletyn v Brown* 7 A & E 447, *Cornish v Searell* 8 B & C 471. *Gratenor v Woodhouse* 1 Bing 38. *Jahalfaz v Secretary of State* 26 B 410 (1901) [admission of payment of rent raises a *prima facie* presumption of title and throws the onus on the other party of showing that it was made by mistake]. For a case under s 60 of the Bengal Tenancy Act see *Durga Das v Samash Akon* 4 C W N 606 (1895).

(7) *Collector of Allahabad v Suraj Butsh* 6 N W P 333 (1874), *Lall Mahomed v Fallans* 11 C 519 (1835).

(8) Bigelow on est 6th Ed 565 569.

The tenant or his assignee it may then be broadly stated is not estopped to explain the circumstances under which being already in possession he has made an attornment to the plaintiff *ib* 6th Ed 565 569 570.

(9) *Shirdhar Balkrishna v Babaji Muje* 38 B 709 (1914).

(10) As by proving eviction by title paramount *Ram Chandra Chatterji v Pramathanath Chatterji*, 35 C L J 146 (1922).

(11) *Ammu v Ramkrishna* 2 M 22 (1879) *Subbaraya v Arishnappa* 12 M 426 (1888) the English authorities are numerous see *Mountjoy v Collier* 1 E & D 630 640. *Hopcraft v Keys* 9 Eng. 613. *Gratenor v Woodhouse* 1 Bing 38. *Lea v Moss* 1 Bing 360. *England v Syburn v Slade*, 4 T R 682. *Claridge v Mackenzie* 4 M & Gr 143. *Doe d Marriott v Edwards* 5 B & Ald 106. *Doans v Cooper* 2 Q B 256, and *Burn & Co v Bushomoyee Dossee* 14 W R 95 (1870) *Mohan Mahtoo v Meer Shumsool* 21 W R 5 (1873). The defendant may show that the plaintiff's title has expired or has been defeated by title paramount as for example that the plaintiff's tenure has been avoided by sale for arrears of revenue. *Iodas Mollah v Kally Dass Roy* 8 C 239 440 241 (1831) or eviction by title paramount *Ram Chandra Chatterji v Pramathanath Chatterji*, 35 C L J 146 (1922).

(12) *Field Fv* 6th Ed 394.

the person who has the real title and may be forced to make payment to him, and it would be unjust if, being so liable, he could not show the expiry or determination of his landlord's title as a defence (1). In a case in the Madras High Court where a person purporting to be *dharmakarta* of a temple granted a lease of the temple property and during the tenancy, was held, in a separate suit, not to be the rightful *dharmakarta*, but the tenant did not attorn to his successor and was not evicted by him. It was held in a suit by the lessor for rent that the tenancy had not been determined and this section estopped the tenant from denying his title (2). Although a tenant may show that his landlord's title has expired, yet if he enters on a new tenancy he shall be bound, but before he can be so bound, it must appear that he was acquainted with all the circumstances of the landlord's title. The landlord, before he enters into a new contract, must explain to the tenant that his former title is at an end (3). It is well settled that a tenant in possession cannot even after the expiration of his lease deny his landlord's title without actually and openly surrendering possession to him or being evicted by title paramount, or attorning thereto or at least giving notice to his landlord that he shall claim under another and a valid title (4). A tenant in possession cannot, even after the expiration of the tenancy, deny his landlord's title without actually and openly surrendering possession to him. A tenant who has executed a lease but has not been let into possession by the lessor, is estopped from denying his lessor's title in the absence of proof that he executed the lease in ignorance of the defect in his lessor's title or that his execution of the lease was procured by fraud, misrepresentation or coercion (5). The tenant must give up possession to the landlord, and then if he has any title *aliunde*, that title may be tried in a suit or ejectment brought by him against his former landlord (6). A tenant who has been let into possession by a landlord under a lease for a term of years is bound to surrender it to such landlord at the expiration of such lease, even apart from any covenant by the tenant to surrender. He cannot set up a *jus tertii* in a third person having a title paramount, unless during the period of the tenancy there has been an ouster by the person having the title paramount, so as to determine the original lessor's right at the date of the lease (7). Adverse action taken by a third party whether that party be the Government, or some other person, or of landlord denying the title of one person cannot alter the character of his possession and make it adverse to the landlord by going over to another person and paying rent to him (9). A very important qualification of the rule of the tenant's estoppel prevails in the case of an actual disclaimer. If the tenant disclaims to hold of his lessor, and notice of the fact is brought home to the lessor, the tenant's possession then becomes adverse, the lessor may at once eject him from the premises, and if he fails to do so before the period of Limitation has expired, the tenant may then set

(1) *Maintjoy v Collier* 1 E. & B. 630, 640. See *Goponund Jha v Lalla Gobind* 12 W. R. 109 (1869) [when a tenant is sued for rent he can set up eviction by title paramount to that of his lessor as an answer and if evicted from part of the land an apportionment of the rent may take place]. *Lodai Mollah v Kelly Dass* 8 C. 241, 242 (1881). As to what constitutes eviction see *Dhunput Singh v Mahomed Karim* 24 C. at p. 300 (1896).

(2) *Detalraju v Mahomed Jaffer Saheb* 36 M. 53 (1913). But see *Thiruppan Nambudripad v Illichiri Amma* 37 M.

373 (1914) (tenant held not estopped).

(3) *Fenner v Duplock* 2 Bing. 10.

(4) *Bigelow op cit* 6th Ed. 562.

(5) *Makham Singh v Basakhi Ram shah* 50 I. C. 591.

(6) *Vasudev v Daji Babaji* 8 Bom. H. C. R. 175 (1871). *Bilas Kunwar v Desraj Ranjit Singh* P. C. 37 A. 557 (1915).

(7) *Bankalal Vittel v Chidramokkansa* 15 Mad. L. J. 368 (1905).

(8) *Kunhunn Menon v Kannan Thava* 45 I. C. 656.

(9) *Abdül Hakim v Pana Mia Miaji*, 51 I. C. 494.

up his own title acquired by adverse possession or the title of any other person under whom he claims to hold. But he cannot set up such title in an action brought by the lessor before the expiration of the period of Limitation (1)

* At the beginning of the tenancy *

These words only apply to cases in which tenants are put into possession of the tenancy by the person to whom they have attorned, and not to cases in which the tenants have previously been in possession. (2) Where, however, in a suit for rent the tenant denied the execution of the *kabuliyat* propounded

case that in *Lal Mahomed v Kallanus* no question was raised or decided as to what, if any, limitations there are of the tenant's privilege to deny the title of his lessor after attornment when he was not inducted by such lessor, and that it was not intended to lay down that a person in occupation of land may select his rent receiver and execute a solemn agreement promising to pay him rent, and pay him rent for a time with full knowledge that he had no right to the land, and thereafter at any time decline to pay him rent, pleading want of title in him, and without attempting to show any other circumstances which would invalidate the contract of tenancy. Certain property was mortgaged in 1884. In 1889 the appellant took from the mortgagors and another person a lease of certain lands which included a portion of the mortgaged property. In a suit by the mortgagee on his mortgage to which the appellant was made a party defendant, it was held that though as between the lessors and lessee under that lease, it might well be that the lessee, who was represented by the appellant, was estopped from saying that, at the date of that lease, the share mentioned in it was not the share of the lessors, yet that the appellant was not, owing to the lease taken by him in 1889, estopped from showing that the mortgagors were not entitled to the whole of the mortgaged property at the time the mortgage was executed in 1884, i.e., five years before the lease was taken by the appellant (4). A Full Bench of the Madras High Court has held that the tenancy and the estoppel under it begin at the execution of the lease before possession is given (5).

Licensee

The rule of the tenant's estoppel prevails against one who is in possession of land under a mere license (6). The rule as to claiming title applied to the case of a tenant, extends also to that of a person coming in by permission as a mere lodger or as a servant. There is no distinction between the case of a tenant and that of a common licensee. Both have been let into possession by the act of the landlord, and the licensee by asking permission admits that there is a title in the landlord, and the law under such circumstances implies a tenancy (7). The case last cited was an ejectment in which it appeared that the defendant applied to the plaintiff then in possession of the premises for the privilege of getting vegetables from the garden, and that having obtained the keys he fraudulently took possession and set up a claim to the land. The Court refused to hear it (8).

(1) Bigelow, *op cit*, 6th Ed 578

(2) *Lall Mahomed v Kallanus*, 11 C 519 see *Seetharama Rayu v Bayanna Pantulun*, 17 M, 278 (1894)

(3) *Ketu Dass v Surendra Nath*, 7 C W N 596 (1903)

(4) *Prosunno Kumar v Mahabharat Saha*, 7 C W N, 75 (1903), as to adverse possession see *Fatleh Singji v Ramani*, 5 Bom L R, 274 (1903)

(5) *Venkata Chetty v Aiyanna Goundan*, F B 40 M, 561 (1917) (Abdur Rahim

J dissenting)

(6) Bigelow *op cit*, 6th Ed, 586, *Doe d Johnson v Baytup*, 3 A & E, 188, *Muthunayan v Sinna Samadayan* (1905) 28 M, 526. See for position of licensee *Moti Lal v Kalu Mondar*, 19 C. L J 321 (1913)

(7) *Doe d Johnson v Baytup*, 3 A & E, 188

(8) See also for another example of the licensee's estoppel *Gour Hari v Amrunnissa Khatoon*, 11 C L R, 9 (1881), see,

117 No acceptor of a bill of exchange shall be permitted to deny that the drawer had authority to draw such bill or to endorse it, nor shall any bailee or licensee be permitted to deny that his bailor or licensor had, at the time when the bailment or license commenced, authority to make such bailment or grant such license

Estoppel of acceptor of Bill of Exchange, bailee or licensee

Explanation 1—The acceptor of a bill of exchange may deny that the bill was really drawn by the person by whom it purports to have been drawn

Explanation 2—If a bailee delivers the goods bailed to a person other than the bailor, he may prove that such person had a right to them as against the bailor

Principle—These are further instances of the estoppel by agreement. The acceptance of a bill amounts to an undertaking to pay to the order of the drawer but the transaction would be idle if after having so undertaken the acceptor were allowed to set up that the drawer had no authority to draw the bill. He is therefore precluded from doing so, for to allow him to do so would be to allow him to contradict that which his act of acceptance really imports (1). The estoppel of bailee and licensee is analogous to that of landlord and tenant and is based on similar principles (2).

Bigel
and *Pes J*
Law of E

115 252 262 412 Act XXI of 1881 (Negotiable Instruments) Ed by M D Chalmers (1913) Cababe Principles of Estoppel (1888)

COMMENTARY.

Estoppels in the case of negotiable instruments are instances of estoppel by agreement or contract. Rules such as those contained in this section may be called estoppels but they are estoppels springing from the nature of the transaction founded upon mercantile custom and may now be regarded as Statutory estoppels (3). This section is in accordance with English Law (4) except as to the first Explanation. Under the terms of the latter the acceptor may show that the signature of the drawer is a forgery, while in England he is not allowed to do so for it is held that he is bound to know his own correspondent's signature (5). And in the undermentioned case it was held by the Calcutta High Court that no person can claim a title to a negotiable instrument through a forged endorsement for such an endorsement is a nullity (6). This section is supplemented by sections 41 and 42 of the Negotiable Instruments Act (XXVI)

Estoppel of bill of exchange

as to licenses Act V of 1882 (Easements)
ss 52—56

(1) Cababe Estoppel 44 *Rup Chand v Sarbeswar Chandra* 10 C W N 747 (1906) s c 3 C L J 629

(2) *Rup Chand v Sarbeswar Chandra* supra

(3) *Below op cit* 6th Ed 519—539
Caspersz op cit 4th Ed Ch VII Chalmers on Bills of Exchange 8th Ed 210—211

(4) See Taylor Ev § 851

(5) *Sanderson v Coleman* 4 M & Gr 209 as to estoppels arising out of adoption of forged signatures see *Brook v Brook* L R 6 Ex 89 99 *Aspitel v Bryan*, 3 B & S 474 492, *Mackenz v British Linen Co* L R 6 App Case 109

(6) *Banku Behari Sirdar v Secretary of State for India in Council* (1908) 36 C 239 following *Hunsray Purmand v Ruttonji Waly* 24 B 65 and dissenting from *Chandra Kalee Dabee v Chapman* 32 C 799

of 1881), which provide for the liability of the acceptor in the case of a forged indorsement and of a bill drawn in a fictitious name (1) Other sections define the position of the maker of a note (2), or cheque (3) an acceptor before maturity (4) the drawer until acceptance (5) the acceptor (6) and indorser (7)

Sections 118—122 of Act XXVI of 1881 (as amended by Acts V of 1914 and VIII of 1919) enact special rules of evidence with regard to negotiable instruments There are certain presumptions as to consideration date time of acceptance, time of transfer order of indorsement stamp and as to the holder being a holder in due course (8) On proof of protest the Court will also presume the fact of dishonour (9) The same Act then proceeds to enact three cases of estoppel against the maker of a note the drawer of a bill or cheque the acceptor of a bill, and the indorser which are here reproduced

No maker of a promissory note and no drawer of a bill of exchange or cheque and no acceptor of a bill of exchange for the honour of the drawer, shall in a suit thereon by a holder in due course be permitted to deny the validity of the instrument as originally made or drawn (10)

No maker of a promissory note and no acceptor of a bill of exchange payable to or to the order of, a specified person shall in a suit thereon by a holder in due course be permitted to deny the payee's capacity, at the date of the note or bill to indorse the same (11)

No indorser of a bill of exchange shall be liable thereon by a subsequent holder in due course to contract of any prior party to

Section 20 deals with inchoate instruments (13) As to estoppels arising out of negligence and agency in connection with negotiable instruments see note below they are but instances of the general estoppel by omission to which reference has been made in section 115 *ante* (14)

The *bond fide* holder for value of a forged *hundī* to whom after it had been dishonoured it had been transferred by indorsement by the payees who at the time of indorsement knew that the *hundī* was forged sued the payees on the *hundī* to recover the amount he had paid them for it *Held* that the payees were estopped from setting up the forgery of the *hundī* as a bar to the suit (15)

The relation between bailor and bailee is analogous to that of landlord and tenant He will not be permitted to deny his bailor's title any more than the tenant may deny title of his landlord (see section 116 *ante*) But by the *second explanation* to this section the same exception applies to his case as to that of

(1) See Chalmers Neg Inst Act p 49

(2) Act XXVI of 1881 ss 32 37

(3) *Id* s 37

(4) *Id* s 32

(5) *Id* s 32

(6) *Id* ss 37 38

(7) *Id* s 38

(8) *Id* s 118

(9) Act XXVI of 1881 s 119

(10) *Id* s 120

(11) *Id* s 121

(12) Act XXVI of 1881 s 122 *Thakur v Bromley* 2 Cr & J 425 *McGregor v Plodes* 6 L & B 266 the above sections appear generally to represent the English law upon the same subject see Chalmers Neg Inst. Act 113 114

(13) See *Foster v Mackenon* D R 4 C P 704 712 *Russell v Langstaffe* 2 Doug 496 *Bahadunissa v Durgadas* 5 C 39 *Beglow op cit* 6th Ed 493 534

612 613—It has been said to be doubtful whether the liability in these cases rests on estoppel or on the law merchant *Ex parte Swan* 7 C B N S 446 as to Instruments lost or stolen see Act XXVI of 1881 s 58 *Bare dale v Benett* L R 3 Q B D 525

(14) *Lverest and Strodes Estoppel* 2nd Ed 315 *Caspersz op cit* 4th Ed ¶ 124—130 pp 133—140 *You v Grote* 4 Bng 53 *Inglam v Primrose* 7 C B N S 82 *Arnold v Cheque Bank* L R 1 C P D 578 *Scholfeld v Earl of Londesborough* L R 1894 2 Q B 660 *Bank of England v Vagliano Bros* L R App Cas 91 L R 23 Q B D 243 L R 23 Q B D 103 *Bhishulram v Hari Prasad* 5 C W N 313 (1900)

(15) *Bishen Chand v Rajendra Kishore* 5 A 302 (1883)

the tenant, namely, that where something equivalent to title paramount has been asserted against the bailee, he is discharged as against those who entrusted the goods to him. The bailee has no better title than the bailor, and consequently if a person entitled as against the bailor to the property claims it, the bailee has no defence against him. The true ground on which a bailee may set up the *jus tertii* is that the estoppel ceases when the bailment on which it is founded is determined by what is equivalent to an eviction by title paramount. It is not enough that the bailee has become aware of the title of a third person nor is it enough that an adverse claim is made upon him so that he may be entitled to relief under an interpleader (1). A bailee can set up the title of another only if he defends upon the right and title and by the authority of that person (2).

As between a bailor and bailee, the latter in an action for non delivery of goods upon the demand of his bailor must take one of the following courses (a) He may show that he has already delivered the goods upon a delivery order authorized by the bailor or (b) he may institute a suit of interpleader or (c) he may defend the action on behalf of the real owner, alleging and proving the title of the real owner, defending expressly upon that title (3).

The same principle applies in the case of a wharfinger who agrees to hold goods for the plaintiff under a delivery order from a purchaser of the defendant wharfinger, he cannot resist trover for them on the ground, *e g*, that they have never been separated from bulk and that therefore, no property passed to the person delivering (4).

The rule with regard to principal and agent is that an agent must account to his principal and cannot set up the *jus tertii* against him except when the principal has been acting under a *bona fide* misapprehension as to the rights of some third person or has been fraudulently acting in derogation of those rights (5).

The position of a licensee who under a license is working a right for which another has not a patent is analogous to the position of tenant and landlord and the licensee is bound in the same way he cannot question the validity of
 show what the
 y be created by
 same position as
 the licensor's title or the
 repudiate the contract (7)
 e, and there is no statutory
 must be determined with

Licenses
Trade-
marks

(1) As to the procedure in interpleader suits see O XXXV Woodroffe and Amir Ali Civ Pro Code 2nd Ed pp 1172—1174 *Rogers Sons & Co v Lambert* L R (1891) 1 Q B 377

(2) *Biddle v Bond* 6 B & S 231 followed in *Rogers Sons & Co v Lambert* supra see Contract Act s 166 and generally as to bailments *ib* ss 148—173 *Coggs v Barnard* Sm L Cas Bigelow op cit 6th Ed 592—598 *Caspersz op cit* 4th Ed Ch X Everest and Strode 2nd Ed 293 294

(3) *Rogers Sons & Co v Lambert*, L R (1891) 1 Q B 325 per Lord Esher, as to estoppel by election to support title either of bailor or third party see Ex parte Da is L R 19 Ch D 80 (1881)

(4) *Woodley v Co entry* 2 F & C

164 *Knights v Wiffen* L R 5 Q B 660 See remarks on this latter case in *Simon v Anglo American Telegraph Co* L R 5 Q B D 212 See *Ganges Manufacturing Co v Sourajm* 5 C 669 (1880) *Henderson & Co v Williams* 1 R (1895) 1 Q B 521

(5) Everest and Strode op cit 2nd Ed 297 *Smith Mercantile Law* 1122 10th Ed

(6) *Clark v Ade* 2 App Ca 423 In the matter of *D H R Moses* 15 C 244 (1887) as to estoppel against patentee see *Cropper v Smith*, 26 Ch D 700 *Proctor v Bennis* 36 Ch D 749

(7) *Jagannath v Cresswell* 40 C 814 (1913) affirmed in *Hannan v Jagannath* 42 C, 262 (1914)

CHAPTER IX

OF WITNESSES.

THE present Chapter deals mainly with the competency(1) and compellability(2) of witnesses. A witness is said to be incompetent to give evidence when the Judge is bound, as matter of law, to reject his testimony (3). The motives to prevent the truth are so much more numerous in judicial investigations than in the ordinary affairs of life that the danger of injustice arising from this cause, has, till modern times, been thought to justify the observance of rules by virtue of which large and numerous classes of persons were rendered incompetent witnesses, and their testimony was uniformly excluded (4). A recognition of the artificial character of these rules of exclusion, which had no foundation or justification in actual experience, and which led to frequent injustice, and of the necessity of increasing, as much as possible, the *medium* of investigation led gradually to the conversion of questions of competency into questions of credibility. The tendency of modern legislation has been rather to allow the competency thus becomes the rule. As it is reduced within a narrow compass, the law declares that all witnesses, whether competent or incompetent, are to be estimated by the tribunal, and the competency thus becomes the rule. As it is reduced within a narrow compass, the law declares that all witnesses, whether competent or incompetent, are to be estimated by the tribunal, and the competency thus becomes the rule.

it being left to the Court "to attach to their evidence that amount of credence which it appears to deserve, from their demeanour, deportment under cross-examination, motives to speak or hide the truth, means of knowledge, powers of memory, and other tests, by which the value of their statements can be ascertained if not with absolute certainty, yet with such a reasonable amount of conviction as ought to justify a man of ordinary prudence in acting upon those statements"(6). Thus neither want of religion, nor physical defect, not involving intellectual incapacity(7), nor interest, arising from the fact that the witness is a party to the record, or wife or husband of such party(8), or otherwise; nor the fact that the witness is an accomplice in the commission of a crime(9), form any ground for the exclusion of testimony

(1) Ss 118—120, 133, *post*.

(2) Ss 121—132

(3) Best, Ev., § 132

(4) See Taylor, Ev., § 1342, Sichel's Practice relating to witnesses, 1—16, Wharton, Ev., §§ 391—420, Burr Jones, Ev., §§ 730—736 and generally §§ 730—736 Stewart Rapalje's Law of Witnesses, 1—307, Philip and Arn. Ev., 3—142 See the Statutes affecting qualifications in Wigmore, Ev., § 488

(5) See Taylor, Ev., § 1343, *et seq.*, Best, Ev., §§ 622, 132 *et seq.*, Wigmore,

Ev., § 501, see remarks in *Blake v Albion Life Assurance Society* 4 C P D 109, *R v Gopal Dass*, 3 M 271, 282 (1881) As to the credibility of and other general remarks as to witnesses, see Field's Ev., 6th Ed., 17 *et seq.*, and Norton Ev p 33 *et seq.*, Best, Ev. pp 11 13 15, 111 As to credibility, see Stewart Rapalje, *op. cit.* 305, 379

(6) Field, Ev., 6th Ed., 399, 400.

(7) See ss 118, 119, *post*

(8) S 120, *post*

(9) S. 133, *post*

But the competency of a witness to give evidence is one thing and the power to compel him to give evidence another (1). And this compellability may be either (a) compellability *to be sworn or affirmed*, thus ordinarily in matrimonial proceedings the parties are competent but not compellable, they may if they choose offer themselves as witnesses (2), and under the Bankers' Books Evidence Act (3) an officer of the Bank is not, in any proceeding to which the Bank is not a party, compellable to produce or to appear as witness to prove, any Bankers' books without the order of a Judge made for special cause or (a) compellability *when sworn to answer questions* thus a witness who may be generally compellable to give evidence, may yet be protected or privileged in respect of particular matters concerning which he may be unwilling to speak (4). Further there are certain cases in which the law will not permit the witness to speak even if he be willing (5). Sections 121—132 declare exceptions to the general rules that a witness is bound to state the whole truth, or to produce any document in his possession or power relevant to the matter in issue (6). These rules of privilege and prohibition rest on grounds of public policy which are shortly set forth in the notes to the sections which enact them (i post). But as a general rule all witnesses competent to give evidence are compellable to do so. The procedure to be followed in order to compel the giving of evidence is regulated by the Civil and Criminal Procedure Codes (7). Lastly, section 131 declares that no particular number of witnesses are required for the proof of any fact.

The exclusionary rules in the present Chapter are based either directly on general considerations of public policy, such as the rules relating to affairs of State and official communications (8) information given for the detection of crime (9) and judicial disclosure (10), or on grounds of privilege, such as the rules relating to professional (11) and matrimonial (12) communications and title deeds and other documents (13). In connection with these rules should be read the provisions of the Civil Procedure Code relating to discovery (14). In fact questions of privilege arise as frequently on applications for discovery or inspection before trial as with reference to testimony in the witness box, but the principles are substantially the same (15). Whatever difference may exist between the case of evidence asked for or tendered at the trial and that of an application for discovery or inspection is altogether in favour of a refusal to order discovery in the earlier stages of the case (16). A person interrogated under O XI r 6 or ordered to produce under O XI r 11 of the Civil Procedure Code may plead his privilege in the terms of the Act. When it was contended for the defendant that even if a case submitted by the plaintiff to his counsel could not be used in evidence under section 129 of the Evidence Act yet the defendant was entitled to have inspection of it under O XI r 11 of the Civil Procedure Code such contention was disallowed by *West J* who said: "The argument that albeit the document may not be such that the Court

(1) See *De Bretton v. De Bretton and Holme* 4 A. 49 52 (1881). As to the meaning of the word "compelled" in the following section see *R v. Copal Dass* 3 M. 21 26 *et seq.* (1881). *Mohr v. Sheikh v. K.* 1 C. 392 400 (1893). *Emp. v. Passi* 46 A. 254.

(2) See Act IV of 1869 ss. 51 52 (Indian Evidence) and note to s. 120 post.

(3) Act XVIII of 1891 s. 5 Act I of 1893.

(4) See ss. 121 124 125 129 post.

(5) See ss. 121 123 126 127 post.

(6) *R v. Copal Dass* supra 277.

(7) Civil Procedure Code O XI pp. 825—826 passim Cr. Pr. Code ss. 171 208 216 217 219 221 224 250 251 256 257.

485 540 see also Penal Code ss. 174 175 and ss. 172—180 *id. passim* see Introduction to Chapter X post.

(8) See 123 and 124 post.

(9) S. 125 post.

(10) S. 121, post.

(11) Ss. 126—129 post.

(12) S. 122 post.

(13) Ss. 130 131 post.

(14) Civil Procedure Code O XI pp. 77—78.

(15) See *Greenough v. Caskell* 1 M. & K. 98 116 *Hennessy v. Wright* 21 Q. B. 13 500 521.

(16) *Hennessy v. Wright* supra, per *Wills J.*, 521.

Under-
standing

Understanding is the sole test of competency. The court has not to enter into enquiries as to the witness' religious belief, or as to his knowledge of the consequences of falsehood in this world or the next (1). It has to ascertain, in the best way it can, whether, from the extent of his intellectual capacity and understanding, he is able to give a rational account of what he has seen or heard or done on a particular occasion. If a person of tender years, or of very advanced age, can satisfy these requirements, his competency as a witness is established (2). The question whether a deliberate omission, to administer an oath or affirmation makes evidence inadmissible has been the subject of conflicting decisions (3). Section 5 of the Indian Oaths Act is imperative; yet under section 13 of that Act no omission to make any oath or affidavit and no

administering any form of oath or affidavit. In other rulings it has been held that 'omission' in section 13 plainly refers to one made by the witness, and that since in accordance with the rules for the construction of statutes a later section if ambiguous should be construed if possible so as to avoid contradicting a former one, this section should be taken as referring only to (4) an unintentional irregularity on the part of the Court. In a case in the Calcutta High Court where two children, aged four and six years respectively, were witnesses and the Judge had intentionally refrained from administering an oath or affirmation to them (apparently on account of their age), and did not seem to have considered their competency during the examination, the conviction was set aside as partly based on this evidence.

In a similar case in the Allahabad admissible (6). The competency of a precedent to the administration to him of an oath or affirmation, and is a question distinct from that of his credibility when he has been sworn or has affirmed (7). If a witness, after being sworn, is shown to be incapable of understanding, the Judge should strike out all his evidence (8). The modern practice is to interrogate the witness before swearing him, or to elicit the facts upon the examination in chief, when, if his incompetency appears, he will be rejected (9).

Disease of
body

"A witness may be in such extreme pain as to be unable to understand or, if to understand, to answer questions, or he may be unconscious, as if in a fainting fit, catalepsy, or the like

Disease of
mind

"This applies to idiocy and lunacy. An idiot is one who was born irrational, a lunatic is one who born rational has subsequently become irrational. The idiot can never become rational; but a lunatic may entirely recover, or have

(1) As to the necessity in English law in the case of a child witness of belief in punishment for lying in a future state see Steph Dig Note XL and Whitley Stokes, 831

(2) *R v Lal Sahai*, 11 A., 183 (1889), *R v Ram Sewak*, 23 A. 90 (1900), as to age and degree of intelligence see Taylor, Ev. § 1377, and Roscoe, Cr Ev 115, 116 10th Ed cited in *R v Maru*, 10 A. 207 210 212 (1888), in which the history of legislation in India relating to oaths and affirmations is discussed *R v Shava* post

(3) *R v Mussumat Itxarya* 14 B L R, 54 (1874), 22 W R, Cr 14, s c., *R v Seta Bhogta*, 14 B L R, 294 (F B), 23 W R, Cr 12 [overruling *R v Anunto Chuckerbutty* 22 W R Cr., 7

(1874)], *R v Shava* 16 B., 259 (1891), per contra *R v Maru* supra, and Quere, *R v Viraperumal* 16 M. 105 (1892), *Nundo Lal v Nistarini Dassee*, 27 C., 428 (1900) see Act X of 1873 ss 5 13

(4) *Rangacharya v Desacharya* 37 B. 231 (1913) (later Statute)

(5) *Nafur Sheikh v R*, 41 C., 506 (1914) 18 C L J., 590

(6) *R v Dhani Ram* 38 A. 49 (1916)

(7) *R v Lal Sahai* supra, *R v Shava*, supra at p 364

(8) *R v Whitehead*, L R, 1 C C R. 33

(9) Wharton Ev 492, Phipson, Ev. 5th Ed., 432, Taylor, Ev §§ 1392 1393, Wigmore Ev § 486 The preliminary examination is known as the *voir dire*

lucid intervals At the time when unscientific ideas prevailed, the deaf and dumb were so far treated as idiots that they were presumed to be incapable of testifying until the contrary was shown This presumption has now disappeared, and ordinarily the only question will be as to the possibility of communicating with them by some certain system of signs (1)

"*Eg*, drunkenness (2) It must be *ejusdem generis* The disability is only co-extensive with the cause, and, therefore, when the cause is removed, the disability also ceases Thus, a lunatic during a lucid interval may be examined The return of sobriety renders a drunkard competent

Or any other cause of the same kind

Explana-
tion

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An accused person cannot, in a Criminal case, be examined as a witness The effect of sections 342, 343 (no oath to be administered to the accused) of the Criminal Procedure Code is to render it illegal for a Magistrate to convert an accused person into a witness, except when a pardon has been lawfully granted under section 337 (5) But an accused person to whom pardon has been tendered, and who has accepted such pardon ought not to be put back into the dock without being examined as a witness when he shows an intention not to give the evidence which he has led the prosecution to expect He should be examined as a witness as directed by section 337(2), of the Criminal Procedure Code and then dealt with under section 339 Such a person if tried should be tried separately, and after the trial of the other accused (6) If tried he should be asked whether he relies on the pardon as a bar to his trial and if he does so rely the prosecution should first prove that the pardon has been forfeited by an incomplete or false disclosure When this course is not adopted the conviction is illegal and will be set aside (7) The Calcutta High Court, however, has held that if an approver forfeits his pardon at the preliminary enquiry the Magistrate may at that stage put him in the dock, re-commence the enquiry and commit him for trial with the other accused (8) Under section 339 of the Criminal Procedure Code the making of a full and true disclosure by the approver is not a condition precedent to the pardon, but making an incomplete or false disclosure is a condition subsequent by which such pardon is forfeited (9) With regard to several persons jointly accused, the rule at one time in England and followed in India was that when there is no community of interest any one of a number of prisoners jointly indicted may be called as a witness either for or

An accused person

(1) *Wigmore Ev* §§ 498 811 (see s 119 post)

(2) *Ib* § 499 See *Walker's Trial* 23 How St Tr 1153

(3) *Norton Ev* 306 307 *Wharton Ev* §§ 401 418 *Stewart Rapalje op cit* §§ 1—10

(4) 2 Den & P C C 254

(5) *R v Hanmanta* 1 B 618 (1877) and see cases cited post In a large number of modern English Statutes clauses have been incorporated enabling the party charged with a crime to give evidence on his own behalf see *Best Ev* § 622 And under the Criminal Evidence Act 1898 (61 & 62 Vict C 36) an accused may elect to give evidence on his own behalf See *Jelfs Law of Evidence in Criminal cases*

(6) *Aranachellam v R* (1908) 31 M 272 following *R v Ramasami* 24 M 321 *R v Khali* 39 A 305 (1917)

(7) *Kullan v R* (1908) 32 M 173 *R v Bala* (1901) 25 B 675 *R v Kohia* (1906) 30 B 611

(8) *Shashi Rajbanshi v Emperor* 42 C 856 (1915) distinguishing *R v Natu* 27 C 137 (1899) and dissenting from *R v Manick Chandra Sirkar* 24 C 49 (1897) as now obsolete and *R v Abani Bhushan Chuckerbutty* 37 C 845 (1910) *Semble* when he deviates from the conditions of pardon at the Sessions court this cannot be done

(9) *Kullan v R* supra *R v Natu* (1900) 27 C 137 *R v Sudra* (1892) 14 A 336 See as to forfeiture Woodroffe's *Criminal Procedure in India* where the cases are cited

against his co defendants (1) But the rule is now otherwise in India, and a person jointly indicted and jointly tried with the accused (but not separately tried)(2), cannot be called as a witness either for or against the accused (3) By the word "accused" in the last sentence of section 312 of the Criminal Procedure Code is meant a person over whom the Magistrate or other Court is exercising jurisdiction (4) A person never arrested, and against whom no process had issued, is a competent witness, even if a principal offender (5) So where a complaint was made to a Magistrate against A and B and process issued against A only, B was held to be a competent witness on his behalf (6) When, during the course of a police investigation one of several persons, who were arrested by the police, was illegally discharged by them such person was held to be a competent witness (7) In *R v Tuladhar*(8) the reasoning in *R v Hanmanta* is extended to the case of an accused person against whom the Magistrate illegally allowed the charge to be withdrawn, his subsequent evidence as a witness was held inadmissible "There is no law or principle which prevents a person who has been suspected and charged with an offence but discharged by the Magistrate for want of evidence, being afterwards admitted as a witness for the prosecution" (9) Where the public prosecutor with the consent of the Court withdrew from the prosecution of two out of several accused persons tried jointly for an offence and the two accused were thereupon discharged under s 191 of the Criminal Procedure Code and then examined as witnesses for the prosecution it was held that the persons so discharged were competent witnesses (10) Section 263 of the Criminal Procedure Code only refers to the record of evidence and does not relieve a Magistrate from his duty to hear all witnesses and consider their evidence (11)

The Criminal Procedure Code provides for the examination as witnesses of jurors and assessors (12)

No person by reason of interest in, or of his being an executor of, a will is disqualified as a witness to prove the execution of the will, or to prove the

(1) *K v Ashraf Shah* 6 W R Cr 91 (1866)

(2) *R v Brallaugh* 15 Cox 217 *Hicks v I L R 1 Q B 390* Steph Dig, Art 109

(3) *K v Hanmanta supra* *R v Remios* 3 Rom H C R Cr C 59 (1867) *K v Ashgar Ali* 2 A 260 (1879) *R v Dahiya* 10 B 190 (1885) *R v Mona Luma* 16 B 661 665 (1892) *I v Payne* 1 R 1 C C 349 *In re A David* 5 C 1 P 574 (1880)

(4) *K v Mona Luma* 668 supra
(5) *Tinckler's case* 1 East P C 354 cited in *R v Mona Luma* 665 supra

(6) *Mohesh Chunder v Mohesh Chunder* 10 C 1 I 553 (1882)

(7) *K v Mona Punz* supra

(8) Cited in *R v Mona Punz* 666 supra

(9) *R v Behary Jall* 7 W I Cr 44 (1867)

(10) *K v Hussein Haji* 25 B 472 (1900)

(11) *Jabbar Shah v Tamur Shah* 39 C 931 (1912), see *R v Surath* 42 C 608

(1915) (all witnesses actually produced)

(12) Cr Pr Code s 294, see *R v Lall Churn* 24 W R 28 Cr (1875) a jurymen is not disqualified by reason of his having given evidence from continuing to sit as jurymen or taking part in delivering the verdict see *R v Mukta Singh* 4 B L R 15 17 (1870), Taylor F 1 1379 Best L 1 187 *In re Hurro Chunder* 20 W R Cr 76 (1873), see also s 121 note

(13) Act X of 1865 s 55 (Indian Succession) Act XXI of 1870 s 2 (Hindu Wills)

(14) S 170

(15) S 119

(16) S 133

(17) See note to s 121

(18) *Ramful Shah v Damanath Manlal* 5 B L R App 78 (18 0) *Cobbett v Hudson* 1 F & B 11 see remarks in *R v Brice* 2 B & Ald 606 it is very unsafe that a person should be permitted to state not upon oath facts which he is afterwards to state on oath and Best F 11 184—187 Steph Dig note XLII

119 A witness who is unable to speak may in any other manner in which he can make it writing or by signs; but such writing must be signs made in open Court Evidence so given shall be deemed to be oral evidence

Principle.—See Introduction, ante

s 3 ("Evidence.")

s 118 (Competency)

s 3 (Meaning of "Oral evidence")

Taylor, Ev, § 1376, Steph Dig, Art 107, Roscoe, N P Ev, 18th Ed, 162 and authorities cited in the last section, Wharton, Ev, §§ 406 407, Stewart Rapalje's Law of Witnesses § 6, Wigmore, Ev, § 811

COMMENTARY.

A deaf mute is taught to give ideas by signs which must be translated by an interpreter skilled and sworn (1) Dumb witness

If the witness is able to communicate his ideas perfectly by writing, he will be required to adopt that as the more satisfactory method (2)

120 In all civil proceedings the parties to the suit, and the husband or wife of any party to the suit, shall be competent witnesses In criminal proceedings against any person, the husband or wife of such person, respectively, shall be a competent witness Parties to Civil suit and their wives or husbands Husband or wife or person under criminal trial

Principle.—See Introduction, ante (3)

s 118 (Competency)

s 122 (Communications during marriage)

Cr Pr Code, s. 488, Act IV of 1869, ss 51, 52 (Indian Divorce), Best, Ev, §§ 167—169, Taylor, Ev, §§ 1348—1372, Steph Dig, Arts 106, 108, 108A Note XLI, Stewart Rapalje's Law of Witnesses §§ 25—45 see also Index, Wharton Ev, §§ 457—490, 421—433

COMMENTARY.

The position of parties to a civil suit is (except when otherwise regulated by Statute) in no wise different from that of other witnesses (4) Proceedings under section 488 of the Code of Criminal Procedure which provides for the passing of orders for the maintenance of wives and children, are in the nature Parties to suit husband and wife

son sought to
unal proceed
prosecuting)
riminal pro
ceedings is that upon a petition by a wife for dissolution of marriage on account

Cases however might occur in which it might be absolutely necessary for the advocate to give evidence see Best Ev, § 184 Taylor Ev § 1391 *Weston v Peary Mohan Das* 40 C 898 (1913)

(1) *Couley v People* 83 N Y 478 (Amer)

(2) *Morrison v Lennard* 3 C & P 127 but this is denied in certain American cases where it is said the witness should be permitted the most fluent and natural mode Wigmore Ev § 811 p 915 n 3 id See also Wharton Ev §§ 406 407 Stewart Rapalje op cit § 6 as to evidence by an interpreter see *Ruston's case*,

1 Leach C C 408

(3) And Best Ev § 132 et seq Taylor Ev § 1344 et seq

(4) See as to weight to be given to testimony of a party *Jogendra Krishna Roy v Karpal Harshi* 35 C L J 175

Wingles post, 11374 Law v. 10120 Jan 10 A 107 (1895) As to examination of wife as to non access of husband see Ro-arrio v Ingles, 18 B 468 (1894) and s 112 ante as to the corroboration of the mother's evidence required by English

of adultery coupled with cruelty or desertion, the parties are *competent and compellable* to give evidence of or relating to such *cruelty or desertion* but they cannot in this case be examined or cross examined as to facts relating to acts of *adultery* and cannot in other cases be examined at all unless they *offer themselves* as witnesses or *verify* their cases by affidavit (1) The respondent in a suit by a husband for the dissolution of his marriage with his wife on the ground of adultery, was summoned by the petitioner in such suit as a witness. The Court did not explain to him before he was sworn that it was not compulsory upon, but optional with him to give evidence or not. He did not object to be sworn and replied to the questions asked him by the petitioner's counsel without hesitation until he was asked whether he had had sexual intercourse with the respondent. He then asked the Court whether he was bound to answer such question. The Court told him he was bound to do so and he accordingly answered such question answering it in the affirmative. Had the Court not told him that he was bound to answer such question he would have declined to answer it. *Held* under such circumstances that the respondent had not 'offered' to give evidence within the meaning of section 51 of the Divorce Act and therefore his evidence was not admissible (2) As to evidence of communications during marriage see section 122 *post*. In criminal proceedings it has been seen (*ante*) that the party accused or any person jointly indicted and tried with the accused is not a competent witness. So much of the section as declares husbands and wives competent witnesses against each other in criminal proceedings differs from the English rule according to which persons are in general incompetent (3) for the prosecution though under the Criminal Evidence Act 1898 (61 & 62 Vict. c. 36) every person charged with an offence and the husband or wife of such person are now competent witnesses for the defence at every stage of the proceeding (4) but in accordance with the Full Bench decision in the case of *P v K/yroollah* (5) In England in addition to the husbands or wives of persons charged with criminal offences who are in general only a *misamisable* upon the application of the person charged though in some few cases they are competent for the prosecution the only classes of persons now incompetent to testify are persons who in cases of High Treason or misprison of Treason (other than such as consist in injuring or attempting to injure the person of the Sovereign) are not included or properly described in the list of witnesses delivered to the defendant and secondly persons devoid of sufficient understanding to know what they are about (6) It has been held that in India under this section both parties to a divorce are competent to prove non access and the consequent illegitimacy of a child (7) *An incriminating statement made by wife to husband* is inadmissible (8)

Judges and
magistrates

121 No Judge or Magistrate shall, except upon the special order of some Court to which he is subordinate be compelled to answer any questions as to his own conduct in Court as such Judge or Magistrate, or as to anything which came to his

law see *Cloc v Manning* L R 2 Q B D 611 *Lawrence v Ingram* 20 L T N S 391 and note to s 134 *post*

(1) Act IV of 1869 ss 51 52 (Ind an Divorce) and see *Kelly v Kelly* 3 B L R App 6 (1869) *DeBretton v DeBretton* 4 A 49 (1881) as to English rule see *Steph Dg Art 109*

(2) *DeBretton v DeBretton* *supra*

(3) *Taylor Ex.* II 1371 1372 *Steph Dg Arts 103 103A* *Whitely Stokes* 831

(4) *Taylor* § 1342—3 *Stephens Comm* (14th edition) v II p 307

(5) 6 W R Cr 21 (1866) s c B L R S p Vol I B App 11 and see for a case under the earlier law *R v Gour Chand* 1 W R Cr 1* (1864)

(6) *Taylor* § 132 (g)

(7) *John Hore v Charlotte Hore* 38 M 466 (1916)

(8) *Ilisanan v F'nt* 25 Cr I J *93 (1922)

knowledge in Court as such Judge or Magistrate; but he may be examined as to other matters which occurred in his presence whilst he was so acting

Illustrations

(a) *A*, on his trial before the Court of Session, says that a deposition was improperly taken by *B*, the Magistrate. *B* cannot be compelled to answer questions as to this except upon the special order of a Superior Court.

(b) *A* is accused before the Court of Session of having given false evidence before *B*, a Magistrate. *B* cannot be asked what *A* said except upon the special order of the Superior Court.

(c) *A* is accused before the Court of Session of attempting to murder a Police-officer whilst on his trial before *B*, a Session Judge. *B* may be examined as to what occurred.

Principle—The general grounds of convenience (e.g., the inconvenience of public policy (1). This section hardly necessary to add that, in Court as Judge, a Judge is as competent and compellable a witness as any other person (2).

s. 3 ("Court")

s. 118 (Competency)

s. 35—186 (Examination.)

s. 165, Prov. 2 (Judge's power to put questions.)

Steph. Dig., Art. 111, Taylor, Ev., § 938, Phipson, Ev., 5th Ed., 182, Best, Ev., § 184, 188, Stewart Rapalje's Law of Witnesses, §§ 45, 68n, 275, Wharton, Ev., § 600.

COMMENTARY.

The privilege is that of the witness, i.e., of the Judge or Magistrate of whom the question is asked. If he waives such privilege or, does not object to answer the question it does not lie in the mouth of any other person to assert the privilege (3). No definition is given of "Judge" or "Magistrate" in the Act (4). Arbitrators who are (but to a narrower extent) within the rule in England, appear from the terms of the section itself, not to be within it (5). This Act contains no provisions as to the duties of witnesses to give evidence as to what they saw or heard, but in the case cited it has been held that

Judges and Magistrates

(1) See *R v Gazard*, 8 C & P 595. *Burdleuch v Metropolitan Board of Works* L R 5 H L 418. Best Ev. § 188 p. 176 note. Taylor Ev. § 938. As to illust. (c) see *R v Lord Thanes* 27 St Tr 836 and for the law before the Act *Ramasami v Ramu* 3 Mad H C R 372 (1867) [evidence of subordinate Magistrate holding preliminary enquiry into a criminal charge].

(2) Steph. Dig. Art. 111 and Note XLII. Taylor Ev. § 1379. Best Ev. *supra* Stewart Rapalje *op cit*, §§ 45, 68n. § 275. Wharton, Ev. § 600.

(3) *R v Chaddi Khan*, 3 A., 573 (1881). As to the meaning of the word "compelled" in the section see *R v Gopal Dass* 3 M., 277 (1881), and in s. 132, see *Emp v Banarsi* 46 A. 254.

(4) Cf. definition given in Penal Code

s. 19 and Act 1 of 1868 s. 4 sub section (13). See now Act X of 1897.

(5) *Burdleuch v Metropolitan Board of Works* L R 5 H L 418. *Amir Begam v Badr ud din Husain* P C 19 C L J 494 (1914). In re *Whitely* 1 Ch 558 (1891). 64 L T 81. *O'Rourke v Commissioners for Railways* 15 App Cas 371, *Ellis v Saltau* 4 C & P 327 (n) a, *Whitley Stokes* 831. In England it has been also held that a barrister cannot be compelled to testify as to what he said in Court in his character of a barrister. *Curry v Walter* 1 Esp 456, Steph. Dig., Art. 111. And a further rule exists against the competency of jurors to give evidence as to what passed between the jurymen in the discharge of their duties. Steph. Dig. Art. 114. Best Ev., §§ 579, 580. Taylor Ev. §§ 942—945.

statements or evidence of admissions by Jurors as to their mode of reaching their verdict are inadmissible (1) In this case it was alleged that Jurors had reached their verdict by casting lots and evidence of another witness was admitted in support of this statement

A Judge cannot, without giving evidence as a witness in the usual way, import into a case his own knowledge of particular facts (2) A judgment based on materials which are not in evidence, or on the personal knowledge of the Judge is not in accordance with the Law (3) But in a case in the Madras High Court it has been said that a Judge is entitled to use his general knowledge and experience (4) When a Judge gives evidence he should be

subject of the charge, and he is not precluded thereby from dealing judicially with the evidence of which his own forms a part (7) Although a Magistrate is not disqualified from dealing with a case judicially, merely, because in his

Further a Magistrate cannot himself be a witness in a case in which he is the sole judge of law and fact A Judge who is a sole judge of law and fact cannot give his own evidence and then proceed to a decision of the case in which that

(1) *Emperor v. Harkumar Barman Roy* 40 C 693 (1913) But the competency of Jurors in a case which they are trying is a different question for which see s 118 ante

(2) *Harpurshad v. Sheo Dyal* 3 I A 259 286 (1876) *Rousseau v. Pinto* 7 W R 190 (1867) *Meethun Bibee v. Busler Khan* 11 Moo I A 213 221 (1867) *Kallonnass v. Gunga Gobind* 25 W R 121 (1876) *Sooraj Kant v. Khodee Naram* 22 W R 9 (1874) *R v. Donnelly* 2 C 405 416 (1877) *Grish Chunder v. R* 20 C 857 865 (1892) *R v. Fatik Biswas* 1 B L R A Cr 13 (1868) As to the duty of the judge to state to the accused the facts he himself observed and the right of the accused to cross examine thereon see *In re Hurro Chunder*, 20 W R Cr 76 (1873) *Grish Chunder v. R* supra 866 It is extremely improper for a Magistrate in disposing of a case to rely in any way on statements made to him out of Court *R v. Sahadev* 14 B 572 (1890) In *Sri Balusu v. Sri Balusu* 22 M 427 (1898) the Court says 'the District Judge of Godavari says 'the people have settled down under the law enunciated in 1862' He can hardly recollect the state of things prior to 1862 but his statement of the present state of things is founded on personal knowledge

(3) *Durga Prasad Singh v. Ram Doyal Chaudhuri* 38 C 153

(4) *Lakshmayya v. Sri Raja Varadaraja*

Apparao 36 M 168 (1913) see ante Commentary on s 3

(5) *Kishore Singh v. Ganesh Mookerjee*, 9 W R 252 (1868)

(6) See *R v. Bholanath Sen* 2 C 23 27 (1876) *R v. Hura Lall* 8 B L R 422 430 (1871) *In re Hurro Chunder* 20 W R Cr 76 (1873) *Grish Chunder v. R* supra *R v. Donnelly* ante *Hood v. Corporation of Calcutta* 7 C 327 (1881) *Loburn Donini v. Assani Rai* av Com pany 10 C 915 (1884) *Sudan Rao v. Collector of Diaruar* 17 B 299 (1892) *Kashunath Khasgitala v. Collector of Poona* 8 B 553 (1884) and *R v. Meyer* 1 Q B D 173 *R v. Pherozis Pestonji* 18 B 442 (1893) *Aloo Nathu v. Gogubha Dipsanj* 19 B 608 (1894) The same person should not be both Judge and prosecutor *R v. Nadi Chand* 24 W R, Cr 1 (1875) *R v. Gungadhar Bhunjo* 3 C 622 (1878) *R v. Deoki Nandan* 2 A 806 (1880) *In re Het Lal* 22 W R Cr 75 (1874) [appeal], *Grish Chunder v. R* 20 C, 865 *R v. Sahadev* 14 B 572 (1890) And a public prosecutor should be without personal interest *R v. Kashunath Dinkar* 8 Bom H C R Cr, Ca 126 (1871)

(7) *R v. Mukia Sing* 4 B L R Cr, 15 (1870) see 13 W R Cr 60

(8) *R v. Bholanath Sen* supra 29 and see remarks of Phear J in *re Hurro Chunder* 20 W R Cr 76 (1873) and of Markby J in *R v. Donnelly* 2 C, 405 414 (1877), *Taylor Ev* § 1379

evidence is given (1) Where in such a case he has given his evidence and convicted the accused, his having so acted makes the conviction bad (2) The conviction is not absolutely bad It is open to the Court to uphold the conviction, if it is evident that the Magistrate's evidence there is other than the conviction (3) *Quære* whether the conviction is valid without the operation of the last-mentioned rule (4)

Where a Magistrate in whose Court a complaint of rioting and mischief had been filed made a personal inspection of the *locus in quo* which inspection was not made only for the purpose of better understanding the evidence which had already been given, *held*, that by so doing he had made himself a witness in the case and had thereby rendered himself incompetent to try it, *held*, further that where a Judge is the sole judge of law and fact in a case tried before himself, he cannot give evidence before himself or import matters into his judgment not stated on oath before the Court in the presence of the accused (5) When a Magistrate was present at a search made by the police during investigation and in all probability he came to know of some facts in connection with the case, it was held to be expedient that the case should be tried by some other Magistrate (6)

122. No person who is or has been married shall be compelled to disclose any communication made to him (7) during marriage by any person to whom he is or has been married, nor shall he be permitted to disclose any such communication unless the person who made it, or his representative in interest, consents, except in suits between married persons (8), or proceedings in which one married person is prosecuted for any crime committed against the other

Communica-
tion
during
marriage

Principle—The protection given by this section has been said to rest upon the ground that the admission of such testimony would have a powerful tendency to disturb the peace of families and to weaken, if not to destroy the mutual confidence upon which the happiness of the married state depends (9) The exception is made *ex necessitate rei* It has however been pointed out (10)

(1) *R v Donnelly* supra *per curiam*
Taylor Ev § 1379 *Grish Chunder v R*
20 C 857 865 (1892) *Hari Kishore v*
Abdul Baki 21 C 920 (1894) *Swamirao*
v Collector of Dhariwar 17 B 299 (1892)
See also *R v Fatich Chand* 24 C 499
(1897) The cases of *Grish Chunder v*
R 20 C 857 (1892) and *Sadhana Upa*
dhya v R 23 C 328 (1895) were dis-
tinguished in the matter of *Anando Chun*
der v Basu Mudh 24 C 167 (1896)

(2) *R v Donnelly* supra *per Markby*
J

(3) *Ib per Prinsep J*

(4) See *R v Mukta Singh* supra and
R v Donnelly supra 414 in which latter
case the correctness of the former deci-
sion in so far as it proceeded upon the
ground that the presence of assessors
brought the case within the general rule
laid down by it is doubted

(5) *P v Mansham* 19 M 263 (1896)
but a Magistrate who views a place merely
to better understand the evidence does not
make himself a witness In *re Lalji* 19

A 302 (1897)

(6) *Gya Singh v Mohamed Soliman* 5
C W N 864 (1901)

(7) In this section 'he him and
his include she her and her Act
X of 1897 As to the meaning of the words
permitted and compelled in this sec-
tion see *R v Gopal Dass* 3 M 271
(1881)

(8) *E g* such communications may be
disclosed under s 52 Act IV of 1869 *v*
s 120 ante

(9) *Taylor Ev* § 909 *Best Ev* § 586

(10) *Wigmore Ev* p 3041 Bentham
says Hard harsh p policy peace
of families absolute necessity — some
such words as these are the vehicles by
which the faint spark of reason that ex-
hibits itself is conveyed These are the lead-
ing terms and these are all you are
furnished with and out of these you are
to make applicable as distinct and intelli-
gible a proposition as you can *Rationale*
Book IX Part IV c v

that no argument advanced for the privilege has ever risen to a higher level than an appeal to considerations of sentiment, and the conclusion of the Commissioners of Common Law Procedure in their second report was that husband and wife should be competent and compellable to give evidence both for and against one another on matters of fact, as to which either could be examined as a party in the cause

§ 120 (*Competency of Husband and wife*) s. 165, PROV 2 (*Judge's power to question*)

Taylor, Ev. §§ 909—910A, Best, Ev. § 586, Roscoe, N. P. Ev., 18th Ed., 164, 169, Steph. Dig., Art. 110, Wharton, Ev. §§ 427—432, Rapalje's Law of Witnesses § 274, Hageman's Privileged Communications, §§ 165—189, Wigmore, Ev., §§ 22, 27, *et seq*

COMMENTARY.

The protection is not confined to cases where the communication sought to be given in evidence is of a *strictly confidential* character, but the seal of the law is placed upon *all* communications of whatever nature which pass between husband and wife (1) An incriminating statement made by wife to husband is inadmissible (2) It extends also to cases in which the interests of strangers are solely involved, as well as those in which the husband or wife is a party on the record It is, however, limited to such matters as have been communicated *during the marriage* and, consequently, if a man were to make the most confidential statement to a woman *before* he married, and it was afterwards to become of importance in a civil suit to know what that statement was, the wife, on being called as a witness and interrogated with respect to the communication, would, as it seems, be bound to disclose what she knew of the matter (3) The privilege extends only to persons who legally and technically are husband and wife

A document, or *vice versa*, or in producing it, there is no compulsion on, or permission to, the wife or husband to disclose any communication The section protects the individuals and not the communication, if it can be proved without putting into the box for that purpose the husband or the wife to whom the communication was made So where on a trial for the offence of breach of trust by a public servant, a letter was tendered in evidence for the prosecution which had been sent by the accused to his wife at Pondicherry and had been found on a search of his house made there by the police, it was held that the letter was admissible in evidence against the accused (5) The privilege continues even after the marriage has been dissolved by death or divorce (6) So where a woman who had been divorced and had married another person, was offered as a witness against her husband, it was held that the communication was admissible in evidence, the fact of her having been divorced being immaterial (7) The words "has been married" in the above section give effect to this dictum The rule being "that nothing

(1) *Ib.*, *O'Connor v Marjoribanks*, 4 M & Gr 435

(2) *Ihsanan v Emp*, 25 Cr L. J 783 (1922)

(3) Taylor Ev § 909 *see* Wharton Ev §§ 427—432, Rapalje *op cit*, § 274

(4) *See* Wigmore Ev, p 3042 "Their domestic peace may be shattered at any litigant's discretion. Again its (the rule's) benefits are not lost by the ingenious wrong-doer who brings himself within

its formal terms by marrying the witness after service of subpoena and thus creating *ad hoc* a domestic peace which is to be jealously safeguarded

(5) *R v Donoghue* 22 M 1 (1898)

(6) Taylor Ev, § 910 Roscoe N. P. Ev 18th Ed, 169 *Monroe v Turstleton* Pea. Add. Cas, 221 *Aterson v Lord Kinnaird* 6 East, 192 193, *O'Connor v Marjoribanks* *supra*, but *see* Wigmore, Ev pp 3054 3055

(7) *Monroe v Turstleton* *supra*.

shall be extracted from the bosom of the wife which was confided there by the husband, she may yet be admitted to testify to facts which came to her knowledge by means equally accessible to any person not standing in that relation" (1) In a case it was held that where there was no representative in interest who could consent to the disclosure of a communication made by a deceased husband to his wife during their marriage, the widow could not be regarded as being his representative in interest for the purpose of giving such consent and could not be permitted to disclose such communication (2)

123. No one shall be permitted to give any evidence (3) derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit

Evidence
as to
affairs of
State

124. No public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interests would suffer by the disclosure

Official
communication

Principle.—Public policy, prejudice to the public interests by disclosure (4) If it were not so it would be impossible to communicate freely (5) If the giving of such evidence would be injurious to the public service, the general public interest must be considered paramount to the individual interest of a sutor in a Court of Justice. The public officer concerned, and not the Judge, is to decide whether the evidence referred to in these sections shall be given or withheld, because the Judge would be unable to determine this question without ascertaining what the document or communication was, and why the publication or disclosure of it would be injurious to the public service—an enquiry which cannot take place in private and which taking place, may do all the mischief which it is proposed to guard against (6) The Allahabad High Court has however recently held (7) that it is for the Court to decide whether or not a particular document for which privilege is claimed under this section, is a communication made to a public officer in official confidence. If the Court decides that it was so made, then it cannot compel its disclosure, and the public officer himself is the sole Judge whether its disclosure would or would not be in the public interest. But it has also been held (8) that an officer's refusal to disclose a document on grounds of public policy is final and that it is not competent for the Court to call for and examine the secret archives of the state in order to satisfy itself of their confidential nature

a. 3 (Evidence)

a. 162 (Production of document referring
to matters of State)

s. 165 Prov 2 (Judge's power to put
questions or order production)

(1) 1 Greenleaf Ev § 254 7th Ed
cited in Best Ev § 586

(2) *Nasab Howladar v Emperor* 40 C
391 (1913) 18 C L J 65n

(3) Oral or documentary v s 3 ante
(4) *Wadeer v East India Company* 8
D G M & G 191 [production does not
depend on the question of the person
called on to produce being a party to
the suit or not] *Moodalay v Morton*, 1
B C C 471

(5) *Smith v East India Company* 1
Ph 55 *The Bellerophon*, 44 L J, Adm,
5, *Hennessy v Wright* post

(6) *Per Pollock C B in Beatson v*
Skene 5 H & N 838 853 as to the

meaning of the word compelled in
this section see *R v Gopal Dass* 277
supra *Nagaraja Pillai v Secretary of*
State 39 M 304 (1916)

(7) *Collector of Jaunpur v Jamna*
Prasad 44 A 360 s c 20 All L J 140
In *Pherson Ev* 6th Ed 195 the Eng
lish rule is stated to be that when the
head of the department by person or proxy
objects the judge will not compel the
production nor decide upon the validity of
the objection unless it is a palpably futile
one see *Lal Tribhuvan v Deputy Com*
missioner Fyzabad 47 I C 225

(8) *Lal Tribhuvan v Deputy Commis*
sioner Fyzabad 47 I C 225

Act V of 1889 (Disclosure of Official Secrets), 21 Geo III, cap 70, s 5 [Prosecution against Governor General or Member of Council, Production of Order in Council]

Taylor, Ev, §§ 946—948A, Roscoe N P Ev, 172, 173, Best, Ev, § 578, Steph Dig, Art, 112, Bray on Discovery, 547, 549, Powell, Ev, 9th Ed, 242, 243, 273, 274 Phipson Ev, 5th Ed, 180, Wharton, Ev, §§ 604A—605, Rapalje's *op cit* §270, Hageman's Privileged Communication, §§ 301—317

COMMENTARY.

Under this head have been held to come the deliberations of Parliament, papers, duties, England that where the head of a Department of Government states at the trial of an action that the production of a particular document by the Department would be injurious to the public interest, the Judge ought not to order its production (2) It has been doubted whether a Government Resolution relating to the conduct of a Deputy Collector can properly be described as relating to an affair of State, but it was held that if it could be so regarded the Government had in relying on it in their list of documents practically conceded permission (3) Communications, though made to official persons, are not privileged when they are not made in the discharge of any public duty, and so letters by a private individual to the Postmaster General, complaining of the conduct of a postal official, were held not to be protected (4) It has been recently Preventio time when particular was not privileged (5) Objectio party interested in excluding the evidence or by the Judge himself "No sound distinction can be drawn between the duty of the Judge when objection is taken by the responsible officer of the Crown or by the party, or when no objection being taken by any one, it becomes apparent to him that a rule of public policy prevents the disclosure of the documents or information" (6) The exclusion when allowed is absolute, so that in the case of documents no secondary evidence is admissible (7) The latter section is confined to public officers, though who are such is not defined The former embraces every one Section 123 leaves the discretion with the head of the department, section 124 makes the officer himself the judge of the propriety of waiving the privilege In no case has the Court any authority to compel disclosures, if the objection is raised by the proper authority (8) In the undermentioned case the accused was convicted of criminal breach of trust in respect of three gold bangles The evidence went to show that the accused insured a parcel in the post office as containing these gold bangles, but shortly after delivery to the addressee, the parcel was found to contain only a piece of steel One of the witnesses deposed to having sold the steel to the accused Accused's counsel asked the Superintendent of Post Offices the name of the person who had informed him about the sale of the steel to, the accused, but the Sessions Judge refused to allow the question

(1) See Text books cited above *et ibi* *casas*

(2) *Williams v Star Newspaper Co* (1908) Times L R v 24 p 297

(3) *Jehangir v Secretary of State* 6 Bom L R 131 160 (1903)

(4) *Blake v Purford & Co* 11 & Rob, 198

(5) *Rukmal v Emperor*, 22 C W N, 451 s c, 19 Cr L J, 524

(6) *Fer Wills J in Hennessy v Wright*, 21 Q B D 509 in which all the authorities are reviewed, and it was held that

an affidavit of objection by the Secretary of State to production sufficed to justify a refusal to give discovery See *Jehangir v Secretary of State* 6 Bom L R, 160 (1903)

(7) *Home v Beninck* 2 B & B 130, *Duckins v Rokeby* L R 8 Q B, 255, *Hennessy v Wright* supra

(8) *Norton Ev* 302 *Jehangir v Secretary of State* 6 Bom L R, 160 (1903) see note to s 162 *post*

to be put, as he was of opinion that the Superintendent was protected by this section and the next, but it was held that neither section had any application (1) And it has been held that documents produced and statements made under process of law (e.g., under the Income Tax Act) cannot be said to be made in official confidence within the meaning of this section (2) Recently a statement made to the Collector by a person applying to have his estate taken under the Court of Wards, setting forth his financial position, that is to say, the details of his property and liabilities, was held to be a communication made to a public officer in official confidence within the meaning of this section, and could not therefore be used as an acknowledgment of any liability mentioned therein (3)

125 No Magistrate or Police-officer shall be compelled to say whence he got any information as to the commission of any offence, and no Revenue-officer shall be compelled to say whence he got any information as to the commission of any offence against the public revenue

Information as to commission of offences

Explanation—‘Revenue-officer’ in this section means any officer employed in, or about, the business of any branch of the public revenue (4)

Principle.—While it is perfectly right that all opportunities should be afforded to discuss the truth of the evidence given against a prisoner on the other hand, it is absolutely essential to the public welfare, that the names of parties who give information should not be divulged, for otherwise,—be it from fear, or shame, or the dislike of being publicly mixed up in enquiries of this nature,—few men would choose to assume the disagreeable part of giving or receiving information respecting offences, and the consequences would be that many great crimes would pass unpunished (5) For the same reason, counsel for the defence is not entitled to elicit from a witness for the prosecution that he is a spy or informer (6) But a detective cannot refuse on grounds of public policy to say where he was hidden (7)

s 118 (Competency)

s 27 (Information received from Accused)

s 165 Prov 2 (Question by Judge)

Act XV of 1887, s 13 [see note (2) *infra*], Act V of 1892, s 12 (ib), Taylor, Ev, § 939 941, Best Ev § 578 Steph Dig, Art 113 Roscoe Cr Ev 13th Ed, 130 132, Phipson Ev 5th Ed, 182 Rapalje s op cit § 276, Wharton, Ev, § 604, Hageman s Privileged Communications §§ 301—303

COMMENTARY.

The section draws no distinction between public and private prosecution (8) Though the section does not, in express terms, prohibit the witness, if he be

Information as to commission of offence

(1) *R v Rasadnan Maharam* 2 Bom. L R 329 (1900)

(2) *Venkatachella Chettiar v Sampath Chettiar* (1909) 32 M 62 ref to *Collector of Jaunpur v Jamna Prasad* 44 A 360 s c 20 All L J 140 and see *Jadobram Dey v Bulloram* (1899) 26 C, 281

(3) *Collector of Jaunpur v Jamna Prasad* 44 A 360 (1922)

(4) This section was substituted for the original s 125 by Act III of 1887 by s 13 Act XV of 1887 and Act V of 1892, s 12 Commandants and Seconds in command of Military Police in Burma and

Bengal are entitled to all the privileges conferred by this section on Police-officers As to the meaning of the word compelled in this section see *R v Gopal Dass* 277 *supra*

(5) Taylor Ev § 941 *R v Hardy* 24 How St Tr 808 816 *Home v Beitch*, 2 B & B 162 *Hennessy v Wright* *supra* 512 513

(6) *Amrita Lal Hasra v Emperor* 42 C 957 (1915)

(7) *Ib*

(8) A distinction which is made in the English rule see *R v Richardson* 3 F & F 693, *Marks v Bejfas* 25 Q B D.

willing from saying whence he got his information, the English authorities and a consideration of the foundation of the rule show that the protection does not depend upon a claim being made and that it is the duty of the Judge, apart from objection taken, to exclude the evidence (1) *A fortiori* if objection is taken it cannot be made the ground of adverse inference (2) The rule applies not only upon the criminal trial, but upon any subsequent civil proceedings arising out of it (3) The English rule protects not only the names of the persons by, or to, whom the disclosure was made, but the nature of the information given, and any other question as to the channel of communication or what was done under it (4) The Court has under this section apparently no discretion to compel an answer (5) even if it consider disclosure necessary to show the innocence of the accused (6)

126 No barrister, attorney, pleader or vakil shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney or vakil, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment (7), or to disclose any advice given by him to his client in the course and for the purpose of such employment

Provided that nothing in this section shall protect from disclosure—

(1) Any such communication made in furtherance of any [illegal] purpose (8),

(2) Any fact observed by any barrister, pleader, attorney or vakil, in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment

It is immaterial whether the attention of such barrister, [pleader] (9), attorney or vakil was or was not directed to such facts by or on behalf of his client (10)

494 Steph Dig Art 113 In re *Molash Clunder* 13 W R Cr 1 10 (1870) see *R v Richardson* supra adversely reviewed in *Worthington v Scribner* 109 Mass 487 (Amer) cited in *Rapaljes op cit* p 456

(1) *Marks v Bejfus* supra *Hennessy v Wright* 21 Q B D 509 per Wills J *Weston v Peary Mohan Das* 40 C 898 (1913) per Woodroffe J

(2) *Weston and others v Peary Mohan Das* (supra)

(3) *Marks v Bejfus* supra

(4) *Phipson* Ev 5th Ed 182 *R v Hardy* supra *Marks v Bejfus* supra

(5) S 165 Prov 2 post

(6) According to the rule in *Marks v Bejfus* supra

(7) In *R v Bala Dharma* 4 Bom L R 460 (1902) the communication was held not to be in the course etc. See

on this sect on *Gopial v Lakhpat Ra* 41 A 135 s c 48 I C 605

(8) The word within brackets was substituted for criminal by s 10 of the Amending Act XVIII of 1872 This substitution carries the rule perhaps somewhat further than has been established in England (see Steph Dig Art 115) but is in conformity with the opinion expressed by Turner V C in *Russell v Jackson* 9 Hare 392 and Rolfe V C. in *Follett v Jefferies* 1 Sim N S 17 It seems just and reasonable to include cases of fraud as well as criminality See also *Kelly v Jackson* 13 Ir Eq Rep 129 and *R v Cox & Ratton* L R 14 Q B D. 153 *Framji Bhicaji v Mahanting Dhanising* 18 B 276 280 281 (1893)

(9) Added by s 10 Act XVIII of 1872

(10) See s 23 Explanation ante

Explanation—The obligation stated in this section continues after the employment has ceased

Illustrations

(a) *A* a client says to *B* an attorney — I have committed forgery and I wish you to defend me

As the defence of a man known to be guilty is not a criminal purpose this communication is protected from disclosure

(b) *A* a client says to *B* an attorney — I wish to obtain possession of property by the use of a forged deed on which I request you to sue

This communication being made in furtherance of a criminal purpose is not protected from disclosure

(c) *A* being charged with embezzlement retains *B* an attorney to defend him. In the course of the proceedings *B* observes that an entry has been made in *A*'s account book charging *A* with the sum said to have been embezzled which entry was not in the book at the commencement of his employment

This being a fact observed by *B* in the course of his employment showing that a fraud has been committed since the commencement of the proceedings it is not protected from disclosure (1)

127. The provisions of section 126 shall apply to interpreters, and the clerks or servants of barristers, pleaders, attorneys and vakils (2)

Section 126 to apply to interpreters etc

128. If any party to a suit gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in section 126, and if any party to a suit or proceeding calls any such barrister, [pleader] (3) attorney or vakil, as a witness, he shall be deemed to have consented to such disclosure only if he questions such barrister, attorney or vakil on matters which, but for such question he would not be at liberty to disclose

Privilege not waived by volunteering evidence

129. No one shall be compelled to disclose to the Court any confidential communication which has taken place between him and his legal professional adviser unless he offers himself as a witness in which case he may be compelled to disclose any such communications as may appear to the Court necessary to be known in order to explain any evidence which he has given, but no others

Confidential communications with legal advisers

Principle—The first two sections apply when the legal adviser or his clerk &c is interrogated as a witness The professional adviser of a third

between a person and his legal professional adviser that are privileged (*v post*)

(1) See *Brown v Foster* 1 H & N 736

s c 26 C 53

(2) See *Kameshwar Pershad v Shesh Amanutulla* 2 C W N 649 661 (1898)

(3) Added by s 10 of the Amending Act XVIII of 1872

The rule is established for the protection not of the legal adviser but of the client, and the privilege, therefore, may only be waived by the latter, it is founded on the impossibility of conducting legal business without professional assistance, and on the necessity, in order to render that assistance effectual, of securing the fullest and most unreserved communication between the client and his legal adviser. Further, a compulsory disclosure of confidential communications is so opposed to the popular conscience that it would lead to frequent falsehoods as to what had really taken place. It is quite immaterial whether the communications relate to any litigation commenced or anticipated; it is sufficient if they pass as professional communications in a professional capacity, if the rule were so limited, no one could safely adopt such precautions as might eventually render any proceedings successful, or all proceedings superfluous (1). The provisos in the first section prevent the privilege conferred from becoming the shield of crime or illegality. The rule does not apply to all which passes between a client and his legal adviser, but only to what passes between them in professional confidence, and the contriving of crime or illegality is no part of the professional occupation of a legal adviser, and it can as little be said that it is part of his duty to advise his client as to the means of evading the law (2). The provisions of the first section are (in order that it may be the more effectual) made by the second to apply to the necessary organs of communications with the legal advisers, viz, interpreters, clerks and servants.

s. 32 EXPLANATION (Admissions in Civil Cases) s. 165 (Questions by Judge)

Civil Procedure Code, Chapter X (Of Discovery and of the admission, Inspection, Production Impounding and Return of documents)

Taylor, Ev §§911—937, Best, Ev § 581, Roscoe, N P Ev, 18th Ed., 169—172, Roscoe Cr Ev, 13th Ed., 127—130 133—135 Powell Ev, 9th Ed., 231—241, Steph Dig Arts 115 116, Bray on Discovery, 385—387, Wharton Ev, §§567—608, Stewart Rapalje's op cit §§ 271—274 Hageman's Privileged Communications, §§ 16—164, Wigmore, Ev § 2290 et seq

COMMENTARY.

English and
Indian
Law

The law relating to professional communications between a solicitor and client is the same in India as in England, with the single exception relating to the substitution of "illegal purpose" for "criminal purpose" (v ante) and, in interpreting section 126, the Court may rightly refer to English cause (3)

Construc-
tion

"The rule of protection seems to me to be one which should be construed in a sense most favourable to bringing professional knowledge to bear effectively on the facts out of which legal rights and obligations arise" (4)

Rule
limited to
legal
adviser

Legal advisers alone are within the rule, and of these (as it would seem from the wording of the section) only barristers, attorneys, pleaders and vakils.

(1) *Greenough v Gaskell* 1 M & K 103 Phipson Ev loc cit Wigmore Ev, § 2291 *Lyell v Kennedy* 9 App Cas 86 *Bolton v Corporation of Liverpool* 1 M & K 88 *Coldey v Richards* 19 Beav 404 Ex parte *Campbell* 5 Ch App 705 cited in *Framji Bhicaji v Mohansing Dhanising* supra 272 *Southwork Co v Quick* 3 Q R D 317 *Ross v Gibbs L chant rean*, 1 911, in *Munchersshaw Bezonsi v New Dhurumsey*

etc Company 4 B 576 (1880)

(2) *Russell v Jackson* 9 Hare 392, *Follett v Jefferys* 1 Sim N S, 17, see also *Kelly v Jackson* and *R v Cox & Railton* supra Wharton Ev § 590 as to testamentary communications v ib and *Pussell v Jackson* supra the privilege does not attach to these Taylor Ev § 928 Hageman §§ 84 85

(3) *Framji Bhicaji v Mohansing Dhanising* 18 B 263 271 278 279 (1893)

(4) Per West J in *Munchersshaw Bezonsi v The New Dhurumsey etc Co* 4 B 576 (1880)

It was decided under section 24, Act II of 1855, that *mukhtars* were not within the rule (1) The protection does not extend to any matters communicated to other persons, *e.g.*, priests and clergymen(2), medical men(3), clerks(4), bankers(5), stewards, and confidential friends(6) and the like, though such communications were made under terms of the closest secrecy No privilege even attaches to communications made to an attorney friend, consulted merely as a friend and not as an attorney(7), nor to those passing *before* the relationship exists, or *after* it has ceased(8) The rule does not require any regular retainer, or any particular form of application or engagement, or the payment of any fees, it is enough if the legal adviser be in any way consulted in his professional character(9), and the protection exists notwithstanding a *bond fide* mistake in supposing that the solicitor had consented to act(10), or the latter's subsequent refusal of the retainer(11) So also under section 129, when the client is interrogated, a confidential communication, in order to be protected must be one which has taken place between the client and his *legal* professional adviser The mere circumstance that communications are confidential does not render them privileged Thus confidential communications between principal and agent, relating to matters in a suit are not privileged To be privileged, they must be "confidential communications with a professional adviser"(12) So also a letter written in answer to enquiries about the character of a servant is *prima facie* a confidential communication, but it is not privileged privilege being confined to communications with the legal advisers of the party(13) The communication is equally protected whether it is made by the client in person, or is made by an agent on behalf of the client, and whether it is made to the solicitor in person or to a clerk or subordinate of the solicitor who acts in his place and under his direction(14) It is immaterial (under section 129, as under section 126) whether the communication relates to a litigation commenced or anticipated or not(15) A communication with a solicitor for the purpose of obtaining legal advice is protected, though it

(1) *R v Chuderkant Chuckerbutty* 1 B L R A Cr 8 (1868) 9 W R Cr Let 10 the reasons given for this decision seem equally to apply to the language of the present section

(2) *R v Gilham* 1 Moo C C 186 *Wheeler v LeMarchant* L R 17 Ch D 681 but see Taylor Ev p 789 note and Steph Dig Note xlv p 196 Some English Judges have considered that such evidence should not be given see *Broad v Pitt* 3 C & P 518 *R v Griffin* 6 Cox C C 219 *Wharton* Ev § 597 Mr Baddely's work on the Privilege of Religious Confessions (1865) and Hageman *op cit* §§ 131-142

(3) *R v Gibbons* 1 C & P 97 Taylor Ev § 916

(4) *Lee v Birrell Camp* 3 37 Webb v Smith 1 C & P 337

(5) *Lloyd v Freshfield and Kaye* 2 C & P 325 [a banker of one of the parties is bound to answer what such parties' balance was on a given day]

(6) *Wheeler v LeMarchant* supra Taylor Ev 916

(7) *Smith v Daniell* 44 L J Ch 189 see also *R v Breuer* 6 C & P

363 *Doe v Jauncey* 8 C & Ph 99 where the relationship between attorney and client was held not to have been established

(8) *Greenough v Gaskell* 1 M & K 103

(9) *Foster v Hall* 12 Pick 89 *Bean v Quinby* 5 New Hamps 94 Taylor Ev § 923

(10) *Smith v Fell* 2 Curtis 667

(11) *Cromack v Heathcote* 2 Br & B 4

(12) *Wallace v Jefferson* 2 B 453 (1878) following *Anderson v Bank of Columbia* L R 2 Ch D 644 and *Bustros v White* L R 1 Q B D 423 see also *Goodall v Little* 1 Sim N S 155

(13) *Webb v East* L R 5 Ex D 108

(14) *Wheeler v LeMarchant* L R 17 Ch D 675 682 or *vice versa* see *Steele v Stewart* 1 Phil 471 *Lafont v Falkland Islands Co* 4 K & J 34 *Laurence v Campbell* 4 Drew 485 Taylor Ev, 1920

(15) *Munchershaw Beconsall v The New Durrumsey Co* 4 B 576 (1880) following *Minet v Morgan* L R 8 Ch App, 361 See Hageman *op cit* §§ 57-67

relates to a dealing which is not the subject of litigation, provided it be a communication made to the solicitor in that character and for that purpose (1)

Joint
Interest

No privilege attaches to "communications between solicitor and client as against persons having a joint interest with the client in the subject matter of the communication—e.g., as between partners(2), directors and shareholders(3), trustee and *cestui que trust*(4) lessor and lessee as to production of the lease(5), reversioner and tenant for life as to common title(6), two persons stating a case for their joint benefit(7), or a husband and wife who are only collusively in contest(8). Nor does any privilege attach as between joint claimants under the same client—e.g., between claimants under a testator as to communications between the latter and his solicitor(9). But where the communications relate to matters outside the joint interest, they are privileged even against a person bearing the expense of the communication(10)—e.g., communications between a plaintiff corporation and its solicitors, as against a defendant rate payer as to matters not connected with the rates, or between where the communication ut to enable him to resist character as not trustee,

but as mortgagee of the client"(12)

Employ-
ment by
different
parties of
same
attorney

Where two parties employ the same attorney, the rule is "that communications passing between them must be disclosed by one to be communicated in the presence of the other"(13). In all these cases the question would seem to be, was the communication made by the party to the attorney? If it was the bond not the communication will not

At any
time

A communication or document "once privileged is always privileged"(15). The obligation continues after the employment, in which the communication was made has ceased(16) nor is it affected by the party ceasing to employ the solicitor and retaining another, nor by any other change of relation between them nor by the solicitors being struck off the rolls(17), nor by his becoming personally interested in the property to the title of which the communications related(18) nor even by the death of the client

Waiver

The privilege may, however, be waived by the client himself (though not by the adviser) expressly under section 126, or impliedly under the second

(1) *Hoecker v. LeMarclant* supra 682

(2) *Re Pickering* 25 Ch D 237 *Gauvain v. Edison* *Gower Bell Telephone Co* 59 L T 813

(3) *Gaurand v. Edison* supra *Bray on Discovery* 290—297

(4) *Talbot v. Marshfield* 2 Dr & S 549 *Re Mason* 22 Ch D 609 *Re Postlethwaite* 35 Ch D 722 even though the party resisting production has paid for the communication *Bacon v. Bacon* 34 L T 349

(5) *Doe v. Thomas* 9 B & C 278

(6) *Doe v. Dale* 3 Q B 609 *Bray* 378—383

(7) *Attorney General v. Berkeley* 2 J & W 291

(8) *Ford v. DePontes* 5 Jur N S 993

(9) *Russell v. Jackson* 9 Hare 387

(10) *Mayor and Corporation of Bristol v. Cox* L R 26 Ch D 678 683

(11) *Thomas v. Secretary of State for India* 18 W R 312 (Eng)

(12) *Phipson* Ex 5th Ed 190 *Johnson v. Ticker* 11 Jur 382

(13) *Phipson* Ex 5th Ed 190 *Taylor* Ex § 296 *Baug v. Cradocke* 1 M & R 182 *Perry v. Smith* 9 M & W 681 *Shore v. Bedford* 5 M & G 271 *Ross v. Gibbs* L R 5 Eq 574 *Rennell v. Spry* 10 Beav 51 all followed in *Mervin Haje v. Moulvi Abdul* 3 B 91 (1878) supra

(14) *Taylor* Ex § 296 *Perry v. Smith* *Rennell v. Spry* supra *Wharton* Ex. I 587

(15) *Bullock v. Corrie* 3 Q B D 356 *Pearce v. Foster* 15 Q B D 114

(16) See *Explanation* to s. 126

(17) *Cholmondeley v. Clinton* 19 Vet. 268

(18) *Chant v. Brown* 7 Hare 79

portion of section 123 (*post*), or perhaps, in the event of the client's death, by his personal representative (1). The client does not waive his privilege by calling the legal adviser as a witness, unless he questions him on matters which but for such question, he would not be at liberty to disclose (2), and even in that case the cross-examination must be confined to the point upon which the witness has been examined in-chief (3). As to waiver in party, *v post* (1). Disclosures made under section 129 should not be enforced in any case except when they are plainly necessary (5).

The communication which may be verbal or documentary (6) must be of a private or confidential nature (as is expressly stated in section 129 and shown by the use of the word "disclose" in section 126), to be privileged (7). It must be made to the adviser *sub sigillo confessionis* (8). Section 126 has no application where the statement is made, not as confidential, but for the purpose of communication (9). It is not every communication made by a client to an attorney that is privileged from disclosure. The privilege only extends to communications made to him confidentially with a view to obtain professional advice (10). Letters containing mere statements of fact are not privileged; they must be of a professional and confidential character (11). Where defendants, at an interview at which the plaintiff was present, admitted their partnership to their attorney, who was then also acting as attorney for the plaintiff, it was held that the attorney was not precluded from giving evidence of this admission to him—1st, because the defendant's statement, having been made in the presence and hearing of the plaintiff, could not be regarded as confidential or private, 2ndly, because those statements did not appear to have been made to the attorney exclusively in his character of attorney for the defendants, but to have been addressed to him also as attorney for the plaintiff (12). The legal adviser must have learned the matter in

Communication must be private or confidential

If, therefore, he were a partner in the firm, he might also be employed for another, he would not be protected from disclosing, for in such a case his knowledge would not be acquired solely by his being employed professionally (13). There is no privilege where, in any correctness of speech there is no communication, as where, for instance, a fact that something was done, became known to him, from his having been brought to a certain place by the circumstance of his being the attorney, but of which fact any other man, if there, would have been equally cognisant (14), or where the thing disclosed had no reference to the professional employment, though disclosed while the relation of attorney and client subsisted, or where the attorney makes himself a subscribing witness, and thereby assumes another

(1) *Bray on Discovery* 386 as to waiver by successor in title or personal representative *ibid* 385—387 and *Taylor Ev* § 927

(2) *S* 128 the rule was otherwise under *s* 24 Act II of 1855

(3) *Taylor Ev* § 927 *Valiant v Dodemead* 2 Atk. 524 *R v Leterson* 11 Cox 15

(4) *Kay v Poorunchand Poonalal* 4 B 631 (1880) *s c* *Ind Jur* 479

(5) *Munclershaw Beonjs v New Dillruisey Co* 4 B (1880)

(6) *Gopal v Lakshpat Rai* 41 A 135 *s c* 48 I C 605

(7) *Memon Hajee v Moulvie Abdul* 3 B 91 (1878) *Framji Bhicaji v Mohan Singh Dhansingh* 18 Bom 263 271 (1893) *Greenough v Gaskell* 1 M & K,

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(8) *Ex parte Campbell In re Cathcart* L R 5 Ch App 703 cited in *Framji Bhicaji v Mohansingh Dhansingh* supra 272

(9) *R v Rodrigues* 5 Bom L R 122 (1903)

(10) *Framji v Dhansingh* supra *Foakes v Webb* 26 Ch D 287 *Gardner v Irwin* 4 Ex D 49 *O Shea v Wood* L R P D (1891) 288 290

(11) *O Shea v Wood* supra 290

(12) *Memon Hajee Moulvi Abdul* supra

(13) *Greenough v Gaskell* supra 103 104 *Taylor Ev* § 910

(14) *Ib* 104 *Framji Bhicaji v Mohan Singh Dhansingh* supra 275 276

character for the occasion, and adopting the duties which it imposes, becomes bound to give evidence of all that a subscribing witness can be required to prove (*v post*) But an attorney may not be called upon to disclose matters which he can be said to have learned by communication with his client, or on his client's behalf, matters which were so committed to him in his capacity of attorney, and matters which in that capacity alone he had come to know (1) The mere circumstance, however, that a solicitor or client obtains, by means of *fr*, does not protect him *wh* (2) But knowledge is itself privileged (3) The communication must be made *by, or on behalf of, the client* (section 126), when the adviser (or client) has his knowledge independently of any communication from the client (or adviser) or from collateral quarters, there is no privilege (4), nor in respect of knowledge derived by the adviser from the employment, but not from the client, as to mere facts patent to the senses (5) Where a solicitor claims privilege under section 126, he is bound to disclose the name of his client on whose behalf he claims the privilege The mere fact that the client's name had been communicated to him in the course, and for the purpose, of his employment as solicitor, by another client, affords no excuse, unless it was communicated to him confidentially, on the express understanding that it was not to be disclosed (6) He may also be compelled to prove "more collateral facts known without confidence," *e.g.*, client's *mere matters of observation* sworn an affidavit, or put in a plea capacity (10), the fact of the

a prosecutor's remark that "he would give a large sum to have his adversary hanged" (14), are not, but all necessary professional and confidential communications, legal opinions, drafts and the like, are privileged (15) A solicitor is not at liberty, without his client's express consent, to disclose the *nature* of his professional employment Section 126 protects from publicity, not merely the details

(1) *Greenough v Gaskell* supra 104
105 See *Gopul v Lajpat Rai* 41 A
135 s c 48 I C 605

(2) *Leuns v Penington* 29 L J Ch
670

(3) *Lyell v Kennedy* 9 App Cas 81
Proctor v Smiles 55 L J Q B 527

(4) *Wheatley v Williams* 1 M & W
533 *Sauyer v Birchmore* 3 M & K
572 *Manser v Dix* 1 K & J 451

(5) *Brown v Foster* 1 H & N 736
per Pollock C B *Kennedy v Lyell* 23
Ch D, 406

(6) *Framji Bhicaji v Mohansingh Dhan-
singh* supra following *Bursill v Tanner*
16 Q B D 1

(7) *Ex parte Campbell* in re *Cathcart*
L R 5 Ch & App 703 cited in *Framji
Bhicaji v Mohansingh Dhan Singh* supra
272 Re *Arnott* 60 L T 109 *Ramsbot-
tom v Senior*, L R 8 E 575

(8) *Daxer v Collins* 7 Ex 646

(9) 1b *Greenough v Gaskell* 1 M &
K 108 *Studdy v Sanders* 2 D & R
347

(10) *Jones v Godrick* 5 Moo P C 16
25

(11) *Levy v Pope* 1 M & M 410
Gillard v Bates 6 M & W 547 *Forshaw
v Lewis* 1 Jur N S 263

(12) *Beckwith v Bonner* 6 C & P 68^o
appears to be disapproved of in *Framji
Bhicaji v Mohansingh Dhan Singh* supra
280

(13) *Poote v Hayne* 1 C & P 545

(14) *Annesley v Anglesea* 17 St Tr
1223 see also *Cobden v Kendrick* 4 T
R 431

(15) *Mutclerlaw Re-ony v The
New Dhurursey Co* 3 B 580 (1880)
Reece v Trye 9 Beav 316 *Penruddock
v Hanford* 11 Beav 59 *Bunbury
v Bunbury* 2 Beav 173 [case for opinion
and opinions] *Reece v Trye* supra
*Mostyn v The West Mostyn Coal & Iron
Co* 34 L T 532 [drafts of agreement
lease or conveyance] *Douden v Blakey*
23 Q B D 332 [draft advertisement
settled by counsel] *Hard v Marshall* 3
T L R 578 *Woolley v N L M Co*
L R 4 C P 602 *Ryrie v Shushankor*
15 B 7 (1890), [notes of interviews or
communications by solicitor or client]

of the business, but also its general purport, unless it be known, *aliunde*, that such business, or the communications made in respect of it, fall within the first or second proviso to the section (1) If this be known, *aliunde*, and a foundation be thus laid for asking the question and admitting the evidence, *e.g.*, if in a particular case the facts proved make it probable that the visit to the adviser really was intended for a criminal or illegal purpose, the adviser may be rightly questioned as to the nature of his employment (2) The legal adviser will not be permitted to state the contents or condition of any document with which he has become acquainted by virtue of professional confidence (3) But he cannot withhold documents, unless his client is so entitled (4) He may not state whether a document, while in his possession, was stamped, indorsed or bore erasures, for that is condition (5) nor the date when or purpose for which, it was entrusted to him (6), but he may prove the fact that a particular document is in his possession so as to let in secondary evidence, if it be not produced on notice (7), but not in whose possession or custody it is, or when or where he saw the same, if he came to the knowledge of the fact inquired after in the course of confidential communication with his client in his professional capacity (8) He may prove that his client put in a pleading, or swore an affidavit, for these are matters of publicity (9) A solicitor employed to obtain the execution of a deed, and who is one of the witnesses is not precluded on the ground of a breach of professional confidence, from giving evidence as to what passed at the time of execution, by which the deed may be proved invalid (10) "If an attorney puts his name to an instrument as a witness he makes himself thereby a public man and no longer clothed with the character of an attorney his signature binds him to disclose all that passed at the time respecting the execution of the instrument, but not what took place in the concoction and preparation of the deed, or at any other time, and not connected with the execution of it" (11)

Documents which the client intends others to see as well as the solicitor, documents of a public nature, documents entrusted to the solicitor for purposes outside the ordinary scope of professional employment—*e.g.*, a book describing the lands and given him for, the purpose of collecting the tithes, are not privileged (12) Names of parties witnesses merely as such, proofs of witnesses whether disclosure be sought before, or at the trial, are privileged (13), but not names of parties' witnesses when constituting material facts in the action—*e.g.*,

(1) *Framji v Diansingh* supra 276 280 281

(2) *R v Cox & Railton* L R 14 Q B D 153 and see *Framji v Dhansingh* supra 279 280 281 cf *Taylor* Ev § 912

(3) S 126 see *Dwyer v Collins* supra *Davies v Waters* 9 M & W 608 *Cleave v Jones* 7 Ex 421 *Doe v James* 2 M & R 47 *Moore v Tyrell* 4 B & Ald 870 *Ljell v Kennedy* 9 App Cas 81

(4) *Bursill v Tanner* 16 Q B D 1

(5) *Wheatley v Williams* 1 M & W 533 but see *Brown v Foster* 1 H & N 736 supra

(6) *Turquand v Knight* 2 M & W 98 *Framji Bhicaji v Mohansingh Dhan Singh* supra

(7) *Dwyer v Collins* 7 Exch 646 *Bevan v Waters* 1 M & M 235

(8) *Cotman v Orton* 9 L J Ch 268 see also *Banner v Jackson* 1 D C & S

472 *Robson v Ke* p 5 Esp 52

(9) *Studdy v Sanders* 2 D & K 347 *Greenough v Gaskell* 1 M & K 108

(10) *Craesour v Salter* 18 Ch D 30

(11) *Robson v Kemp* 5 Esp 52 per Lord Ellenborough

(12) *Phipson* Ev 5th Ed 193 194 R v *Hoodley* 1 M & R 390 *Doe v Hertford* 19 L J Q B 526 but copies or extracts from public or non privileged private documents are privileged if the collection is the result of the solicitor's (or his agents') labour and skill and might disclose his view of the client's case *Ib Ljell v Kennedy* 27 Ch D 1 *Walsham v Stainton* 2 H & M 1

(13) *Ib Marriott v Chamberlain* 17 Q B D 154 *London Gas Co v Chelsea* 6 C B N S 411 *Fenner v S E R Co* L R 7 Q B 767 *Eade v Jacobs* 3 Ex D 337 mentioned in 20 Ch D, 529 See also *Mackenzie v Leo*, 2 Curt, 866 *Taylor* Ev § 932

those of persons in whose presence a slander was uttered (1) Draft pleadings in the same or former action are privileged, but not pleadings when filed, for they then become *publici juris*. Similarly, indorsements on, or notes and observations in, counsel's brief as to private matters, and solicitor's instructions on or in the brief are privileged. But instructions to counsel are only privileged in the sense that they are protected from disclosure to an opponent: they are not protected from enquiry by the Court. If he makes a charge on instructions and is protected by his instructions, for it is reasonable grounds for a charge before making one (3). But there is a presumption of good faith on his part, and to tax him with defamation it must be proved that he was actuated by an improper motive personal to himself (4). Indorsements on other matters *publici juris* are not privileged (5); as such, or between co-plaintiffs or co-defendants when directed to be admitted to a joint solicitor, are privileged (7). So also are letters written by the solicitor of two plaintiffs to the solicitor of a third plaintiff, as against the defendant claiming their production, if the communication is not a confession of fault on the part of the solicitor (6). A person relieves himself of the privilege by making the communication clearly and distinctly within it (9).

In the course and for the purpose of his employment

The communication need not, as has been seen, relate to any actual or prospective litigation, but the matter of the communication must be within the ordinary scope of professional employment (10), e.g. the sale purchase and conveyance of estates (11) or negotiations for a loan (12), but not communications to a solicitor acting merely as under sheriff (13), rent collector (14), patent agent (15) or trustee (16) nor communications in furtherance of a fraud or crime whether the solicitor is a party to or ignorant of the illegal object (17) nor probable are forged documents though entrusted to the solicitor in professional confidence, privileged (18).

(1) *Ib Roselle v Buchanan* 16 Q B D 656 *Marrnett v Chamberlain* supra

(2) *Heston v Peary Molan Das* 40 C 598 (1913) *per Woodroffe J*

(3) *Ib*

(4) *Aikunja Behari Sen v Harendra Chandra Sinha* 41 C. 514 (1914)

(5) *Ib Halsam v Stanton* 2 H & M 1 *Lamb v Orton* 22 L. J., Ch., 713 *Nicholls v Jones* 2 H & M 558. In this case it was also said that counsel's indorsement is a note on which the Court always rests and on which great reliance is placed. *Ch., 505* *Haslam v Hall* 3 T. L. R. 776 as to notes of evidence and proceedings in open Court see *Ravestone v Compton* on *of Preston* 30 Ch. D. 116 *Fobson v Harcourt* 38 Ch. D. 370

(6) *Phipson F.C.* 5th Ed. 195 and cases there cited and see note to s. 21 ante as to communications "without prejudice" the rule however applies where the attorney is a co-defendant *Hamilton v Auld* L. R. 16 Eq. 112

(7) *Jenkins v Bushby* L. R. 2 G. 548

(8) *Kay v Doornichand Doornalal* 4

B. 631 (1880)

(9) *Framji Bhai v Molanangh Dhan singh* supra 278

(10) *Carpmael v Peart* 1 Phill. 687, 692 a correlative test is whether the nature of the employment would give the Court summary jurisdiction over the solicitor *Turgand v Knight* 2 M. & W. 101. As to knowledge acquired in course of employment see *Capital v Lakhpur* 48 L. C. 605

(11) *Ib*

(12) *R v Farley* 2 C. & K. 313

(13) *Hudson v Rastall* 4 T. R. 753

(14) *Stratford v Hogan* 2 Pall. & R. 16 (Irish) *Doe v Hertford* 19 L. J. Q. B. 526

(15) *Mosely v The London Rubber Co.* 55 L. T. 482

(16) *Tugwell v Hooper* 10 Feas. 345

(17) *S. 126* *Proviso R v Cox & Fall* 14 Q. B. D. 153 *R v Downer* 14 Cox 455 *Re Annot* 10 L. T. 10 *Post* *Thurston v Rukman* L. R. 35 Ch. D. 722

(18) *Phipson F.C.* 5th Ed. 189 *R v Havard* 2 C. & K. 174 *R v Avery* 8

"The exclusion of such evidence is for the general interest of the community, and, therefore, to say that, when a party refuses to permit professional confidence to be broken, everything must be taken most strongly against him, what is it but to deny him the protection, which for public purposes the law affords him, and utterly to take away a privilege which can thus only be asserted to his prejudice"(1) There is a distinction between such cases as these and those in which evidence is *improperly* kept out of the way (2)

No hostile inference should be drawn from a refusal to let a legal adviser disclose confidential communications

If the solicitor, in violation of his duty, should voluntarily communicate to a stranger the contents of an instrument with which he was confidentially intrusted, or should permit him to take a copy, the secondary evidence so obtained would, it seems, be admissible, provided that notice to produce the original were duly given and the production were resisted on the grounds of privilege (3) ' Indeed it has been more than once laid down that the mere

Communication in violation of duty, secondary evidence

lawfully or unlawfully, nor will it raise an issue to determine that question"(4)

Sections 126—129 refer to communications between clients and their legal advisers alone. As regards documents governed by these sections, they are absolutely privileged, and the Court has no power whatever to order production (5) There are certain cases, however (for which the Act does not make specific provision and in which the question of privilege generally arises on applications for discovery or inspection before trial), in which communications made *for the purpose of litigation* between *third persons* and the adviser, or *third persons* and the client, for the purpose of submission to the adviser, are under the discretion given by s. 130 of the Civil Procedure Code, which discretion is exercised according to the practice of the Court (6) protected from disclosure. Such communications are only protected when they have been made in contemplation of some litigation, or for the purpose of giving advice or obtaining evidence with reference to it. And this protection is given because the solicitor is then preparing for the defence or for bringing the action, and all communications he makes for that purpose and the communications made to him (directly or to the client for transmission to him) for the purpose of giving him the information are, in fact, the brief in the action (7) The rule relating to the privilege may be summarised as follows.—The information may be called into existence or obtained either by (A) the client, or (B) the solicitor.

Information obtained from third parties for the purpose of litigation

A—(a) Information (oral or documentary) from third persons called into existence by the client, and given in relation to an intended action (whether

C & P 596 599 *R v Jones* 1 Den 166 *R v Brown* 9 Cox 281 *R v Doi* ner supra Taylor Ev § 929

(1) Per Lord Brougham in *Bolton v The Corporation of Liverpool* 1 M & K 88 94

(2) *Hentworth v Lloyd* 10 Jur N S 961

(3) *Cleave v Jones* 21 L J Ex 106 *Lloyd v Mostyn* 10 M & W. 481 482 Taylor Ev § 920 if the client sustains any injury from such improper disclosure being made an action will lie against the solicitors *Taylor v Blacklow* 3 Bing N C 235

(4) Taylor Ev § 920 and cases there cited

(5) *Vishnu Yeshnan v New York Life Insurance Co* 7 Bom L R 709 (1905) and see *Umbica Churn Sen v Bengal Spinning Co* (1894) 22 C 103

(6) *Id*

(7) *Wheeler v LeMarchant* supra 684 685 You have no right to see your adversary's brief and no right to see the materials for his brief Per James L J in *Anderson v Bank of Columbia L R 2 Ch D 644* and see remarks of Blackburn J in *Fenner v S E R₃ Co L R 7 Q B 767*

at the request of a solicitor or not, and whether ultimately laid before the solicitor or not) is privileged, if it has been so called into existence for the purpose of submission to the solicitor, either for the purpose of advice or of enabling him to prosecute or defend an action(1), *e.g.*, shorthand notes of interviews held between a superior and subordinate employee of a plaintiff company or between the chairman of the same company and an employee, in order to obtain information on a subject of expected litigation for submission to the company's solicitors were held to be privileged(2), and so also were reports obtained by a party from his subordinates for a similar purpose(3). But letters written by one of the defendants' servants to another, for the purpose of obtaining information with a view to possible future litigation, with the intention that, in that case, they should be laid before a solicitor, are not privileged. It is for the party claiming the privilege to show that the documents were prepared for the use of his solicitor, that they came into existence for the purpose of being communicated to the solicitor with the object of obtaining his advice, or of enabling him to prosecute or defend an action, as *Cotton, L. J.*, or as *Brett, L. J.*, says "merely for the purpose of his advice or consideration"(4). If the advice given with reference to such communications must also be privileged; and it is immaterial that such communications pass from agent to principal, or vice versa before or after they are communicated to the solicitor. The same rule must apply to the advice of the solicitor(6). Documents which record the steps taken by the plaintiff from time to time in prosecuting their claim against the defendant are not privileged(7). (b) But information (oral or documentary) obtained by the client otherwise than for submission to the solicitor (*e.g.*, reports and communications made by agents or servants in the ordinary course of their duty) is not privileged even though litigation be anticipated(8). The rule has been thus stated by *Brett, L. J.*: "Any report or communication by an agent or servant to his master or principal, which is made for the purpose of assisting him to establish his claim or defence in an existing litigation, is privileged and will not be ordered to be produced, but if the report or communication is made in the ordinary course of the duty of the agent or servant whether before or after the commencement of the litigation, it is not privileged and must be produced. The time at which the communication is made is not the material matter, nor whether it is confidential, nor whether it contains facts or opinions. The question is whether it is made in the ordinary course of the duty of the servant or agent, or for the instruction of the master or principal as to the claim." Accordingly, if a claim had been made and asked

(1) *The Southwark & Lanchester Water Company v. Quick* L. R. 3 Q. B. D. 315 followed in *Bipro Doss v. Secretary of State* 11 C. 655 (1885) *Lush v. Lushant* v. *New York Life Insurance Co.* 7 B. N. R. 709 (1905).

(2) *Southwark v. Quick* supra.

(3) *London & Tilbury Ry. Co. v. Kirk* 28 Sol. Journ. 688 *Haslam v. Hall* 3 T. L. R. 776.

(4) *Bipro Doss v. Secretary of State* supra *Southwark v. Quick* supra see also *Cooke v. North Met. Tran. Co.* 6 T. L. R. 22 *Hestings v. M. R. Co.* 48 T. L. R. 46.

(5) *Southwark v. Quick* supra.

(6) *Ry. v. Shrestankar Gopali* 15 B. (1890).

(7) *Ib.*

(8) *Woolley v. North London Ry. Co.* L. R. 4 C. P. 602 *Wallace v. Jefferson* 2 B. 453 (1878), see also *Cooke v. North Met. Tran. Co.* 6 T. L. R. 22.

(9) *Woolley v. North London Ry. Co.* supra at pp. 613, 614.

(10) *Anderson v. Bank of Columbia* L. R. 2 Ch. D. 644 followed in *Wallace v. Jefferson* supra see also *London Gas Co. v. Chelsea* 6 C. B. N. S. 411 *English v. Toller* 1 Q. B. D., 141.

principal to be submitted "in the event of litigation" to the latter's solicitor, have been held not to be privileged (1)

B—(a) Information (oral or documentary) from third persons "which has been called into existence by the solicitor (or by his direction, even though obtained by the client) for the purposes of litigation—e.g., information to be embodied in proofs of witnesses(2), reports made by medical men at the request of the solicitors of a Railway Company, as to the condition of a person threatening to sue the Company for injury from a collision(3), and anonymous letters sent to solicitor and counsel(4) with reference to, and for the purpose of a trial, are privileged (5) (b) But there is no privilege in respect of such information "not called into existence by the solicitor, though obtained by him for purposes of litigation, e.g. copies of letters written before action by third persons to the client(6), or called into existence by the solicitor though not for the purposes of litigation—e.g., a report made by a surveyor at the solicitor's request as to the state of a property upon which the client was about to lend money(7), or as to matters in respect of which litigation was not at the time contemplated although it afterwards arose" (8) (See also preceding paragraph)

130 No witness who is not a party to a suit shall be compelled to produce his title-deeds to any property, or any document in virtue of which he holds any property as pledgee or mortgagee, or any document the production of which might tend to criminate him, unless he has agreed in writing to produce them with the person seeking the production of such deeds or some person through whom he claims

Production of title-deeds of witness not a party

131 No one shall be compelled to produce documents in his possession which any other person would be entitled to refuse to produce if they were in his possession, unless such last mentioned person consents to their production

Production of document which another person having possession could refuse to produce

Principle—A rule of legal policy founded in English law upon a consideration of the great inconvenience and mischief to individuals which might and would result to them from compelling them to disclose their titles by the production of their title deeds (9) The object of the privilege as to not producing title deeds is that the title may not be disclosed and examined (10) The ethics of the rule has been said to be questionable Nevertheless in England the law's failure to protect titles adequately by registration and the inevitable risks which were thereby created for even *bona fide* titles furnished a sufficient explanation if not a justification But under a system of compulsory public registration there is in such a privilege neither necessity nor utility Those

(1) *Cooke v North Met Tram Co* supra *West Gloucester v M R Co* 48 L T 462 *B pro Doss v Secretary of State* 11 C 655 (1885)
(2) *Dinbal v Fra ro* 43 J C 71
(3) *Hoolley v A L A Co* supra *Frem v L C & D R Co* 2 Ex D 437 and see *Wheeler v LeMarchant* supra *Proctor v Sniles* 55 L J Q B 527 *Bustros v White* 1 Q B D 423 *McCorquodale v Ball* 1 C P D 471
(4) *Re Holloway* 12 P D 167 but anonymous letters sent by stranger to client are not privileged (ib) when a solicitor

is employed on behalf of his client the information which he gets in reference to the litigation in which his client is concerned is protected (ib)
(5) *Phipson Ex* 5th Ed 196
(6) *Chad ck v Bouman* 16 Q B D 561
(7) *Wheeler v LeMarchant* supra
(8) *West Gloucester v M R Co* 48 L T 462 *Phipson Ex* 5th Ed 195 196
(9) *Stark v Ex* 111 see *Best Ex* § 178 see also *Taylor Ex* § 1464
(10) *Phipps v Price* 3 E & B 441 per *Erle J*

and they are few, who do not register voluntarily, take the risk of loss, and their situation does not justify special protection. Those who do register have no need of protection, for their title in general stands or falls by what is publicly recorded, not by what they privately possess (1). As to section 131, see Commentary, and as to criminating documents, see Commentary and section 132, *post*.

s 3 ("Document")

s 139 (*Cross examination of persons called to produce document*)

s 165 (*Production of Documents*)

s 165, PROV 2 (*Power of Judge to compel production of document*)

Act XIX of 1853, s 26, Act X of 1855, s 10, Act XVIII of 1891, s 5 (Banker's Books), Steph Dig Arts 118 119, Starkie, Ev, 111, Best, Ev, § 128, Roscoe, N P Ev, 18th Ed, 156—159, Taylor, Ev, §§ 458, 918, 919, 1464, Bray's Discovery, 313, 203—206, Woodroffe and Amerer Ali, Civ Pr Code, O XI, r 6, p 757, 2nd Ed, p 783, r 14, p 767, 2nd Ed, p 793, Hageman, *op cit*, §§ 117, 118, Wigmore, Ev, § 2211

COMMENTARY.

Production of privileged documents

The rule enacted by these sections, in so far as they relate to witnesses not parties, and the class of persons contemplated by section 131, is in general accordance with that of the English law on the same subject (2). The first section applies only in the case of a witness who is not a party to the suit in which he is called. But where discovery is sought under the provisions of the Civil Procedure Code, a witness, if a party, cannot be compelled to produce documents which he swears relate solely to his own title or case, and do not in any way tend to prove or support the title or case of his adversary. But the production of other relevant and material documents will ordinarily be compelled (3). The privilege in the case of a *party* is not confined to title-deeds. "The word 'title' produces confusion, because in many cases it is not a question of title at all, and the proposition ought to be that a plaintiff is not entitled to see any document that does not tend to make out his case" (4). The oath of the witness is conclusive as to the nature of the document (5). *Quære* whether a party can on an application for discovery be compelled to answer interrogatories, or to produce documents of a criminating character. In England (where, however the rule relating to criminating evidence is different from that under this Act) he would not be so compelled (6). No protection is given by this Act against such answer or production, which (section 1) does not apply to affidavits, and

be dealt with as if the party interrogated were in the witness box, and that all questions will be allowed which the party interrogated would be bound to answer if he were a witness (7). If this be so, the defendant would be bound to answer. On the other hand, it is one of the inveterate principles of English

(1) Wigmore Ev § 2211. In the United States there is no such privilege.

(2) Taylor Ev §§ 458 918, *Pickering v Noyes*, 1 B & C, 263, *Adams v Lloyd*, 3 H & N, 351, *Whitaker v Izod* 2 Taunt 115, and text books cited *ante*.

(3) *Morris v Edwards*, D R 15 App Cas 309, affirming *Morris v Edwards*, 23 Q B D 287, see *Bolton v Corporation of Liverpool*, 1 M & K, 8^o.

(4) *Per Kindersley*, V C, in *Jenkins v Bushby*, 35 L J, Ch, 400, see *Bewicke v Graham*, 7 Q B D, 400, *Morris v Edwards*, 23 Q B D, 287.

(5) *Morris v Edwards*, *supra*.

(6) Cf Woodroffe & Amir Ali's Civ Pr Code 2nd Ed, O XI r 6 p 783 r 16 p 795, *Hill v Campbell*, L R, 10 C P 222, *Atherley v Harvey* 2 Q B D 524, *Fisher v Owen* 8 Ch D, 645, *Webb v Easte*, 5 Ex D, 108, Bray on Discovery 313. As to discovery in criminal cases, see *Mohamed Jackersiah v Ahmed Mahomed* 15 C, 109 (1887).

(7) See remarks of Alderson B in *Osburn v London Dock Co*, 10 Ex, 698 702, *Lycell v Kennedy* 8 App Cas, 234

held that, unless it appears that the title of "will in some way be affected by its production would appear from the terms of section 131" (1) "it has also been" (2) "plated by that section cannot be compelled" (3) "possession, they will yet if they so choose, be permitted to do so" (4) "and therefore" (5) "for example, though a legal adviser holding a document confidentially for his" (6) "client, may justify his refusal to produce it under this section, and is forbidden" (7) "(by section 126) to state the contents of any document with which he has become" (8) "acquainted in the course, and for the purpose, of his professional employments" (9) "he will yet be permitted to produce the document itself, if it happen to be in his" (10) "possession and he chooses to do so (8) The fact that the production of document" (11) "will expose the person producing it to a *civil action* affords no ground for protection" (12) "(9) A witness not a party need not produce a criminating document, but" (13) "he must answer any criminating question, save, it is submitted, any question as" (14) "to the contents of any such criminating document, as, by the provisions of" (15) "section 130 he is not bound to produce (10) As to a witness who is a party," (16) "*ante* In all cases notwithstanding any objection there may be, the document" (17) "itself must be brought to Court when the Judge will decide as to the validity" (18) "of the objection (11) As to the liability of a witness for damages in case of" (19) "failure to give evidence or to produce a document *see* Acts XIX of 1853 (12)" (20) "and X of 1855 (13) A witness called on his *subpoena duces tecum* who objects to" (21) "the production of documents has no right to have the question of his liability"

(11) S 162 *post*
(12) S 26 (in force in Bengal N W
P and Oudh)
(13) S 10 (in force in the Presidencies
of Madras and Bombay)

to produce argued by his counsel retained for that purpose (1) A witness cannot
of any
product
in such
practica
should be permitted him So though a solicitor, having a lien on a deed, may not be bound to produce it at the instance of the client against whom the lien exists, yet if the client is bound to produce it for the benefit of a *third person*, as *e.g.*, under a *subpœna duces tecum*, so too is the solicitor (4) A banker is not compellable to produce his books in legal proceedings to which the bank is not a party (5) But in England it has been recently held that the fact that a banker has received a document upon the terms that it shall not be delivered up except with the consent of the depositor is no answer to a *subpœna duces tecum* (6)

132. A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answers to such question will criminate, or may tend directly or indirectly to criminate such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind:

Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer (7)

Principle—The general rule is otherwise in England, where (with certain exceptions) a witness need not answer any question the tendency of which is to expose the witness, or the wife or husband of the witness, to any criminal charge, penalty or forfeiture (8), the maxim being "*Nemo tenetur seipsum*

(1) *Roach v Egremont* 2 M & Rob 386 see also *Lee v Merest* 39 L J 1cc 53 56

(2) *Hunter v Leathley* 10 B & C 885 *Lev v Barlow* 1 Fx 801 *Taylor Ev*, § 458 and cases there cited

(3) This is suggested in *Brassington v Brassington* 1 Sim & St 455 and acted upon in *Kemp v King* 2 M & Rob 437. see also *Hepe v Liddell* 24 L J Ch, 693 *Re Camerons etc Co* 25 Beav 4, *Taylor Fx* § 458 *Brays Discovery* 203—206 *Wignore Ev* p 3001

But it seems to be opposed to *Hunter v Leathley* supra in which a broker who had a lien on a policy for premiums advanced was compelled to produce it in an action against the underwriter by the assured who had created the lien [Steph Dig Art 118 see also *Fowler v Fowler*, 29 W R (Eng) 801 See *Lockett v Carey* 10 Jur N S 144 where a solicitor was party to the action and Indian Contract Act (IX of 1872) ss 171 221 As to right of mortgagee to withhold production of mortgage-deeds or title deeds,

see *Beattie v Jetha Dungsari*, 5 Bom H C R O C J 152

(4) *Cordery's Law* relating to Solicitors 3rd Ed 365 *Lush's Practice* 3rd Ed 335 336, as to lien in insolvency, administration and in winding up proceedings see *Brays Discovery* 205

(5) Act XVIII of 1891 s 5

(6) *R v Daye* (1908), 2 K B 333 (Div Ct)

(7) See *Horsain Baksh v R* 6 C. 96 107 (1880) as also see *R v Durant* 23 B 213 220 (1898) in which the accused called as witnesses persons charged with him and awaiting a separate trial for the same offence

(8) See *R v Gopal Dass* 3 M 279—282 (1881) *Best Ev* §§ 126—129, *Taylor Ev* §§ 1450—1463 *Bray on Discovery* 311—349 *Roscoe N P Ev*, 18th Ed 167—169 *Phipson Ev*, 5th Ed 198 202 *Powell Fv* 9th Ed 221—228, *Steph Dig*, Art 120 *R v Boyes* 1 B & S 330 *Fx parte Reynolds* L R., 20 Ch D 298 (oath of the witness not conclusive claim must be *bona fide*)

Witness not excused from answering on ground that answer will criminate

Proviso

prodere" (1) The privilege is based on the principle of encouraging all persons to come forward with evidence, by protecting them, as far as possible, from injury or needless annoyance in consequence of so doing (2) This privilege was repealed in India by section 32, Act II of 1855, which is reproduced in the present section. The state of the law, while the privilege existed, tended in some cases to bring about a failure of justice, for the allowance of the excuse when the matter to which the question related was in the knowledge solely of the witness, deprived the Court of the information which was essential to its arriving at a right decision. In order to avoid this inconvenience, and to obtain evidence which a witness refused to give, the witness was deprived of the privilege of claiming excuse, but, while subjecting him to compulsion the Legislature, in order to remove any inducement to falsehood declared that evidence so obtained should not be used against him, except for the purpose in the Act declared (3) The necessity under which the privileged witness formerly lay of explaining how the answer might criminate him amounted in some cases to a virtual denial of the privilege. This necessity for an enquiry as to how the answer to a particular question might criminate is now avoided. The rule enacted by this section thus secures the benefit of the witness's answer to the cause of justice, and the benefit of the rule, that no one shall be compelled to criminate himself, to the witness (claiming his privilege) when a criminal proceeding is instituted against him (4)

s. 130 (*Criminating Documents*)

ss 148—149 (*Criminating Questions in cross-examination*)

Steph Dig., Art 120 Taylor Fr §§ 1453—1463 Best Ev §§ 126—129 Bray on Discovery 311—349 Roscoe N P Ev 18th Ed 167—169 Powell Ev 9th Ed 221—228 Cr Pr Code ss 161—175 Stewart Rapalje a Law of Witnesses §§ 261—269 Wharton Fr §§ 533—540 Hageman's Privileged Communications §§ 256—271

COMMENTARY.

This section gives the Judge no option to disallow a question as to matter relevant to the matter in issue. Section 148 gives him an option to compel an answer to a question as to a matter which is material to the suit only so far as it affects the *credit* of the witness (5) As to interrogatories, see notes to s 130 *ante* Shall not be excused "

This section does not in terms deal with *all* criminatory questions which may be addressed to a witness, but only with questions as to matters, relevant to the matter in issue. Irrelevant questions should not be allowed, and it may be implied from the limitation in this section, that a witness should be excused from answering questions tending to criminate as to matters which are irrelevant (6) On the very language of the section the witness can always claim to be excused on the ground of the irrelevancy of the question (7) Relevant to the matter in issue

Though the question does not so expressly provide, it follows, *à fortiori* that a person is not excused from answering any question only because the Criminate penalty, forfeiture

(1) For a criticism of this rule see Bentham Rationale Bk IX Part IV Ch 3, Stephens's History of the Criminal Law I 342 441, 535 542 565, Wigmore Ev § 2251 and at p 3101 where he deals with the subject of judicial cant towards crime and with what a wit has called "justice tampered with mercy"

(2) Best Ev. § 126 a compromise has however been adopted in several modern statutes by compelling the disclosure but indemnifying the witness from its results

see Phipson Ev 5th Ed 198

(3) *Per* Turner C J in *R v Gopal Dass* supra 279 280

(4) *Ib per* M Ayyar J at pp 286 287 So a co accused in separate case can be called as defence witness under the protection of this section *Raja Ram v Emp* 24 Cr L J 633 (1923)

(5) *R v Gopal Dass* 3 M 271 280.

(6) *Ib* 278 *per* Turner C J

(7) *Ib* 283 *per* Innes J

answer may establish or tend to establish, that he owes a debt or is otherwise liable to a civil suit, either at the instance of the Crown or of another person (1)

Shall be
compelled
to give

The section makes a distinction between those cases, in which a witness voluntarily answers a question, and those in which he is compelled to answer and gives him a protection in the latter of these cases only. Protection is afforded only to answers which a witness has objected to give, or which he has asked to be excused from giving, and which then he has been compelled to give, and not to answer given voluntarily. "As these words stand they presuppose an objection by the witness, which has been overruled by the Judge and a constraint put upon the witness to answer the particular question." If, therefore, the witness wishes to prevent his statement from being thereafter
ground for
use of in a
the witness

himself(3), or the Counsel or pleader representing him (4) *Quære*, however whether the Judge ought not (though he is not bound) to advise the witness of his right (5). Recently however, it has been held, that although a voluntary statement made by a witness may stand on a different footing an answer given by a witness in a criminal case on oath to a question put to him either by the Court or by counsel on either side, especially when the question is on a point which is relevant to the case, is within the protection afforded by this section, whether or not the witness has objected to the question asked him (6). More recently still it has been held that the question whether a witness is compelled to answer is in each case a question of fact (7). In the undermentioned case it was held by the Allahabad High Court that if a witness while giving evidence makes a statement which amounts to defamation he may be prosecuted under section 199 of the Penal Code, and it lies on him to show that the statement falls within one or other of the exceptions to that section or that he is protected by the proviso to this section (8). It has been held that a prisoner's thumb impression which had been taken out of Court and without objection by him was admissible against him in a later trial for giving false evidence (9). This decision was based on the

(1) See 46 Geo III Cap 47 Steph Dig Art 120 and note as to the meaning of tendency to criminate see *Lamb v Munster* 10 Q B D 111 114

(2) *R v Gopal Dass* supra (1881) per curiam Kerman and Ayyar JJ dissent *R v Ganu Sobna* 12 B 440 (1883) per curiam Birdwood J dissent *R v Samsappa* 15 M 63 per curiam (1891), *Moher Sheikh v R* 21 C 392 (1893) per curiam *R v Moss* 16 A 88 100 (1893) *Haider Ali v Abru Mia* 2 C L J 105 (1903) s c 9 C W \ 911 32 C 736 *Sodaruddin Sarkar v R* 31 C 715 (1904) at pp 720 721 As to the law under section 32 Act II of 1855 see *R v Jai Ivan B L R Sup Vol 521 524 526 530* (1866) *Joseph Perry v Official Assignee* 47 C 254 *Kallu v Sital* 40 A 271 (1918), *Ganga Sahas v Emperor*, 42 A, 257 (1900)

(3) *Thomas v Newton* 1 M & M 48n *R v Adey* 1 M & Rob 94, *Boyle v Hiscan* 10 Ex R 647

(4) *R v Pramatha Nath Bose* (1910) 37 C 878

(5) See *Fisher v Ronalds* 12 C B 762 *Parton v Douglas* 16 Ves 242 *A G v Radolf* 10 Ex 88 *R v Gopal Dass* supra 286 s 148 post especially refers to warning by Judge As to the power of the Judge to question the witness see *R v Hari Lakshman* 10 B 185 (1883)

(6) *Elli v Clatur Singh* 43 A 92 (1921)

(7) *Ell v Banarsi* 46 A 254 s c 25 Cr L J 477 (1923)

(8) *R v Ganga Prasad* (1907) 29 A p 686 (Knox and Aikman JJ but Richards J dissent) held that no prosecution for defamation could lie against a witness for conflict of decision on this point see *Kari Singh v R* 40 C 433 (1913) *Venkata Reddi in re F B 36 M 216* (1913) *Satish Chandra Chakravarti v Ran Doyal De* 48 C 388 *Dinshaw Fidalvi v Jehangir Coomaji* 47 B 15 and post Examination of Witnesses

(9) *Timoo Mia v R* (1911) 39 C. 349

grounds that the taking of the thumb impression was not equivalent to the asking and answering of a question and that it had been done without objection and not in the course of a trial. In another later case where a party to a suit had made objections to questions asked of him, it was held that this objection was held in a subsequent case that the overruling an objection will not necessarily amount to compelling a witness to answer.

Persons examined by Police officers investigating cases under the provisions of sections 161, 175 Criminal Procedure Code, are not bound to answer questions put by such officers (2). As to criminating documents see section 130 *ante* and as to the penalties for refusing to give evidence and for perjury and the protection afforded to witnesses in respect of what they may say whilst under examination see Introduction to Chapter X.

Persons
examined
by Police-
officers

133. An accomplice shall be a competent witness against an accused person, and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

Accom-
plices

Principle—The testimony of accomplices who are usually interested, and nearly always infamous witnesses, is admitted from necessity, it being often impossible without having recourse to such evidence to bring the principal offenders to justice (3). But the practice is to regard the statements of such persons as tainted because, from the position occupied by them their statements are not entitled to the same weight as the evidence of an independent witness (4). Accomplice evidence is held untrustworthy for three reasons (a) because an accomplice is likely to swear falsely in order to shift the guilt from himself (b) because an accomplice as a participator in crime and consequently an immoral person is likely to disregard the sanction of an oath, and (c) because in the expectation of an acquittal or a pardon those with whom he acted in the prosecution (5). There fore as a general rule confirmation of the evidence of an accomplice is required (*vide post*) yet as it is allowed that he is a competent witness the consequence is inevitable that if credit is given to his evidence it requires no confirmation from another witness (6).

ss 114 ILLUSTR (b) (*Presumption as to accomplice evidence*)

Taylor Ev §§ 967—971 B at Ev §§ 170 171 Foster & Crown Law 352, Roseoe, Cr Ev 13th Ed 103—113 Criminal Procedure Code ss 337—339 (Tender of Pardon to accomplice) s 297 (Charge to Stewart Rapalje's Law of jury) Witnesses §§ 226—228, Burr Jones Ev §§ 786—788 Wharton's Criminal Ev §§ 439—445 Wigmore Ev, § 2056 *et seq*

(1) *R v Pranati Nath Bose* (1910) 37 C 878 distinguishing *Thon as v Newton* (supra) and *R v Adey* 1 Moo and Rob 94

(2) Cr Pr Code ss 161 175

(3) Taylor Ev § 967

(4) *R v Bepin Biswas* 10 C 970 975 (1884)

(5) *Per Scott* I in *R v Maga Lall* 14 B 115 119 (1889) *see* remarks of Peacock C J in *R v Elahi Bux post*

and *Kanala Prasad v Sital Prasad* 24 C 339 324 343 (1901)

(6) *R v Jaws* 2 Camp 131 *R v Elahi Bux* B L R Sup Vol F B 459 462 (1866) *See* Wigmore Ev § 2056 *Emperor v Anant Kunar Banerji* 32 C L J 204 As to whether absence of corroboration is fatal *see Alla ud Din v Emperor* 20 Cr L J 561 52 I C 49 and *see* 49 I C 607 *Pangang v Emperor* 19 Cr L J 47 *see* 42 I C 1002

COMMENTARY.

Accomplices

An accomplice is one concerned with another or others in the commission of a crime (1). The term "accomplices" may include all *participes criminis* (2). An accomplice is a person who is a guilty associate in crime or who sustains such a relation to the criminal act that he can be jointly indicted with the defendant (principal) (3). But it is not every participation in a crime which makes a party an accomplice in it, so as to require his testimony to be confirmed: much depends on the nature of the offence and the extent of the complicity of the witness in it (4). It is generally unsafe to convict a person on the evidence of accomplices unless corroborated in material particulars. But in considering whether this general maxim does or does not apply to a particular case, it is to be remembered that all persons coming technically within the category of accomplices cannot be treated as on precisely the same footing, the nature of the offence and the circumstances under which the accomplices make their statements must always be considered. No general rule on the subject can be laid down (5). Where a witness admits that he was cognizant of the crime as to which he testifies, and took no means to prevent or disclose it, his evidence must be considered as no better than that of an accomplice (6). A person who offers a bribe to a public officer is an accomplice in the offence of taking an illegal gratification (7). Persons merely present when money is given to a bribe-taker are not accomplices but the case is different if they have co-operated in the payment of the bribe, or taken some part in the negotiations for its payment. In the latter case they cannot be regarded as independent witnesses and their evidence is tainted (8). Where certain persons accompanied another who was entrusted with and carried the money intended to be given as a bribe to the head constable, in the knowledge that it was to be so paid and in order to witness and assist in such payment they were held to be accomplices (9). While it is usually unsafe to convict a public servant of receiving bribes on the uncorroborated evidence of persons who say they have given them the question as to the amount of corroboration depends on the circumstances of each case (10).

The mere presence of a person on the occasion of the giving of a bribe and his omission to promptly inform the authorities do not constitute him an accomplice, unless it can be shown that he somehow co-operated in the payment of the bribe or was instrumental in the negotiations for the payment (11). There

(1) Wharton Law Lexicon 5th Ed. The co-operation in the crime must be real and not merely apparent. Wharton Cr. L. § 440. See 74 C. W. N. 119.

(2) Foster & Crown Cases 341 thus in English law it includes both principals in the first and second degrees and accessories before and after the fact. But in India it was held that an accessory after the fact (under the law prior to the Penal Code) stood on a very different footing from an accomplice. *R. v. Chatterdhar Singh* 5 W. R. Cr. 59 (1866) see also Mysore Penal Code note to s. 117 and ss. 130, 136, 167, 212, 216.

(3) Per Sir S. Subramaniam Aiyar Offg. C. J. *Ramasami Gounden v. R.* 27 M. 771 (1903) see 14 Mad. L. J. 226.

(4) *R. v. Chatterdhar Singh* 5 W. R. Cr. 59 (1866) Best F. 171. *R. v. Hargrave* 5 C. & P. 170. *R. v. Jarvis* 2 Moo. & P. 40. *R. v. Hayes* 1 B. & S. 311, 322 see first & supplementary illustrations to all (b) s. 114.

(5) *K. v. Mallor* 26 B. 193 (1901) see 1 Bom. L. R. 694. *K. v. Hanwant* C. B. I. R. 441, 450 (1904).

(6) *J. v. Chaita Chonlalnee* 24 W. R. Cr. 55 (1875) see *Isai Chaitra v. R.* post.

(7) *K. Chagat Dossan* 14 B. 331 (1900). *K. v. Magan Lal* 14 B. 115 (1899). *R. v. Malhar* 26 B. 193 (1901) see also *R. v. Ohlay Churn* 3 W. R. Cr. 19 (1865). *K. v. Sripa* 15 M. 63 (1901).

(8) *Alatani Ali v. Emperor* 15 P. W. R. Cr. 1919 see 20 Cr. I. J. 254.

(9) *Raoji Kant v. Isan Mullick* 2 C. W. N. 672 (1895).

(10) *R. v. Mahor* 76 B. 193 (1901). (11) *K. v. Deodhar Singh* 27 C. 144 (1909) and in *Akhoy Kumar v. Jagat Chunder* 27 C. 925 (1909) it was held that a person lending money in ordinary course of business to pay a amount extorted was not an accomplice.

is nothing in the law to justify the broad proposition that the evidence of witnesses, who admit that they were cognizant of a crime, that they made no attempt to prevent it, and that they did not disclose its commission, should only be relied on to the same extent as that of accomplices (1) A person who has helped the accused to conceal the corpse of a person murdered or has omitted to give information of the murder is not an accomplice, although he may be guilty of an offence either under s 201 or s 202 of the Indian Penal Code (2) "An accomplice witness is one who is either being jointly tried for the same offence and makes admissions which may be taken as evidence against a co-prisoner and which make the confessing accused *pro hac vice* a sort of witness, or one who has received a conditional pardon on the understanding that he is to tell

The action of a spy and informer in suggesting and initiating a criminal offence is itself an offence, the act not being excused or justified by any exception in the Indian Penal Code, or by the doctrine which distinguishes the spy from the accomplice. But the act of a detective in supplying marked money for the detection of a crime cannot be treated as that of an accomplice (6) Where an informer was upon his own statement cognizant of the commission of an offence and omitted to disclose it for six days, the Court was not prepared to say that he was an accomplice, but held that his testimony was not such as to justify a conviction except where it was corroborated (7) "When the Judges speak of the danger of acting upon the uncorroborated evidence of accomplices, they refer to the evidence of accomplices who are admitted as evidence for the Crown in the hope or expectation of a pardon" (8) And in a case in the Calcutta High Court it was held that a person who, either before associating with wrongdoers or before the perpetration of an offence, makes himself an agent for the prosecution with the purpose of disclosing such offence, is a police spy or decoy and not an accomplice, and that therefore his evidence (though its value would depend on his character) would not require corroboration (9) In this case it was also held that a person who associates with wrongdoers with a criminal design and does not help the prosecution till after the perpetration of the offence is an accomplice.

This section is the only absolute rule of law as regards the evidence of accomplices. But there is a rule of guidance which the Court should also regard, and it is to be found in illustration (b) to section 114. The latter section enacts

(1) *R v Snrther* 26 M 1 12 (1902)

(2) *Ramasami Gouden v R* 27 M 271 (1903) per Sir S Subramania Aiyar Offg C J and Sir Bhashyam Aiyangar J

(3) Per Glover J in *R v Ramsodoy Chuckerbutty* 20 W R Cr 19 (1873) as to giving evidence under pardon see remarks of Peacock C J in *R v Elahi Bux* at p 468 see *R v Boyes* 311 322 supra *R v O'Hara* 17 C 642 (1890)

(4) *R v Ramsodoy Chuckerbutty* supra

(5) Taylor Ev § 971 Wharton Cr Ev § 440 Stewart Ripalje op cit § 228 *R v Despard* 28 How St Tr 489 *R v Mullins* 3 Cox C C 526 referred to and followed in *R v Jave charam* 19 B 363 (1894), in which the

distinction between a spy and an accomplice is pointed out. See also *R v Mona Puna* 16 B 661 *R v Shankar* Cr R 91 (Bom) 21 Dec 1888 cited in 19 B, supra at p 368

(6) *R v Jasechara* 19 B 363 (1894)

(7) *Ishan Chandra v R* 21 C 328 (1893) *R v Chardo Chandahnee* 74 W R Cr 55 (185)

(8) Per Peacock C J in *R v Elahi Bux* B L R Sup V 459 (1896) at p 469

(9) *R v Chait bhuji Dhu* (1910) 38 C 96 and for English rule to same effect, see Archbold's Criminal Pleading 25th Ed 441 and *R v Buckley* (1909) 2 Cr App Rep 53 *R v Darling* (1848) 3 Cox C C 526

a rule of presumption, and read with section 4 it indicates that this is not a presumption incapable of rebuttal. The right to raise this presumption is sanctioned by the Act, and it would be an error of law to disregard it. What effect is to be given to it must be determined by the circumstances of each case. The evidence of the accomplice requires to be accepted with great caution because among other things he is likely to swear falsely in order to shift the guilt from himself. The corroboration of such evidence when required should be such corroboration in material particulars as would induce a prudent man to believe, on consideration of all the circumstances, that the evidence is true so far as it affects each person implicated (1).

Rule in the section and in section 114, illustration (b)

The rule in this section and in section 114, illustration (b), are part of one subject, and neither section is to be ignored in the exercise of judicial discretion (2), and they coincide with the rule formerly observed in England (3), and laid down in India prior to the passing of this Act (4). "On the whole, the result" of these sections "appears to be that the Legislature has laid it down as a maxim or rule of evidence resting on human experience that an accomplice is unworthy of credit against an accused person i.e., so far as his testimony implicates an accused person, unless he is corroborated in material particulars in respect to that person, that it is the duty of the Court which in any particular case has to deal with an accomplice's testimony to consider whether this maxim applies to exclude that testimony or not, in other words, to consider whether the requisite corroboration is furnished by other evidence or facts proved in the case though

notwithstanding

to the accomplice

doing so upon grounds other than so to speak, the personal corroboration (5). The rule that an accomplice must be corroborated in a material particular is a mere rule of general and usual practice, the application of which is for the discretion of the Judge by whom the case is tried. Thus the rule has no application in the case of an accomplice who is merely a youthful tool in the hands of one who stood to him in *loco parentis* (6). In a case in the Madras High Court it was said

thus point,

and that the

presumption in section 114 illustration (b), and may consider the evidence of an accomplice in the light of all the

always bearing in mind that

in another in which it was he

tion (b), lays down the rule

of an accomplice is not illegal where the presumption of untrustworthiness is rebutted by special circumstances (8). It was said in this case that nothing

(1) *R v Shrinivas Krishna and R v Naor Blaskar* 7 Bom L R 969

(2) *R v Chagan Dayara* 14 B 331 344 (1890) *R v Mohiudin Sahib* 25 M 145 147 (1901) [the section must be read with illust (b) to s 114]

(3) *R v Ramasami Padayachi* 1 M 394 (1878), *R v Pam Saran S A* 306 (1886) *R v Magan Lal* 14 B 115 (1889)

(4) See the Full Bench case of *R v Elahi Bux* (D L R Sup Vol I B 459 May 1866 s c 5 W R Cr 80) in which the law which is the subject of these sections was fully discussed

(5) *Per Fear J in R v Sadhu Mun dal* 21 W R Cr 69 70 (1874) See

remarks in *Abdul Karim v R* 1 All L J 110 (1904) where the Court was unable to regard a witness as an accomplice of such an exceptional kind as would justify the Court in dispensing with confirmatory evidence. Corroboration is required unless the Court can unhesitatingly believe it. See 32 I C 49

(6) *Ramasami Gounden v R*, 27 M, 271 (1903) per Sir S. Subramania Ayyar Offg C J

(7) *R v Nilakanta* (1911) 35 M, 247 and *R v Tate* (1903) 2 K B 690 *Meunier (In re)* (1874) 2 Q B, 415

(8) *Muthukumarasami Pillai v R* 35 M 397 (1912) See 52 I C, 49

in section 114 overrides this section or forbids the Court to act on such uncorroborated evidence when believing it to be true(1), and that while section 114 raises certain presumptions the use of 'may' instead of 'shall' indicates that the Court is not compelled to raise them but need only consider whether they should be raised (2)

In England there is now an increasing tendency to insist that the evidence of an accomplice must be corroborated. In Archbold's "Criminal Pleading" it is said that "it is now fully recognized to be an established practice, virtually equivalent to a rule of Law, to require corroboration of the evidence of an accomplice by independent evidence on some material particular going to the offence itself and implicating the accused"(3)

This section in unmistakable terms lays it down that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice, and to hold that corroboration is necessary is to refuse to give effect to this provision (4). And so a jury may, if they please, act upon the evidence of an accomplice, even in a capital case, without any confirmation of his statement (5). And there may be cases of an exceptional character in which the accomplice's evidence alone convinces a Judge of the facts required to be proved, and section 133 would support him, if he acted on that conviction without the corroboration usually insisted on (6). "Although, as a general rule, it would be most unsafe to convict an accused person on the uncorroborated evidence of an accomplice, such evidence must, like that of any other witness, be considered and weighed by the judge, who, in doing so, should not overlook the position in which the accomplice at the time of giving his evidence may stand, and the motives which he may have for stating what is false. If the

guilt of the prisoner, it is his duty to convict"(7). Before acting on the presumption mentioned in section 114, the Court or jury is required by the section and the sequel to the *Illustrations* to take into consideration certain facts with the view to ascertain the probability of the story told (8). It is not wise or feasible to construct a fixed rule of law for all cases, though constant attempts have been and are still made to turn what was in its origin and is under the Act a cautionary practice into a rule of law (9).

On the other hand, accomplices are not like ordinary witnesses in respect of credibility, but their evidence is tainted and should be carefully scrutinized before being accepted(10) and therefore, the presumption that an accomplice is unworthy of credit unless corroborated in material particulars, has become a rule of practice of almost universal application (11). "Neither section 114,

Accomplice unworthy of credit

(1) *Ib* per Benson C J

(2) *Ib*, per Wallis J

(3) Archbold's Criminal Pleading etc 25th Ed 441 and Taylor on Evidence (10th edition) 967

(4) *R v Ramasami Padayachi* 1 M 394 (1878) *R v Gobardhan* 9 A 528 553 (1887) *R v Koa* 19 W R Cr 48 (1873) *R v Ram Saran* 8 A 306 (1885) *R v Mogan Lal* 1 B 115 (1889) *R v Chagan Dayaram* 14 B 331 (1890)

(5) *R v Codai Paout* 5 W R Cr 11 (1866) *R v Ramasami Padayachi* supra *R v O'Hara* 17 C 642 665 (1890) *R v Mahina Chundra* 16 B L R App 108 111 (1871) *R v Nidhee*

ram, 18 W R Cr 45 (1872)

(6) Per Scott, J in *R v Mogan Lal* 14 B 115 119 (1889) *R v Ramasami Padayachi* supra.

(7) *R v Gobardhan* 9 A 528 554 per Edge C J

(8) *R v Ramasami Padayachi* supra as to the character of an accomplice see sequel to Illust (b) s 114 and remarks of Peacock C J in *R v Elahi Bux* 468

(9) See Wigmore Ev § 2050

(10) *Rajoni Kanta v Asan Mullick* 2 C W N 672 (1895)

(11) *R v Mogan Lal* supra Best Ev § 171 it is not a rule of law but of practice only *R v Amir Khan* 9 B L R,

illustration (b), nor this section are to be ignored in the exercise of judicial discretion. The illustration (b) is however, the rule and when it is departed from the Court should show, or it should appear that the circumstances justify the exceptional treatment of the case. It is not enough for a Court to state the rule *pro forma* and merely as a reason to evade it, the Courts must act up to it. So long established a rule of practice as that which makes it prudent, as a general rule, to require corroboration of accomplices, cannot without great danger to society be ignored simply because section 133 declares that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an 'accomplice' (1). The general result therefore is that in almost all cases the presumption mentioned in section 114, illustration (b) should be raised and corroboration in material particulars required. The bare existence of a principle is acknowledged in order to meet the requirements of very exceptional cases but from the very fact of the exceptional character of these cases this principle is in practice constantly disapproved of and frequently violated (2). Recent cases leave the law where it was *viz.*, that the evidence of an accomplice if believed is in law sufficient but that in practice the Courts will generally insist on corroboration of it in material particulars (3). There is no rule of law or practice that the self incriminating portion of the evidence of an accomplice is unworthy of belief unless corroborated. The credibility of a witness who says that he and another joined in committing an offence stands *per se* so far as his self accusation is concerned on the same footing as that of a witness who says that he alone committed an offence though in the latter instance there would be a narrow basis for cross examination to test his own self accusation. If a witness is an accomplice he is an accomplice and must own to being an accomplice if he tells the truth. It is therefore merely arguing in a circle to say that the self incriminating statement of an accomplice requires corroboration because he is an accomplice. What must first be decided is whether the witness in question is in truth an accomplice or is merely posing as an accomplice. When it is once established that he is an accomplice then the next practical question arises who are the other accomplices and it is at that stage when his evidence implicating others has to be weighed that there comes into application the maxim that it is unsafe to convict upon the evidence of an accomplice unless he is corroborated in material particulars both as to the circumstances of the offence and the identity of the persons whom he implicates (4).

Charge to Jury

The evidence of accomplices should not be left to the jury without such directions and observations from the Judge, as the circumstances of the case may require, pointing out to them the danger of trusting to such evidence when

36 57 (1871) *P v Stubbs* 25 L J M C 16 but it is a practice which deserves all the reverence of the law *R v Farlar* 8 C & P 107 per Lord Abinger. In the matter of *Jogendra Nath v Sanga* Gao 2 C W N 55 (1897) *Kamala Prasad v Sia Prasad* 28 C 339 343 (1901)

(1) *Per Jarline J* in *R v Chagan Dayaram* 14 B 331 344 (1890) see also *R v Imam* 3 Bom H C R 57 59 C C (1867) *R v Mohan* 22 W R Cr 38 (1874) [whether evidence of approver alone uncorroborated was sufficient to justify the Court on calling upon the prisoner for his defence] *R v Luch mee Pershad* 19 W R, Cr 43 (1873)

(2) See Remarks in *Roscoe Cr L* 11th Ed. 109 110,

(3) *Ja aldi v E p* 51 C 160 (1923) s c 25 Cr L J 1000 *Manna Lal v Imp* 25 Cr L J 49 (1923) *Maung Lay v Emp* Ibid 381 *Darya v Fmp* Ibid 570 *Khusi v Imp* Ibid 979 *Kauromal v Fmp* Ibid 1057 *Mahant Narain v Emp* 3 I 144 (1922) *Lala v Fmp* 23 Cr I J 158 (1921) *Aisan v Fmp* Ibid 391 (1921) *Fatta v Fmp* Ibid 476 (1920) *Narain v Fmp* Ibid 513 (1921) *Ahmad v Fmp* Ibid 597 (1922) *Cobinda v Fmp* Ibid 673 (1920) *Tota v Fmp* Ibid 734 (1922) *Madan Gurn v Fmp* 4 P L T 381 s c 24 Cr L J 23 *Ha ara v Emp* 25 Cr I J 131 (1924)

(4) *R v Hannant* 6 Bom. L. R. 443 450 (1904) per Aston J

it is not corroborated by other evidence (1) The omission to do so is an error in law (2) in the summing up by the Judge and is on appeal (3) a ground for setting aside the conviction when the Appellate Court thinks that the prisoner has been prejudiced by such omission and that there has been a failure of justice (4) Where a Judge charged the jury that they were not to convict upon the evidence of *G* if satisfied that he was an accomplice and uncorroborated but coupled the direction with a strong expression of opinion that *G* was not an accomplice held that this constituted a misdirection in fact though not in form calculated seriously to prejudice the prisoner's case (5) Where the only evidence of the payment of a bill to the accused apart from hearsay statements which were not admissible (6) consisted of the uncorroborated evidence of an accomplice which was further in itself improbable and to some extent inconsistent with the story of the other accomplices the High Court set aside the conviction (7) It has been held that the conviction of an accused on the uncorroborated testimony of an accomplice is perfectly legal, and that a direction to the jury that it would be their duty to convict the accused if they believed the accomplice and gave credit to his evidence is a perfectly legal direction,

when it is based on a consideration of the evidence yet where the Lower Courts have not considered the evidence from the point of view that the witnesses were accomplices and where hearsay evidence has been improperly admitted in important points the Court will go into the facts of the case (9) And it has been held by the Calcutta High Court that an Appellate Court is bound to find whether witnesses alleged to be accomplices were accomplices and to weigh their evidence accordingly (10)

(1) *R v Elah B* B L R S P vol 459 (1866) *R v Bankantianath* 3 B L R F B 2 note (1868) *R v Karoo* 6 W R Cr 44 (1866) *R v Mohina Chandra* 6 B L R App 108 (1871) *R v Nautab Jan* 8 W R Cr 19 (1867) *R Gan* 6 Bom H C C C 57 (1869) *R v Sad* 11 W R Cr 69 (1874) *R v O'Hara* 1 C 642 665 (1890) *R v Ran Saras* 8 F 306 (1886) *R v Ari* 12 M 196 (1888) see cases cited ante passim *R v Magan Lall* 14 B 115 119 (1889) *R v Elahi B* v supra 479 *R v Ganappa Kardeppa* 38 B 156 (1914)

(2) *R v Elahi Bux* supra *R v Arumugan* supra *R v Nautab Jan* supra *R v Khotab Sheikh* 6 W R Cr 17 (1866) see cases cited ante passim See per contra *R v Chagai Dayaram* 14 B 331 335 (1890) *R v Gan* 6 Bom H C R C C 5 (1868) *R v Stubbs* 25 L J M C 16 s c Dear C C 55 Phillips Ev 95 See also s 297 Cr Pr Code (charge to jury)

(3) Cf s 418 Cr Pr Code but see *R v Chagan Dayaram* supra 336 and ss 435—439 Cr Pr Code (revisional powers) as to proceedings under the Letters Patent see *R v O'Hara* 17 C 642 (1890) *R v Nauraji Dadabhai* 9 Bom H C 358 (1872) *R v Hurribole Chunder* 1 P C 207 (1876) *R v Pilambar*

J a 2 B 61 (1876) *R v Shih Chider* 10 C 1079 (1884) *R v Pestan* cc D nsl a 10 Bom H C 75 89 (1875)

(4) *R v Elahi Bux* supra cf also Cr Pr Code s 537 and see *R v Tate* C C A (1908) 2 K B 680 and *R v Beauchamp* (1909) 25 Times L R 330

(5) *R v O'Hara* 17 C 642 (1890)

(6) It was held in the case cited that a statement by a witness that he heard *A* say in the absence of the accused that he had paid a sum of money to the accused as a bribe was hearsay and not admissible

(7) *Rajoni Kant v Asan Mull* ch 2 C W N 672 (1895) In *R v Lakshmayya Padaran* 22 M 491 (1899) that accomplices statement was only not corroborated but was distinctly contradicted by the evidence in the case

(8) *Ramasami Gounden v R* 14 Mad L J 226 (1903) s c 27 M 271 per Bhashya Aiyangar J see *Mil kimara suami Pillai v R* 35 M 397 (1912) (it was said by Benson C J that the question whether evidence amounts to corroboration is for the jury and is for the Judge if he sits without one)

(9) *Ramasami Gounden v R* 14 Mad L J 276 (1903) s c 27 M 271 per Boddam J

(10) *Amarat Sardar v Nagendra Biswas* (1910) 38 C 307

The corroboration must be on a point material to the issue, the testimony of the approver ought to be corroborated in some material circumstance, such circumstance connecting and identifying the prisoner with the offence (1) 'There is a great difference between confirmation of an accomplice as to the circumstances of the felony and those which apply to the individuals charged. The former only show that the accomplice was present at the commission of the offence, but the others show that the prisoner was connected with it. This distinction ought always to be attended to. The confirmation which I always advise juries to require, is a confirmation of the accomplice in some fact which goes to fix the guilt on the particular person charged' (2) The "corroboration ought to consist of some circumstance that affects the identity of the person accused. A man who has been guilty of a crime himself will always be able to relate the facts of the case, and if the confirmation be only on the truth of that history, without identifying the persons that is no corroboration at all (3) It is an established rule of practice that as a general rule the accomplice must be corroborated by independent evidence as to the identity of every person whom he impeaches (4) The accomplice must in most cases be corroborated as to all of the persons affected by his evidence. If he is corroborated in his evidence as to one prisoner, there will still be need of corroboration of his testimony with respect to the other prisoners (5) But "it is sufficient, if the evidence is confirmatory of some of the leading circumstances of the story of the approver as against the particular prisoner, so that the Court may be able to presume that he has told the truth as to the rest. The true rule on the subject of the corroboration

ground for believing that he also speaks truth in other parts as to which there may be no confirmation" (6) When corroboration is required it is not necessary that an accomplice should be corroborated in every material particular, because

by an accomplice, must there be corroborative evidence but which is more important still, as to the *corpus delicti* there must be some *prima facie* evidence pointing the same way, to make the evidence of an accomplice satisfactory' (8)

(1) *R v Naab Jan* 8 W R Cr 19 20 28 25 26 (1867) followed in *R v Bepin Biswas* 10 C 970 973 (1884) *R v Elahi Bur B L R Sup Vol F B 459* (May 1866) s c 5 W R Cr 80 *R v Ba kuntha Nath* 3 B L R F B 2 note (1868) *R v Chuticardharee Sing* 5 W R 59 (1866) *R v Mohesh Biswas* 10 B L R 455 note (1873) *R v Imdad Khan* 8 A 120 135 (1885) *R v Sadhu Mundul* 12 W R Cr 69 (1874) *R v Duarka* 5 W R Cr 18 (1866) *R v Ila* 3 Bom H C 57 C (1867) *R v O'Hara* 17 C 642 (1890) *R v Sagal Sanba* 21 C 642 657 (1893) *Ashraf Ali v Emperor* 42 C 25 (1915) In *R v Mohiuddin Sahib* 25 M 143 (1901) the evidence of the approver was held to be sufficiently corroborated *Stewart Rapalje op cit* § 227 *Wharton Cr Ev* §§ 441-442

(2) *R v Wilkes* 7 C & P 272 per *Alderson* B cited in *R v Elahi Bur* 466 supra *R v Mohiuddin Sahib* 25 M 143 147 (1901)

(3) *R v Farler* 8 C & P 106 cited in *R v Elahi Bur* 465 supra *Roscoe Cr Ev* 13th Ed 110 and see *R v Stubbs* 25 L J M C 16 per *Cresswell J* — You may take it for granted that the accomplice was at the commission of the offence and may be corroborated as to the facts but that has no tendency to show that the parties accused were there. See also *R v Ram Saran* 9 A 306 310 (1885)

(4) *R v Krishnablat* 10 B 319 (1886) *R v Budhu Nanku* 1 B 475 (1876) *R v Malappa b n* 11 Bom H C R 196 (1874) *R v Ran Saran* 8 A 306 (1885) and cases cited ante

(5) *Abdul Karim v R.* 1 All L J 110 (1904)

(6) *R v Kala Chand* 11 W R Cr 21 (1869) per *Norman J*

(7) *R v Gallagher* 15 Cox C C 291 *R v Barnard* 1 C & P 88 *R v Boyes* 1 B & S 311 320

(8) *R v Chatur Purshotam* 1 B 476 note

The corroboration when required must be independent of the accomplice or of a co confessing prisoner (1) The evidence of one accomplice does not corroborate the evidence of another (2) The evidence of two or more accomplices requires confirmation equally with the testimony of one (3) There may be circumstances such as where previous concert by the informers is highly improbable in which the agreement in their stories together with corroboration which is afforded by the circumstance that their stories cannot have been arranged between them beforehand must be taken into account (4) It has been held that previous statements made by the accomplice himself though consistent with the evidence given by him at the trial are insufficient corroboration for his statement whether made at the trial or before the trial and in whatever shape it comes before the Court is still only the statement of an accomplice and does not at all improve in value by repetition (5) But in a case in the Madras High Court it was held that such previous statements legally amount to corroboration though the weight attached to them must vary (6) Nor can the confession of one of the prisoners be used to corroborate the evidence of an accomplice against the others because such a confession cannot be put on a higher footing than the evidence of an accomplice and is moreover not given on oath or subject to the peril or to lessen

tainted evidence

the accomplice is confirmed as to some only and not as to others the Court ought as a general rule (and in trial by jury the latter ought to be advised) to acquit those against whom there is no corroboration (8) The retracted confession of an accused may be sufficient corroboration of the approver's story as against himself but not against a co accused (9)

The extent of corroboration will depend much upon the nature of the crime and the degree of moral guilt attached to its commission and if the offence be one of a purely legal character or if it imply no great moral delinquency the parties concerned though in the eye of the law criminal will not be considered

(1) *Abd I Karim v R* 1 All L J 110 (1904) See *R v Balar Al Ga* 42 C 89 (1915)

(2) *R v Malappa b n* 11 Bom H C R 196 198 (1874) but see second illustration appended to illustration (b) s 114 remarks thereon in *R Sadli Mundli* 1 W R 69 1 (1884) and remarks of Peacock C J in *R Elal Bux* 468 s f a and see *R v Clagan Dayara* 14 B 331 339 340 (1890) *R v Chitardharee S ng* 5 W R 60 (1866)

(3) *R v Duarka* 5 W R Cr (1866) *R v Noakes* 5 C & P 376 *R v Ran Saran* 8 A 306 (1885) *R v Elal Bux* supra 468 but see preceding note

(4) *R v Ningappa* 2 Bom L R 610 (1900)

(5) *R v Malappa b n Kapana* 11 Bom H C 196 (1874) *R v Bep B swas* 10 C 971 (1884) and see note to s 157 post This view was rejected by the majority of the Court in *R v Nilakanta* (1911) 35 M 247

(6) *Misthukumarasami Pulla v R* 35 M 397 (1912) (they might for instance be important if it was alleged that the

witness had been recently influenced—per Benson C J and see *R v Akha Badoo* 34 B 599 (1910) previous statements admissible to corroborate statements at trial

(7) *R v Malappa b n* 11 Bom H C R 196 (1874) *R v Bep B swas* 10 C 970 (1884) *R v Balsoo Cloudhry* 25 W R Cr 43 (1876) *R v Krishnabai* 10 B 319 (1886) *R v Jaffer Ali* 19 W R Cr 57 (1873) *R v Budhi Nanku* 1 B 475 (1876) *R v Uddhan Bnd* 19 W R Cr 68 (1873) *R v Moha Lall* 4 A 46 (1881) *R v Sadhi Mundli* 21 W R Cr 69 (1874) *R v Ram Saran* 8 A 306 (1885)

(8) *R v Wells M & M* 326 *R v Morris* 7 C & P 270 and see *R v Stubbs* supra remarks of Jervis C J Roscoe Cr Ev 12th Ed 115 116 *R v Ran Saran* 8 A 306 312 (1885) *R v Ina* 3 Bom H C 57 (1867) *R v Elal Bux* 467 s pra following *R v Stubbs* supra

(9) *Palla v Emperor* 20 Cr L J 183 s c 49 I C 604

such accomplices as to render necessary any confirmation of their evidence (1) The application of the rule is for the discretion of the Judge by whom the case is tried and in the application of the rule much depends on the *nature* of the offence, and the extent of the *complicity* of the witness in it (2) Ordinarily speaking the evidence of an accomplice should be corroborated in material particulars At the same time the amount of criminality is a matter for consideration, when a person is only an accomplice by implication or in a secondary sense, his evidence does not require the same amount of corroboration as that of the person who is an actual participator with the principal offender In dealing with the question what amount of corroboration is required in the case of testimony given by an accomplice the Courts must exercise careful discrimination and look at the surrounding circumstances in order to arrive at a conclusion whether the facts deposed to by the person alleged to be an accomplice are borne out by these circumstances or whether the circumstances are of such a nature that the evidence purporting to be given by the alleged accomplice should be supported in essential and material particulars by evidence *abunde* as to the facts deposed to by that accomplice (3)

Number of
Witnesses

134. No particular number of witnesses shall in any case be required for the proof of any fact

Principle—This section deals with the question of the quantity of legitimate evidence required for judicial decision Cases now and then though seldom occur in which injustice is done by giving credence to the story of a single witness On the other hand, however as the requiring a plurality of witnesses clearly imposes an obstacle to the administration of justice specially where the act to be proved is of a *casual* nature, above all where being in violation of law as much *clandestinity* as possible would be observed—it ought not to be required without strong and just reason (4)

s 133 (Accomplice.)

ss 68—71 (Attestation.)

s 3 (Proof)

s 3 (Fact)

Wharton Ev § 414 & Cr Ev § 386 *et seq* Best Ev 596—622 Taylor Ev, §§ 957—966 Ind in Penal Code Ch VI (False Evidence) Ch VI 16 (Offences against the State anlogous to treason) Starkie Ev 877 Cr Pr Cole Ch XXXVI (Maintenance) Stewart Raper's Law of Witnesses § 225

COMMENTARY

Quantity of
evidence

Section 28 of the repealed Act II of 1855 which was more directly and in terms in accord with the present English law on the subject than the present section was as follows — Except in cases of treason the direct evidence of one witness who is entitled to full credit shall be sufficient for proof of any fact in any such Court or before any such person But this provision shall not affect any rule or practice of any Court that requires corroborative evidence in support of the testimony of an accomplice (*v ante*, section 133) or of a single witness in the case of perjury The effect of the present section is that in *any case* the testimony of a single witness (if believed by the Court or jury) is sufficient for the proof of *any fact* Thus a conviction upon the statement of a complainant alone is lawful (5) The evidence of one witness if believed

(1) *R v Boyes* 1 B & S 311 320 322 Taylor Ev § 968 and cases there cited see first supplementary illustration to illust (b) s 114

(2) *R v Boyes* supra

(3) *Kamala Prasad v Sital Prasad* 28 C 339 (1901) s c 5 C W N 517

(4) Best Ev §§ 597 598 as to the merits and demerits of the *ius nullus*

rule see ib § 598 and generally §§ 596—622 65—70 *passim* see *Kulum Mundu v Bhowani Prasad* 27 W R Cr 12 (1874) Taylor Ev §§ 952—966 Starkie Ev 877 see also remarks of Sir Lawrence Peel in *R v Hedger* post Wharton Ev § 414

(5) *Kulum Mundu v Bhowani Prasad* 22 W R Cr at p 32 (1874)

is sufficient according to the law of this country to establish any fact to which the witness speaks directly (1) A Magistrate is fully justified in believing one witness in preference to three others, if he sees reason to do so, and it is not legally necessary that he should detail his reasons (2) The Act contains no provision corresponding to the English rule requiring corroboration in breach of promise of marriage (3) and affiliation cases (4), or in claims on the estates of deceased persons (5), or in prosecution for perjury (6) In regard to the giving of false evidence it was held by the Full Bench of the Calcutta High Court (following the English rule) under section 28 of Act II of 1855, that a person cannot be convicted of giving false evidence upon the uncorroborated evidence

terms require corro-

Judge unfettered to

yet it is conceived

that the Courts will in coming to such a determination, follow as a general rule, but with such modifications as the law may here require (9) the practice in England, where it is not thought safe in such cases to accept the testimony of a single witness without some corroboration (10) "The rule" (necessity of more than oath against oath on an indictment for perjury) cannot be defended

(1) *Raja Prasanna v. Romonee Dassee*
10 W R 236 (1868)

(2) *Gobind Suan v. Narain Raot* 24
W R Cr 18 (1875) *ponderatur teste*
non numerantur see Best Ev s 596

(3) 32 and 33 Vic 68 s 2 *Wiedemann*
Walpole 2 Q B 534

(4) 8 & 9 Vic c 10 s 6 35 & 36
Vic c 95 s 4 *Taylor* Ev § 964 *Cole*
Manning 2 Q B D 611 *Laurence v*
Ingmire 20 L T Rep N S 391 cf Cr
Pr Code Ch XXXVI (of the maintenance
of wives and children) the evidence of
the mother must be corroborated in some
material particulars

(5) *Finch v. Finch* 23 Ch D 267
Livesey v. Smith 15 Ch D 655 In re
Garnett 31 Ch D 1 *Hill v. Wilson* L
R 8 Ch 888 In re *Hodgson* 31 Ch D
183 *Varasseur v. Varasseur* 27 Times
L R 250 Steph Dig Art 121 A *Taylor*
Ev § 965 *Williams* on Executors
10th Ed 1409 1410 the rule has been
acted upon in India *Webb v. Smallwood*
Cal High Ct Sutt No 810 of 1896 heard
4 & 7 Feb 1898

(6) *R v. Elliott* (1908) C C C Sess
Pa p 837 *Taylor* Ev § 959—
963 two witnesses are also required in
English law in certain treasons ib § 959—
958 corroboration is also required
in certain cases under the Criminal Law
Amendment Act 1885 s 4 and the Pre-
vention of Cruelty to Children's Act 1889
s 8 See *Stewart Rapalje's op cit* §
225 *Wharton* Cr Ev § 386 et seq

(7) *R v. Lalchand Kourah* B L R
Sup Vol 17 B 417 (Feb 1866) s c 5
W R Cr 23 See also *R v. Bakloree*
Choudhary 5 W R Cr 98 (1866) *R v.*
Ross 6 Mad H C 342 (1871) [and or
amount of confirmatory proof required]

(8) The Law of England as to the
necessity of calling at least two witnesses

to support an assignment of perjury is not
law in India per Duthoit J in *R v.*
Ghulet 7 A 44 50 (1884) but in Eng-
land though corroboration is required it
is not precisely accurate to say that the
corroborative circumstances must be tanta-
mount to another witness *Taylor* Ev §
959

(9) Thus the law in India as to con-
tradictory statements is not the same as
in England *Taylor* Ev § 962 *Field* Ev
6th Ed 432 433 It has been held by
two Full Benches of the Calcutta High
Court that where no evidence for the
prosecution is offered corroborative of
either statement and the giving intention-
ally of false evidence is charged on two
contradictory depositions made the one
before the committing Magistrates and the
other before the Sessions Judge a finding
in the alternative is sufficient to maintain
a conviction *R v. Zafar Ali* B L R F
P 571 (1866) s c 6 W R Cr 65
R v. Malomed Hoo ajoon 13 B L R
F B 324 (1874) s c 21 W R Cr
72 *Habibullah v. R* 10 C 937 (1884)
Sathu Sheikh v. R 10 C 405 (1884)
followed by the Madras High Court in
R v. Palany Chetty 4 Mad H C R 51
(1868) *R v. Ross* 6 Mad H C R 342
(1871) and Allahabad High Court in
R v. Ghulet 7 A 44 (1884) [overruling *R*
v. Niaz 41 S A 17 (1832)] *R v. Mata-*
badal 15 A 392 (1893) and see *R v.*
Klari 22 A 115 (1899) Bombay High
Court see *R v. Ramji Sajabarao* 10 B
124 (1885) *R v. Bharna* 11 B 702
(1886) *R v. Mugapa bin* 18 B 377
(1893) See also *Field's Ev* 6th Ed
432—434

(10) *Field* Ev 6th Ed., 434 *Whitley*
Stokes 92 R v. *Bal Gangadhar* 6 Bom
L R 324 1904 [perjury] s c 23 B
479

as a rule founded in all cases on reason, for it is easy to conceive cases, where the credit due to one person is so far beyond that which is due to another, as to leave no ground for reasonable doubt in acting on the testimony of a single witness though directly in conflict with that of another. But though the rule

which it rests, is of great
Where direct testimony
experience or by the pro

bability supplied by the circumstances of the case, the consideration of the number of witnesses becomes most material (2). And where the witnesses and the parties are at issue on a vital point (such as the defendant's signature to an agreement of which specific performance is sought) the safe principle is to consider what story fits in with the admitted circumstances and the resulting probabilities (3).

(1) *Per* Sir Lawrence Peel C J in his charge to the jury in *R v Hedger* (1852) see remarks in *Best Ev* §§ 603 606

(2) *Starkie Ev* 878 cited and adopted

in *R v Hedger* *supra* at page 114 see also *Field Ev* 6th Ed 430

(3) *Dallas v Maung Shwe Go* (1911) 38 I A 155

OF THE EXAMINATION OF WITNESSES

The duty of citizens to appear and testify to such facts within their knowledge as may be necessary to the due administration of justice is one which has been recognised and enforced by the common law from an early period (2). The right to compel the attendance of witnesses was an incident to the jurisdiction of the Common Law Court, and Statutes have extended the power to other officers, such as arbitrators. Every Court having power definitely to hear and determine any suit, has, by the Common Law, inherent power to call for all adequate proofs of the facts in controversy and to that end to summon and compel the attendance of witnesses before it (3). By an early English Statute witnesses were entitled to their "reasonable costs and charges" (4). The wilful neglect to attend or to testify after proper and reasonable service of the subpoena (5) and, in civil cases after payment or tender of the witness's fee (6) or waiver of payment (7), is a contempt of Court (8). When it is necessary not only to secure the oral testimony of the witness, but also the production of documents in his possession, the subpoena contains in addition to the ordinary

Attendance
of witness
and produc-
tion of
documents

by docu-
by subpoena
must

Comm 382 *Amev v Long* 9 East 483
In the High Court following the English
practice a *subpana duces tecum* is only
issued when the person in possession of
the documents is not a party to the suit.
When the writings are in possession of
the adverse party or his attorney notice
to produce is given. See 2 Phil & Arn,
Fv 425

obey like other *subpœnas*. He has no more right to determine whether the documents shall be produced than whether he shall appear as a witness. It is his duty to attend and to bring with him the documents according to the exigency of the writ. It is for the Court to determine whether the documents are admissible, or whether they should be produced and exhibited (1). A witness clearly cannot be compelled to produce documents by the *subpœna* unless

public officers they are provable by certified copies. When the documents are produced in obedience to the *subpœna*, the person calling the witness is under no obligation to have the witness sworn (3). From a very early period the common law recognised the privileges of parties and witnesses in judicial proceedings to go the place of trial, to remain so long as necessary, and to return home free from arrest on civil process; this being an immunity considered to be a necessity in the administration of justice (4).

All the matters abovementioned are in this country provided for by the Civil and Criminal Procedure Codes and the Penal Code, viz, procedure for summoning and compelling the attendance of witnesses (5); the production of documents and other things (6); the expenses of witnesses (7), the freedom of complainants and witnesses in criminal cases from police restraint (8); recognition for the attendance of complainants and witnesses in criminal proceedings (9), exemption from attendance in person by reason of non-residence within

(1) S 162 *post*, 2 Phil & Arn, Ev 425, Burr Jones Ev, § 801, and cases there cited, *Doe v Kelly*, 4 Dowl 273 R v Russell, 7 Dowl 693, R v Dixon 3 Burr, 1687 Amey v Long supra. The *subpœna* or notice should describe the papers to be produced with certainty and clearness Civ Pr Code, s 163.

(2) *Amey v Long*, 1 Camp, 17, *Corsen v Dubois* 1 Holt, 239, R v Daye (1908) 2 K B 333.

(3) *Perry v Gibson* 1 A & E 48, *Summers v Mosley* 2 Crompt & M, 477.

(4) Civ Pr Code s 135, Woodroffe and Amey Ali, 2nd Ed, p 490, Burr Jones, Ev §§ 805, 806, Bacon Abr tit Privileges, 4, 17, 55, *Meekins v Smith*, 1 H Black 636, the privilege extends to cases where the attendance is voluntary *Walpole v Alexander* 3 Doug, 45, *Arding v Flower*, 8 T R, 534, *Spence v Stuart* 3 Fast, 89, Ex parte *Byre* 1 Ves & B, 316. A person who violates the privilege is guilty of contempt, *Cole v Hawkins*, Andrews 275, *Strange* 1094, *Childerson v Barrett* 11 East, 439. The immunity extends until the witness can return home, *Strong v Dickenson* 1 M & W, 488, *Selby v Hills*, 8 Bing 166, *Pitt v Coombes*, 5 B & Ad, 1078; *Lightfoot v Cameron*, 2 W. Black 1113, *Rickets v Gurney*, 7 Price, 669, *Sidgier v Birch*, 9 Ves Jr, 69.

(5) Civ Pr Code O XVI Woodroffe and Amey Ali 2nd Ed pp 825 836, ss 31, 32, p 204; O V, 2nd Ed, pp 637-

660 Cr Pr Code, ss 68-74 (summons); 75-86 (warrants of arrest), 87-89 (proclamation and attachment), 90-93 (other rules regarding processes), 328 (summons on juror or assessor), 485 (imprisonment or committal of person refusing to answer or produce document), 208 (production of further evidence in cases triable by Court of Session or High Court), 216 (summons to witnesses for defence when accused is committed), 219 (power to summon supplementary witnesses), 23 (recall of witness) 244 (issue of process in summons cases), 254, 256, 257 (warrant cases), 540 (power to summon material witness or examine person present) Penal Code, ss 174, 175. As to the attendance of witness before Coroners, see Act IV of 1871, and the Bengal and Bombay Councils Acts III (B C) of 1866, XIII (Bom C) of 1866.

(6) Civ Pr Code O XVI, Woodroffe and Amey Ali, 2nd Ed pp 825 836. See as to discovery, admission, inspection production, impounding and return of documents, Civil Pr Code, O XI, 2nd Ed, pp 777 800, Criminal Pr Code, ss 94 95 (summons to produce document or other thing), 96-99 (search-warrants); 485 (consequences of refusal to produce) See s 162, *post*.

(7) Civ Pr Code, O XVI, rr 2-4, *op cit*, Woodroffe's 2nd Ed, pp 826-829, Criminal Pr Code ss 244 257.

(8) Cr Pr Code s 171.

(9) Cr Pr Code, ss 217, 170.

certain limits(1), or of the witness being a *purdanashin* lady or person of rank(2), the exemption of witnesses from arrest under civil process(3) Non attendance may further render a witness liable to a civil action for damages(4) Witnesses cannot be sued in a Civil Court for damages, nor prosecuted in a Criminal Court (except for perjury) in respect of evidence given by them in a judicial proceeding(5)

There is a conflict of decisions as to whether witnesses are absolutely privileged as to anything they may say as witnesses having reference to the enquiry on which they are called as witnesses(6) The ground of absolute protection is said to be this, "that it concerns the public and the administration of justice that witnesses giving their evidence on oath in a Court of Justice should not
 'for damages, but that
 falsely, should be an
 quires that witnesses

shall not be harassed by the fear of suits for damages, it must be conceded that it is equally undesirable that they should be liable to be prosecuted(8) The Madras and Bombay High Courts adopt this view, but the trend of the decisions in the Calcutta and Allahabad High Courts is against it In the case cited a Full Bench of the Madras High Court held that the law of defamation is not exhaustively laid down in section 499 of the Indian Penal Code, and that the English doctrine of absolute privilege though not expressly recognized in that section is applicable in India(9) But in another later case, the Calcutta High Court has held that section 499 of the Penal Code is exhaustive and that a statement which does not fall within its exceptions is not privileged(10) In this case it was said that the English Common Law doctrine of absolute privilege does not obtain in the Mofussil and that a defamatory statement made in

(1) Civ Pr Code O XVI r 19 2nd Ed p 834

(2) *Ib* ss 131—133 Woodroffe and Amir Ali 2nd Ed pp 486 490 There is no similar exemption from attendance before the Criminal Courts but a *purdanashin* lady may claim to be examined sitting in a palanquin *Rookia Khan v Roberts* 1 B L R S N 5 (1868) *Misrut Banoo v Mahomed Sayem* 18 W R 23 (1872) or on commission In re *Huroo Soondary* 4 C 20 (1878) In re *Dintarini Debi* 15 C 775 (1888) or to have special arrangements made for an examination in private In re *Basant Bibi* 17 A 69 (1889) [a witness may be examined at some place other than the Court house *Hem Coomaree v R* 24 C 55 (1897) A *purdanashin* complainant must personally attend in Court such arrangements being made as are necessary to secure her privacy In re *Farid un-ssa* 5 A 92 (1882) see *Abhayeshwari Debi v Kishori Mohan Banerjee* 47 C 19 (1915)]

(3) Civ Pr Code s 135 *op cit* 2nd Ed p 490 see Taylor Ev §§ 1330—1341 there is no protection given against criminal process

(4) Under the provision of s 26 Act XX of 1853 which is in force in the Bengal Presidency or of s 10 of Act X of 1855 which is in force in the Madras and Bombay Presidencies see *Roy Dhunput v Prem Bibee* 24 W R 72 (1875)

(5) *Bishonath Rukht v Ram Dhone*, 11 W R 42 (1869) *Gunesh Dutt v Mugneerami Choudhry* 11 B L R 328 (1872) *Bhikumber Singh v Becharam Sircar* 15 C 264 (1888) *Chudambara v Thirumani* 10 M 87 (1886) *Manjaya v Sesla Shetti* 11 M 477 (1888) *Dawan Singh v Mahip Singh* 10 A 425 (1888) *R v Babaji* 17 B 127 (1892) *R v Balkrishna* 17 B 57 (1893), *Templeton v Laurie* 25 B 230 (1900)

(6) *Seenan v Netherchift* L R 2 C P D 53, *Bhikumber Singh v Becharam Sircar ante*

(7) *Ganesh Dutt v Mugneerami Choudhry supra*

(8) *R v Balkrishna* 17 B 573 579 (1893)

(9) *Venkata Reddy (In re)* F B 36 M 216 (1911) see *Abrar Naidi (In re)* 30 M 222 (1907) *Pael aspermi Claitar v Dasi Thangara* 31 M 400 (1908) *Adapala v Rabala* M W N 155 (1910) *Nathji Muleswar v Lalbhai Ravdat* 14 B 97 (1890) *Nagarji (In re)* 19 B 310 (1895)

(10) *Kari Singh v R* 40 C 433 (1912) see *Golap Jan v Bholanath* 38 C 880 (1911) *Angada Ram v Vemas Chand* 23 C 867 (1896) *Kali Nath Gupta v Gobinda Chandra* 5 C W N 293 (1900) *Haidar Ali v Abru Mia* 32 C 756 (1903) *R v Ganga Prasad* 29 A 685 (1907) *Isri Prasad v Umrao Singh* 22 A 234 (1900)

bad faith by a witness is punishable. A defamatory statement on oath or other-

party making it (3) In England it has been recently held that the report of the Official Receiver dealing with a company in liquidation, is absolutely privileged (4) and that "the real doctrine of absolute privilege is that in the public interest it is not desirable to enquire whether the words or acts of certain persons are malicious or not. The privilege is to be exempt from all inquiry as to malice" (5)

Assuming that the witnesses are in attendance before the Court, certain other provisions are laid down for their examination (6) In civil proceedings the rule is (a) to evidence given on commission (7), (b) evidence given by direction of the Court on affidavit (8), (c) examination before trial of witnesses about to leave the jurisdiction (9) Evidence recorded in a previous proceeding between the same parties is made admissible in a subsequent proceeding by the consent of both parties (10)

In criminal proceedings, except as otherwise expressly provided, evidence must be taken in the presence of the accused, or when his personal attendance is dispensed with (11) in presence of his pleader (12) This general rule is qualified by the provisions relating (a) to the examination of witnesses on commission (13), (b) the case of an absconding accused (14), (c) the direction by an Appellate Court that additional evidence be taken by the Lower Court, and that such evidence be taken without the accused person or his pleader being present (15) The order of production and examination of witnesses is regulated in the case of trials before High Courts and Sessions Courts by sections 286, 287, 312, 289, 290, 292 (16) As to the procedure in summons (17),

(1) *Satish Chandra Chakravarti v. Ram Doyal De*, 48 C 388 A complainant does not enjoy the protection given on principles of public policy to an ordinary witness *Dinsha Edalji v. Jehangir Cowasji*, 47 B, 15

(2) *Raman Nayar v. Subramanyar Ayyar*, 17 M, 8 (1893)

(3) *Pachasferumal Chethiar v. Das Thangam* (1908) 31 M, 400

(4) *Burr v. Smith*, C A (1909), 2 K. B. 306 25 Times L. R., 542

(5) *Bottomly v. Broughman* (1908) 1 K B, 587, following *Munster v. Lamb*, 11 Q B D, 588

(6) Cr. Pr. Code, O XVIII, r 4 Woodroffe and Amir Ali, 2nd Ed., p 843

(7) *Ib.*, O XXVI, rr 1-8, *op cit* 2nd Ed., pp 1038-1092 *see s* 33, *ante*

(8) *Ib.*, O XVIII, r 16, *op cit*, 2nd Ed., p 848, 849 *see s* 1, *ante*

(9) *Ib.*, O XIX, 2nd Ed. *op cit*, pp 830, 831, and *see Edwards v. Muller*, 5 B L R, 252 (1870)

(10) *Jainab Bibi v. Hyderabadly Sahab*, 43 M 609

(11) *See Cr Pr Code ss* 116 205 and

in the matter of *Rahim Bibi* 6 A 59 (1883) (*pardanashin*) In a warrant case the accused being a *pardanashin* the Magistrate can dispense with her attendance if he issues a summons in the first instance *Basumoti Adhikarini v. Budram Kalita* 21 C 588 (1894)

(12) Cr Pr Code, s 353, *See R v. Kanye Sheikh*, W R., 1864 Cr, 38, *R v. Sheikh Kiamul*, ib, 1, *R v. Afazuddeen*, Ib 13, *R v. Mohun Banfor*, 22 W R, Cr 38 (1874) *R v. Rajkrishna* 1 B L R O Cr 37 (1868), *Ali Meah v. Magistrate of Chittagong* 25 W R, Cr 14 (1876) *Subba v. R* 9 M, 83 (1885), *R v. Rand Ram* 9 A 609 (1887)

(13) Cr Pr Code, ss 503-507, *see s* 33 *ante*

(14) *Ib.*, s 512, *see s* 33 *ante*, *R v. Rustam*, 38 A, 29 (1916) (proof of absconding)

(15) *Ib.*, s 428 *see also s* 310 *ib* (16) *See Cr Pr Code*, Chap XXIII *passim* as to commitment for trial *see s* 206-220 496 498

(17) *Ib.*, Chap XX s 451 A

and warrant(1), cases, the right of accused to be defended by pleader(2); the procedure on divisions(3), and on appeal(4), and when Magistrate cannot pass sentence sufficiently severe(5), the conviction or commitment on evidence partly recorded by one Magistrate and partly by another(6), see the sections and Chapters of the Code noted below

In civil proceedings it is in the discretion of a Court of first instance, after the plaintiff's case is closed, to allow him to call further witnesses, and there is no right of special appeal upon that point (7). The Judge has a discretionary power of recalling witnesses at any stage of the trial. He will seldom, however, except under special circumstances, permit a plaintiff after his case is closed, to recall a witness to prove a material fact. A witness after cross examination may also be recalled to be further cross examined, and a question omitted in examination in chief may with permission (which is usually given) be put to the witness in re-examination either by the Judge or Counsel (8). Cross examination ordinarily gives notice to the other side of the line of defence. So where the defendant's Counsel cross examined as to certain misrepresentations made towards the defendant and deceptions practised on him, this was held to be considered as notice to the plaintiff's Counsel of the line of defence, and, therefore, if he had letters of the defendant tending to show that he knew the real state of the facts, the plaintiff's Counsel ought to have given them in evidence before the plaintiff's case was closed and he will not be allowed to put them in as evidence in reply (9).

Whenever a prisoner is put upon his trial, he is entitled to have the witnesses examined *de novo* if they have previously given evidence on the trial of another prisoner, and it is not sufficient to require the witnesses to identify the prisoner and to read over to them their former examination, and require them to attest it (10). It has been held that though to omit to do this is illegal yet if it has not occasioned a failure of justice, a new trial need not be ordered (11).

It is not generally competent to the Court to refuse to examine any of the witnesses produced by the parties. The Judge is bound to receive all the evidence tendered, unless the object of summoning a large number of witnesses

(1) *Ib* Chap XXI

(2) *Ib* s 340. The Code makes no express provision for advocates addressing the Court in Magistrate's cases or in the course of proceedings preliminary to commitment but such cases will be covered by this section. Field Ev 6th Ed 436 437.

(3) *Ib* ss 439 440. As to the right of prisoner's Counsel to begin in cases under s 434 see *R v Appa Subhana* 8 B 200 (1884).

(4) *Ib* s 423

(5) *Ib* s 349

(6) *Ib* s 350. there is no similar provision as to cases tried by the Court of Session the whole trial must take place before the same Judge cf Field Ev 6th Ed 437. *R v Charoo* W R 1864 Cr 32. *R v Gopal Voshjo* 21 W R Cr 47 (1874). *R v Raghoona h* 23 W R Cr 59 (1865). See generally as to the Criminal Procedure Woodroffe's Criminal Procedure in India.

(7) *Rakhai Dass v Protap Chunder* 12 W R 455 (1870) as to recall of witnesses in criminal cases see Cr Pr Code

ss 231 256 350

(8) Taylor, Ev, § 1477, and cases there cited. See s 138 *post*. The practice should not be encouraged of allowing either party after stating his case to amend and add to his proof until by repeated experiments he conforms to the view of the Court. *Burr Jones* Ev s 809 see as to evidence in reply and fresh evidence after close of case *R v Hilditch* 5 C & P 299. *Giles v Powell* 2 C & P 259. *Halls v Atcheson* 2 C & P 268.

(9) *Wharton v Lewis* 1 C & P 529, see *Bank of Bombay v Nandlal Thackersey* Das P C 37 B 122 (1913).

(10) *R v Kanye Sheikh* W R 1864 Cr 38. *R v Sheikh Kiyamat ib* Cr 1, *R v Affar-uddeen ib* Cr 13. *R v Mohun Banfor* 22 W R Cr 38 (1874). *R v Rajkrishna*, 1 B L R., O Cr 37 (1868). *Attorney-General v N S Wales v Bertrand L R 1 P C 520*, *R v Bushonath* 12 W R Cr 3 (1869). *Ali Meah v The Magistrate of Chittagong*, 25 W R, Cr 14 (1876).

(11) *Subba v R* 9 M 83 (1885), *R v Chand Ram* 9 A 609 (1887).

clearly appears to be to impede the adjudication of the case or otherwise to obstruct the ends of justice. Thus it was held not right for the lower Court to select five out of twenty witnesses tendered for examination (1). It appears from the case first cited that a Civil Court has power to refuse to examine an excessive number of witnesses, if satisfied that the object of the persons calling them is clearly to impede the adjudication of the case. The Code of Civil Procedure however, contains no provision analogous to that contained in section 216 of the Criminal Procedure Code, *exclude from the list of witnesses to be*

persons whose evidence is not really relevant (2). The fact of a witness not having been named in the plaintiff's list of witnesses is no ground for refusing to examine him when produced (3). In the undermentioned case, the plaintiffs in the Court of first instance produced both documentary and oral evidence in support of their claim. The Court, being satisfied with the documentary evidence produced by the plaintiff, declined to record the evidence of the wit-

the lower Appellate
it in its turn declined
lence before it. On
though there was no
to the circumstances

of the case, the Court was warranted *ex debito justitiæ* in setting aside all proceedings of both Courts below and in directing the Court of first instance to re-try the case, admitting all admissible evidence which had previously been tendered to the Court of first instance, and which that Court had refused to record (1).

Where a day has be-
potent to decide the ca-
witnesses, on the groun-

-ot com
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(5) A
case when he knows
e had no opportunity

(1) *Ramdhan Mandal v Rajballab Paramish* 6 B L R App 10 (1870) and to the same effect see *Watson & Co v Nukee Mundul* 6 W R (Act X) 83 (1866) *Jestant Singjee v Jet Singjee* 3 M I A 245 R v *Ishan Dutt*, 6 B L R App 88 (1871) R v *Bhoobun Isher* 2 W R Cr 36 (1865) R v *Abdool Setar* 3 W R Cr 6 (1865) *Ranee Oojulla v Gholam Mostafa* 6 W R Civ R 60 (1866) *Nilkanth Surmah v Soosela Debia* 6 W R 324 [objection taken in special appeal] *Looloo Singh v Rajender Laha* 8 W R 364 (1867) [a party is entitled to have all his witnesses examined what ever opinion the Court may form by anticipation as to the probable value of the evidence when it shall be given] *Mt Shunemokee v Ishachander Marsh* Rep 266 (1863) [The Court cannot put a party to elect which of several witnesses he will call where all are material and their evidence bears upon different points in the case. Conviction quashed the witnesses not having been summoned] R v *Kalee Thakoor*, 5 W R Cr 65 (1866) *Ram Shahai v Shankar Baladur* 6 B L R App 60 (1871) *Ial Mohan Sah* v

Tasi naddin 49 I C 756 (refusal to examine witnesses and receive document)

(2) Field Ev 4th Ed 659 when the Magistrate does not proceed under this section the accused is entitled to have the witnesses named in the list examined before the Court of Session R v *Prosunno Coolar* 23 W R 56 (1875)

(3) *Rakkhal Dass v Protab Chunder* 12 W R 455 (1870) as to criminal cases see s 291 Cr Pr Code

(4) *Durga Dihal v Anoraji* 17 A, 29 (1894)

(5) *Ranee Oojulla v Goham Mostafa* 6 W R 60 (1866) In re *Mohima Chundra* 6 B L R App 78 (1871) [It is the Magistrate's duty to summon witnesses for the accused who can speak to the facts of the case and he ought not to determine beforehand what credit he will give to their evidence] R v *Sreenath Mookappa* d' a 7 W R Cr 45 (1867) [a Magistrate cannot decide the case of a prosecutor without examining his witnesses] see *Sreenath Mundle v Sreeram Rajput* 24 W R Cr 62 (1875)

(6) *Radha Jeebun v Grees Chunder* 8 W R 461 (1867)

The examination of a material witness of the plaintiff in the absence of the defendant, his *wakil* having been removed, and no other *wakil* then acting for him is such an irregularity as, if objected to at the proper time, would be fatal to the reception of such evidence. But where no objection was urged during the trial or until an appeal was interposed, the Judicial Committee held that the objection came too late, and could not be sustained, as notwithstanding such irregularity and miscarriage, the fact did not taint the whole proceedings so as to prevent the plaintiff recovering upon the other evidence which was sufficient to establish his case (1)

By the procedure of the Courts in India the Courts are bound to proceed according to the facts alleged in the plaint and not to refuse to try issues of fact upon the merits on the ground of the legal effect of the facts alleged in the plaint (2)

The Court may in its discretion direct the exclusion of witnesses from the Court room while the testimony of other witnesses is being given. When it is desired to examine witnesses on both sides, the examination should generally be made upon the motion of either party at any period of the trial (3). If a witness remains in Court in contravention of the order to withdraw, it is a contempt for which he renders himself in England liable to fine and imprisonment. But the Judge has no right to reject his testimony on this ground (4). His disobedience ought, however, to be recorded and may materially lessen the value of his evidence (5). In India, even in the most true cases there is generally more or less concert between the witnesses on the same side (6). Formerly when the evidence of witnesses on opposite sides was directly conflicting the Court would often direct that such witnesses should be confronted, but in England this practice though useful, has now fallen into disuse (7).

In the undermentioned case (8) the plaintiff's Counsel called and examined a witness on behalf of the plaintiff, but he was not cross examined by Counsel for the defendants. The latter for the defence proposed to recall him as a matter of course, as a witness in chief. But the Judge refused to allow him to be recalled without leave of the Court, which he observed should have been asked for when the first examination was concluded.

The order, where there exist any provisions on the point is regulated by the Procedure Codes and in the absence of any such provision by the discretion of the Court (9). This is a subject which lies chiefly in the discretion of the Judge before whom the cause is tried, it being from its nature susceptible of but few positive and stringent rules (10). In the regular order of procedure

Order of
production
and exami-
nation

(1) *Rajah Bammaraux v Gangasamy*
Mudaly 6 Moo I A 262 (1855)

(2) *Nawab Sidhee v Ojoodhyaram*
Ahan 10 Moo I A 540 (1866)

(3) Taylor Ev §§ 1400—1402 and cases there cited Field Ev 6th Ed 31. It is usual not to exclude attorneys *wakils* or *mukhtars* of the parties nor the parties themselves since their presence is usually necessary to a proper management of their case. It is the practice of the High Court (and of the American Courts Burr Jones § 807) not to exclude an agent of the party when upon the statement of Counsel the presence of such agent from his familiarity with the facts is necessary for the proper management of the action of defence. The Supreme Court followed Exchequer practice *Kissenmohun Singh v Collypersaud*

Dutt Clarke's Rules and Orders 1831
1832 p 32 (1830) *United Company v*
Rajah Buddi auth id

(4) Taylor Ev § 1401

(5) *Ib* Field Ev 6th Ed 31. Al- though in practice the demand is seldom made the reason of the rule would seem to require the exclusion of witnesses during the opening argument of Counsel if requested *R v Murphy* 8 C & P 297

(6) Field Ev 6th Ed 19

(7) Taylor Ev § 1478. In the case of *Arnclesley v Lord Aiglesea* no less than four witnesses were for this purpose put in the box

(8) *Mackintosh v Nobumoney Dossie*,
2 Ind Jur N S 160 161 (1867)

(9) S 135 *post*

(10) Greenl Ev § 431

the party having the affirmative ought to introduce all the evidence necessary to support the substance of the issue, then the party denying the affirmative allegations should produce his proof, and finally the proof, if any, in rebuttal is received (1)

The order of examinations is laid down by section 138 of this Act. The rule with regard to the production of evidence in Civil cases as laid down by the Civil Procedure Code is as follows —

The plaintiff has the right to begin and the defendant admits the facts and the law or some part of the relief which he seeks, in which case the defendant has the right to begin (2). On the day fixed for the hearing of the suit, or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove. The other party shall then state his case and produce his evidence (if any) and may then address the Court generally on the whole case. The party beginning may then reply generally on the whole case. Where there are several issues, the burden of proving some of which lies on the other party, the party beginning may, at his option, either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the other party, and in the latter case the party beginning may produce evidence on those issues after the other party has produced all his evidence, and the other party may then reply specially on the evidence so produced by the party beginning, but the party beginning will then be entitled to reply generally on the whole case (3).

Criminal proceedings being of a varying character, the Criminal Procedure Code lays down no such general rule as that reproduced above. Chapter XVII, however, of that Code deals with the procedure in the case of enquiries into and Chapters XX—XXIII warrant cases, summary-charges, and Court of Session, respectively, Chapters XXXI, XXXII treat of the procedure on appeal, reference and revision.

Examination of witnesses

The rules for examination are contained in sections 136—166, and are in general conformity with the English and American law upon the subject. The rules require but little explanation. Such elucidation as has been considered necessary is given in the Notes appended to these sections, to which the reader is referred.

Order of production and examination of witnesses

135. The order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to Civil and Criminal procedure, respectively, and in the absence of any such law, by the discretion of the Court.

Taylor, Ev. §§ 1394, 1478, Burr Jones, Ev. § 797 *et seq.* Greenleaf, Ev. § 431. Civ. Pr. Code, O. XVII, rr 1—3 Woodroffe and Ameer Ali 2nd Ed., pp 837—839. Cr. Pr.

(1) *v. ante* pp 676 *et seq.* The trial Judge is to determine what is evidence in rebuttal and it lies within his discretion to receive or exclude such testimony. *Marshall v. Da* 17 N. Y. 414 420 (Amr.) as to the nature of evidence in reply see *R v. Hudditch* 5 C. & P. 279 as to calling fresh evidence after close of case see *Giles v. Powell* 2 C. & P. 259 *Halls v. Atcheson* 2 C. & P. 268, and

as to rebutting evidence after close of case to impeach credit of witness see *Ahad Jah Khanum v. Abdool Kureem* 17 C. 344 (1889).

(2) Civ. Pr. Code O. XVIII. r 1 *op. cit.* 2nd Ed. p 842.

(3) Civ. Pr. Code O. XVIII. rr 1—3, *op. cit.* 2nd Ed., p 842. See *Field Ev.* 6th Ed. 434—435.

Code, Chs XVIII, XX—XXIII, XXVI, XXVII, and cases and authorities cited in Introduction

COMMENTARY.

See the sections and chapters of the Civil and Criminal Procedure Codes with the attendance of witnesses of production and examination in the undermentioned case(3) at the close of the examination in chief of the plaintiff's attorney, Counsel for the defendant asked that the cross examination of the witness be deferred until after the examination in chief of the plaintiff by his Counsel, submitting that the word "examined" in this section included cross examination, and referring to section 138, and submitting that the plaintiff should have been first called and given his account of the transaction. The Court however, stated that it was slow to interfere with the discretion of Counsel as to the order in which witnesses should be examined, and stated that it thought that in that case the ordinary practice should regulate the order of examination, and that the witness should be cross examined at the conclusion of the examination in-chief, which was done

Order of production and examination of witnesses

136. When either party proposes to give evidence of any fact, the Judge may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant, and the Judge shall admit the evidence if he thinks that the fact, if proved, would be relevant, and not otherwise

Judge to decide as to admissibility of evidence

If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last-mentioned fact must be proved before evidence is given of the fact first mentioned, unless the party undertakes to give proof of such fact and the Court is satisfied with such undertaking

If the relevancy of one alleged fact depends upon another alleged fact being first proved, the Judge may, in his discretion either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact

Illustrations

(a) It is proposed to prove a statement about a relevant fact by a person alleged to be dead which statement is relevant under section 32

The fact that the person is dead must be proved by the person proposing to prove the statement before evidence is given of the statement

(b) It is proposed to prove by a copy the contents of a document said to be lost

The fact that the original is lost must be proved by the person proposing to produce the copy before the copy is produced

(c) A is accused of receiving stolen property knowing it to have been stolen

It is proposed to prove that he denied the possession of the property

The relevancy of the denial depends on the identity of the property. The Court may in its discretion either require the property to be identified before the

(1) *Ante* pp 686—693

(2) *Ante* pp 694—695

(3) Kedar Nath v. Bipendra Nath 5 C W N 25 (1900)

denial of the possession is proved or permit the denial of the possession to be proved before the property is identified

(d) It is proposed to prove a fact (A) which is said to have been the cause or effect of a fact in issue. There are several intermediate facts (B, C and D) which must be shown to exist before the fact (A) can be regarded as the cause or effect of the fact in issue. The Court may either permit A to be proved before B, C or D is proved or may require proof of B, C and D before permitting proof of A.

s 3 (Evidence)

s 3 (Fact)

s 3 (Proved)

s 3 (Relevant)

s 3 (Court)

s 104 (Burden of proving fact to be proved to make evidence admissible)

s 162 (Admissibility of documents)

Greenleaf Ev § 51 (a) Burr Jones Ev §§ 812 381 Norton Ev 319

Principle—The necessity of confining the proof to those facts which being relevant can alone be given in evidence under the provisions of this Act. The ground of the last clause is general convenience v post

COMMENTARY.

Judge to decide as to admissibility

In order that the proof may be confined to relevant facts and may not stray beyond the proper limits of the issue at trial the Judge is empowered to ask in what manner the evidence tendered is relevant. The Judge must then decide as to its admissibility. In cases tried by jury it is the duty of the Judge to decide all questions of admissibility and in his discretion to prevent the production of inadmissible evidence whether it is or is not objected to by the parties (1). A Civil Court also should irrespective of objections made by the parties compel observance of the provisions of this Act (2). In the case of documents the Court must decide the validity of any objection there may be to their production or admissibility (3). An erroneous omission to object to that which is not evidence does not make it admissible (4). The Court must at the time when the evidence is tendered decide whether or not it is legally admissible. Questions as to the admissibility of evidence oral or documentary should be decided as they arise and should not be reserved until judgment in the case is given (5).

With the second clause read section 104 ante which enacts that the burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence. In other words no person shall be allowed to give evidence before he has shown that he is in a legal position to do so. It often (to take an example) happens

call another witness in the middle of his examination to prove a point or meet such a state of things that this clause is provided (6)

(1) Cr Pr Code s 298 v ante p 128

(2) v ante p 128

(3) S 162 post

(4) Miller v Madlo Das 23 I A 106 s c 19 A 76 (1890) Sri Rajah Prakasharajan v Garu v Venkata Ram 38 M 160 (1915) See s 5

(5) Jad Rat v Bhubataran Nu d 17

C 173 (1889) Gorachand Sircar v Ram Karam Cho dhry 9 W R 587 (1863) Rana Karam v Mangul Sen 1 All L J 224 n (1904) and documents which are not admissible should be returned when they are presented d v ante p 127

(6) Norton Ev 319

the details of evidence shall be brought forward. When evidence is offered which proves or tends to prove any relevant fact it is to be presumed that this will be followed by such other proof as is necessary to establish the proper connection. Hence it is of no consequence in what order the evidence is introduced so far as its ultimate legitimacy is concerned, provided in its relation to the other evidence in the case, it is at the end pertinent to the issue (1). It has often been declared that the relevancy of testimony need not always appear at
per and
e which
under

takes to produce. If it is not subsequently thus connected with the issue it is to be laid out of the case (2). But before Counsel can claim the indulgence of the Court in this manner to introduce evidence otherwise presumably incompetent he should state what he expects to prove or in some other way satisfy the Court that the evidence will be made competent. If Counsel fail to make the testimony relevant by other evidence it should be withdrawn from the consideration of the Court. Having however regard to the influence of the improper testimony upon the minds of the jury it is clear that the Court should exercise great caution in criminal cases in admitting testimony of doubtful competency upon the promise of Counsel to show its materiality by subsequent proof (3). The section accordingly gives the Court a wide discretion in this matter. It should be added that it is extremely desirable that where possible, proofs should be offered in a connected sequence whether it be chronological or logical for the greater convenience of the Court and facility of apprehension.

A Judge who has suggested not then decide against the part made when the party has acted giving him an opportunity of calling witnesses whom he had been ready to adduce and whom he had refrained from calling at the suggestion of the Judge (4).

137. The examination of a witness by the party who calls him shall be called his examination-in-chief.

The examination of a witness by the adverse party shall be called his cross-examination.

The examination of a witness subsequent to the cross-examination by the party who called him, shall be called his re-examination.

138. Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined then (if the party calling him so desires) re-examined.

The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

Examination in-chief

Cross-examination

Re-examination

Order of examination

(1) Burr Jones Ev § 812

(2) Greenleaf Ev § 51 (a)

(3) Burr Jones Ev § 813

(4) *Hasaji v. Dhondram* 6 Bom L R. 616 (1904)

Dis. u. n.
of re. ex.
r. 138 n.

The re-examination shall be directed to the explanation of matter referred to in cross-examination and if new matter is by permission of the Court introduced in re-examination the adverse party may further cross-examine upon that matter.

COMMENTARY.

by the Court, no cross-examination upon the answer given in reply is allowed without the leave of the Court(1), yet if the witness be called by the Court he may be cross examined in the same manner as if he had been produced by the adverse party (2)

The order of examination is as follows —When a witness has been sworn or affirmed he is first examined by the party calling him to testify, this is called the direct examination or examination in chief. When the direct examination is finished the adverse party is at liberty to cross examine after which the party calling the witness may re examine him. This usually closes the examination of the witness though in many cases the adverse party is permitted to re cross examine at the close of the re examination but this is no more than a further cross examination, permitted either because new matter is brought out in the re examination or because the Judge in his discretion sees proper, under the circumstances to allow it. The party beginning then calls his next witness who is examined in like manner. When all the witnesses of the party beginning have been thus examined his case is closed. His opponent then opens his case and calls his witnesses who are examined in the same way first by himself then by his opponent and then re examined if necessary by himself. The close of his case is ordinarily followed by his summing up of the evidence and then by the speech in reply of the party who began. Sometimes however, the latter at the close of his opponent's evidence claims to adduce further evidence in reply to that which has been given on the other side. As to this rebutting evidence *vide post*. Section 202 of the Criminal Procedure Code as to right of reply is to be read in conjunction with section 289 of that Code (3). The object of the examination in chief is to lay before the Court and jury the whole of the information of the witness that is relevant and material, that of the cross-examination is to search and sift to correct and supply omissions, that of the re examination, to explain, to rectify, and put in order (4).

The privilege to examine witnesses has also been extended to jurors and assessors (5). A witness may not foist into his answer in any examination statements not in answer to questions put to him. This is called 'volunteering evidence' and the pleader of the opposite party should be on his guard to check its introduction by objection (6). The trial Judge should upon motion *strike out answers* that are *not responsive* to the questions asked that is, those answers that state facts not called for by the questions or those which express an opinion as to the matter in question unless the question calls for an opinion as in the case of experts. But where only a part of the answer is not responsive to the question only that part will be stricken out which is objectionable for not being responsive (7).

As to objections by the Court to the admissibility of particular questions *vide ante* pp 127 128 and as to objections by parties pp 130 134 *ante*. As respects the form of objections they should be specific rather than general that is, should show the ground or grounds of objection. Objections to questions should be made at the time they are put or they will generally be regarded as waived (8). A distinction however, must be drawn between the effect of the admission

(1) S 165 *post* R v Sakaram Muk undji 11 Bom H C R 166 (1874)

(2) *Tarun Charan v Saroda Sundari* 3 B L R A C 145 158 (1869) R v *Grish Chunder* 5 C 614 (1879) *Gopal Lal v Manick Lal* 24 C 288 (1897)

(3) R v *Sreenath Malapatra* 43 C 426 (1916)

(4) Stewart Rapalje's *op cit* § 230 *Willis Ev 2nd Ed* 314 370 377

(5) S 166 *post*

(6) Norton Ev 321

(7) Burr Jones Ev § 814 Stewart Rapalje's Law of Witnesses § 243 and cases there cited. In America it has been held that the refusal of the trial Judge to strike out an irresponsible answer is reversible error unless it is shown that such evidence is not prejudicial to the party appealing *b See* Taylor Ev § 1475

(8) Stewart Rapalje's *op cit* § 244

without objection of wholly irrelevant evidence and relevant evidence presented in an improper form. Only in the latter case will want of objection cure the defect. For an erroneous omission to object to that which is not relevant at all will not render it relevant (1). But consent or want of objection to the manner in which relevant evidence was brought on the record will preclude a party from objecting to such evidence on appeal (2). And it has been held that consent will make evidence otherwise relevant but recorded without jurisdiction admissible (3). The failure to object to one improper question to which an unsatisfactory answer was given, will not preclude a party from re-iterating on of as well as to are asked in a

merely preliminary to the others, is improperly overruled, the objection will not be limited to the first question, but will be deemed to cover the others which sprang naturally from it (4).

When evidence is rejected at the trial, the party proposing it should formally tender it to the Judge and request him to make a note of that fact (5). The moment a witness commences giving evidence which is inadmissible he should be stopped by the Court (6).

The witness must be competent. If there be any doubt upon this point the modern practice is to interrogate the witness before swearing or affirming him or to elicit the facts upon the examination in chief, when, if his incompetency appears he will be rejected (7).

As to evidence in rebuttal, see the Civil Procedure Code, O. XVIII, rr 2 & 3 (8) and *ante* s 133. It is also generally upon himself a notice on the pleading (9) and in any case where a defendant does not lay a foundation for his own affirmative case by such a cross examination of the plaintiff's witnesses as will give him fair notice of the points as to which they are going to be contradicted the plaintiff will generally be allowed to give evidence in reply (10).

As the demeanour of the witness while under examination is a most important test of his credibility, the Courts are empowered by the Codes to record their remarks relative thereto (11).

Leading Counsel may interpose and take the examination out of a junior's hands (12).

This is the first examination after the witness has been sworn or affirmed (13). It is the province of the party by whom the witness is called to examine him in

(1) *Miller v Madho Das* 23 I A. 106 116 (1896) s c 19 A 76 *ante* p 131

(2) *Sri Rajah Prakasaram Garu v Venkata Ram* 38 M. 160 (1915) following *Miller v Madho Das* (supra)

(3) *Sreenath Roy v Goluk Chunder Sein*, 15 W R 348 (1871) *Ramaya v Deppa* 30 B 109 (1906)

(4) *Stewart Rapalje* s *op cit* § 244 see generally *Taylor Ev* §§ 1881—1887B

(5) *Taylor Ev* § 1887A

(6) *R v Pitambar Sirdar* 7 W R Cr 25 (1867), s *ante* p 886 note (3) and cases there cited

(7) s *ante*, p 886. The preliminary examination as to competency is technical, by called examination on the *voir dire*, see *Taylor Ev* § 1393 *Wigmore Ev* § 486 see s 118 *ante*, *Stewart Rapalje*

op cit 232 *Warner's Law of Evidence* 58—61. For case of child see *Najar Sheikh v R* 41 C 406 (1915) 18 C L J 582, *R v Dhans Ram* 38 A 49 (1916) and *ante*, p 886

(8) O XVIII, rr 2, 3, *Woodroffe & Ali* 2nd Ed pp 838 839

(9) *Doe v Gosley*, 2 M & Rob 243

(10) *Biggs v Dickinson* 4 Ch D., 24, cf *Briggs v Aynsworth* 2 M & R 168

see *Wills Ev*, 2nd Ed, 313

(11) Civ Pr Code s 188, Criminal Procedure Code s 363. See *Mouladad Khan v Abdul Sattar* 39 A 426 (1917) *Bombay Cotton Co v Motilal Shitlal*, 42 I A 110

(12) *Doe v Roe* 2 Camp, 280

(13) S 138, as to oaths and affirmations s Oaths Act

chief for the purpose of eliciting from the witness all the material facts within his knowledge which tend to prove such a party's case

Few general rules can be laid down as to this topic, inasmuch as the propriety of the questions put by a party to his own witness in proof of his case must in the nature of things depend to a very great extent upon the particular circumstances to be proved. The object of the examination is to elicit the truth, to get at the facts, or such of them as bear upon the issue in favour of the party calling the witness. The issue must be kept in mind by the questioner, and only material and relevant facts, not those which are collateral and impertinent, may be inquired about. But it is not necessary that every question put to a witness shall be so broad and comprehensive that the answer shall be evidence of some issues in the case. If all the answers to a series of questions upon the same general subject, taken together, are competent, each is competent and a question tending to elicit such an answer should be allowed. Each question should call for a fact and not a conclusion of law and should not embrace the whole merits of the case. It is no objection to a question that it assumes facts which are undisputed but a question based upon the supposition of facts not proved is improper (1). So also a compound question, one part being admissible, and the remainder inadmissible may be rightly excluded as a whole. But Counsel are often allowed to ask apparently irrelevant and consequently inadmissible questions upon their promise to follow them up at the proper time by proof of other facts, which, if true, would make the question put legitimately operative (2). The party examining a witness in chief is bound at his peril to ask all material questions in the first instance, and if he fail to do this, it cannot be done in reply. No new question can be put in reply unconnected with the subject of the cross examination and which does not tend to explain it. If a question as to any material fact has been omitted upon the examination in chief, the usual course is to suggest the question to the Court, which will exercise its discretion in putting it to the witness (3).

On the examination in chief a witness as a general rule can only give evidence of facts (4) within his own knowledge and recollection. In some cases, hearsay and opinions are relevant. But in all cases the facts must be relevant (5), and in all cases the answer must be upon a point of fact as opposed to a point of law. Ordinarily a witness cannot be asked as to a conclusion of law. Some times this has been so far pressed as to involve the assumption that a witness cannot be asked as to conclusions of fact. The error of such a contention consists in this that there are few statements of fact which are not conclusions of fact (6). The conclusions of a witness as to the motives of other persons are inadmissible, motives being eminently inferences from conduct (7). Yet when a party is examined as to his own conduct he may be asked as to his own

(1) See notes to s 138 post

(2) Stewart Rapalje *op cit* § 238 (as to the order of proof *v s* 136 pp 935—937. In direct examination although mediocrity is more easily attainable it may be a question whether the highest degree of excellence is not even still more rare (*i.e.* than in cross examination). For it requires mental powers of no infer or order so to interrogate each witness whether learned or unlearned intelligent or dull matter of fact or imaginative single minded or designing is to bring his story before the tribunal in the most natural comprehensible and effective form. Best *Ev* § 663

(3) Stewart Rapalje *op cit* § 233

(4) *v s* 3 ante pp 106 108

(5) S 138 for meaning of *relevant*

v s 3 ante p 107 as to belief and opinion see Taylor *Ev* § 1414 et seq *v ante* pp 420 443

(6) Wharton *Ev* §§ 50 509 Wharton *Cr Ev* § 7 see p 410 ante. Conclusions of law are for the Court to draw not witnesses. So a witness will not be permitted to testify as to whether a party is responsible to the law whether certain facts constitute in law an agency and the like *ib*. Stewart Rapalje *op cit* § 238 witnesses are not permitted to state their views on matters of moral or legal obligation or on the manner in which other persons would probably have been influenced had the parties acted in one way rather than another Taylor *Ev* § 1419

(7) Wharton *Ev* § 68

intention or motive, his testimony to such intention or motive being based not on inference but on consciousness. But the right of a party to testify to his intent in drawing a contract or other document is limited by the rule that a party cannot be admitted to prove his intent so as to vary the terms of a document by which he is bound (1).

As to opinion evidence and the distinction between 'matter of fact' and "matter of opinion" see *ante* pp 421—423, and as to hearsay, p 491, *ante*.

In the case of documents the witness may testify to their existence and identity but not, unless secondary evidence be admissible, to their contents (2), and he may explain but may not in general contradict or vary their terms (3). A witness may give the substance of conversations or writings, but he will not be permitted to say what is the impression left on him by a conversation unless he swears to such impressions as recollections and not inferences. And it is enough if a witness swears to event and objects according to the best of his recollection and belief (4). Further, in order to save time a witness will be permitted to state the result of numerous or voluminous documents subject to cross examination as to particulars (5). So he may state whether a party's books showed his insolvency or the reverse (6), or in what manner bills have been invariably drawn (7), but he will not be allowed to give his impressions derived from unproduced documents, for these are matters of inference or construction which belong to the tribunal (8) and production of the books themselves should be given if required (9).

The witness will, while under examination be permitted to refresh his memory by reference to documents (10). Leading questions may not ordinarily be put in examination in chief (11). In cases where the witness proves to be hostile he may be cross examined by the party calling him (12). Questions tending to corroborate evidence of a relevant fact are admissible (13), and former statements of a witness may be proved to corroborate later testimony as to the same fact (14). Whenever any statement relevant under sections 32, 33 *ante*, is proved all matters may be proved to corroborate it, or to confirm the credit of the person by whom it was made which might have been proved if that person had been called as a witness (15). Where the prosecution declined to call in the Court of Session a witness for the Crown who had been examined in the Magistrate's Court and such witness was therefore placed in the witness box by Counsel for the defence it was held that Counsel for the

(1) Wharton Ev §§ 508, 482 further ordinarily extrinsic evidence of intent is inadmissible in the case of the interpretation of documents *Beit Maharam v Collector of Tlaxuah* 17 A. 188, 209 (1894) *v ante*, introd to Ch VI except in certain cases of ambiguity *v pp* 654, 672 *ante*. Wharton Ev § 955. As to proof of intention and motive *v ante* s 14 and cases there cited and Stewart Rapalje's *op cit* 391, 392. A common instance of the admissibility of evidence of mental condition exists when a party is asked whether in entering into a contract on which the action is based he relied upon the representations of the other party.

(2) *v ant* ss 91, 59, 65 and notes to those sections. Phipson Ev 5th Ed 463 as to the interposition of questions for the purpose of ascertaining whether the matter spoken to was contained in a document *see s* 144 *post*.

(3) *v ante* introd to Ch VI and ss 92, 99.

(4) Taylor Ev 1415, Wharton Ev, §§ 514, 515. If a witness called to prove the handwriting of a paper says that he believes it to be of the handwriting of the defendant from its contents and from other circumstances he may be asked what those circumstances are *R v Murphy* 8 C & P 297.

(5) S 65 cl (g) *ante* p 507. *Rowe v Brexton* 3 M & R 212. *Roberts v Daxon* Pea N P C 83.

(6) *Mayor v Sefton* 2 Stark R., 271.

(7) *Spencer v Bulling* 3 Camp 310.

(8) *Topham v McGregor* 1 C & L., 320.

(9) *Johnson v Kershaw* 1 D G & S., 260. *see* Taylor Ev § 462, Stark Ev 645. Steph Dig Art 71 (h).

(10) Ss 159—161 *post*.

(11) Ss 141, 142 *post*.

(12) S 154 *post*.

(13) S 156 *post*.

(14) S 157, *post*.

(15) S 158 *post*.

defence was not entitled to commence his examination of the witness by questioning him as to what he had deposed in the Magistrate's Court. Questions as to his previous deposition were under the circumstances only admissible by way of cross-examination with the permission of the Court, if the witness proved himself a hostile witness (1).

After the party calling a witness has concluded the examination in chief, the (An tabl

Cross-examination

and efficacious means of discovering the truth. Though certain rules have been laid down for the guidance of advocates in this respect (3), the faculty of interrogating witnesses with effect is mainly the result either of natural acuteness or of long forensic practice (4). It will, however, prove useful to recall here Mr Norton's observation (Law of Evidence, p 320) that cross examination is that unless there is some be broken down it is rarely unation. Sometimes consequently a cross examination is little more than affectation in order that the examiner may not seem to let the witness go without question, as if he were totally impregnable, and a few questions are asked to shake his credit or show the weakness of his memory. The object and scope of cross examination is two

but all questions (a) tending to test his means of knowledge, opportunities of observation, reasons for recollection and belief, and powers of memory, perception and judgment, or (b) tending to expose the errors, omissions, contradictions and improbabilities in his testimony, or (c) tending to impeach his

the parties in the cause (6), or (iii) that he has been convicted (7) of any criminal offence (8).

The cross examination must as much as the examination in chief relate to relevant facts (9). Therefore hearsay is always inadmissible as substantive

(1) *R v Zauar Hussien* 20 A 155 (1897)

(2) *Mote Singh v Emp*, 24 Cr L J 595 (1923)

(3) See Best Ev §§ 649—663 (in the last paragraph citing D P Brown's Golden Rules pp 614 615) § 21

Examination of witnesses Hints for conducting a trial Des Moines Iowa 1877 Harris Hints on Advocacy Quintilian Inst Orat Bentham's Judicial Evidence Hints to witnesses in Courts of Justice by a barrister (Baron Field) London 1815 Stark. Ev 194 Taylor Ev § 1428, Alison's Practice of the Criminal Law of Scotland 546 547 Evans on cross-examination in his Appendix to Pothier's Obligations No 16 Vol II pp 233 234 Field Ev 630 631 tests of credibility and concert demeanour and other indications of truth or falsehood (ability memory descriptive powers) 6th Ed 447 448 17—22 24—29 29—31 32—45 Stewart Rapalje's op cit § 245

et seq Whately's Rhetoric and His toric Dougl's Campbell's Rhetoric Glass ford's Principles of Evidence Edinburgh 1870 see Observations of Norman J in *Sujad Ali v Kashinath Dass* 6 W R 181 *R v Ratchardra Govind* 19 B 759 (1895)

(4) Best Ev §§ 650 663

(5) See s 146 post

(6) See s 155 (2) and (3) which deal with the impeachment of the credit of the witness by calling other persons to testify to the facts therein mentioned if he denies the same on cross examination. The impeachment of credit in the text refers to impeachment by cross examination of the witness himself and not by means of independent testimony. As to the partiality of the witness see s 153 Exception (2)

(7) See s 155 Except on (1)

(8) Phipson Ev 5th Ed 472

(9) S 138 see Observations in Wills, Ev 225 226 ib 2nd Ed 321

evidence, whether the evidence be elicited in examination in chief or cross examination (1) In so far, however, as the credibility of a witness is always in issue (2), 'relevancy' is a term of a wider scope in cross examination than in examination in chief embracing all those questions to credit which are the subject matter of sections 146—153, *post*. Moreover, the cross examination need not be confined to the facts to which the witness testified in his examination in chief (3) This is permitted by the generality of section 143 'leading questions may be asked in cross examination' and under section 151 the Court has discretion to permit the prosecution to test by cross examination the veracity of its own witnesses with reference to new matter so elicited by the defence (4) This is in accordance with the English practice by which the cross examination is not limited to the matters upon which the witness has already been examined in chief, but extends to the whole case, and therefore, if a plaintiff calls a witness to prove a single, even the simplest, fact connected with the case, the defendant is at liberty to cross examine him on every issue, and by putting leading questions, to establish, if he can, his entire defence (5) In America however, on the other hand the rule which prevails in most of the States is quite different and the cross examination can only relate to facts and circumstances connected with the matter stated in the direct examination of the witness. If a party wishes to examine a witness as to other matters, he must do so by making the witness his own (6)

A witness may be cross examined as to all facts relevant to the issue and his answers thereon may be contradicted. He may also be cross examined on all matters which affect his credit, but his answers thereon cannot, except in two cases, be contradicted (7) A witness cannot, however, be cross examined as to any *collateral independent fact irrelevant* to the matter in issue, for the purpose of contradicting him if his answers be one way, by another witness, in order to discredit the whole of his testimony (8) So where, as in the case *last cited*, defendant's Counsel cross-examined a witness as to the nature of a contract made by him with Mr S (such contract not being the matter in suit nor Mr S a party thereto) intending if the witness gave an affirmative answer to his question to draw from thence a conclusion that he had made the same kind of contract with the defendant (which was suggested to be the fact) or if witness answered in the negative to call Mr S, and then to prove the contrary and thereby destroy the witness's credit, it was held the question could not be put.

Whether the right to cross examine survives if the cross examiner afterwards calls his opponent's witness to prove his own case seems in England doubtful. But the better opinion is that it does not, and that the witness can be cross examined on his second examination while he may after the party who originally called him (9) This last view was adopted by this Act. The party who calls a witness in chief of the case—examines him in chief. Such examination would naturally be directed to the support of his own case upon which the adverse party would then have a right to cross examine. If the

(1) *Ante* p 482

(2) Best Ev § 263

(3) S 138 the same rule prevailed prior to this Act R v Ishan Dutt 6 B L R App 83 (1871) s c 15 W R Cr 341

(4) *Anurita Lal Hasra v R* 42 C 957 (1915)

(5) *Mayor v Murray* 19 L J Ch 281 Taylor Ev § 1432 Steph Dig Art 127 The rule prevails though the

proof is of a merely formal character *Morgan v Brydges* 2 Stark 314

(6) *Burr Jones* Ev § 1803

(7) S 153 *post*

(8) *Spencely v De Willott*, 7 East, 108 in other words no such question can be put for the mere purpose of impeaching the witness's credit by contradicting him Taylor Ev § 1435

(9) Taylor Ev § 1433

adverse party again called the same witness, he could clearly only examine him in chief (1)

Leading questions may be put in cross examination (2) As to evidence regarding matters in writing (3), cross examination as to previous statements in writing (4), and the questions which generally may be put in cross examination (5)

entitled himself to examine the witnesses in case, in order that he may bring out what he thinks possible, and in the form which he thinks proper.

It follows that evidence given when the party never had the opportunity either to cross examine, as the case may be, or to rebut by fresh evidence, is not legally admissible as evidence for or against him, unless he consents that it should be so used (6) When a case decided *ex p* of cross-examination hearing, it

had applied for leave to postpone cross-examination till the next day, on the ground that he had no opportunity to deal with the witnesses were not the postponement of

called by one of the parties is a competent witness, the opposite party has a right to cross examine him, though the party calling him has declined to ask a single question (11)

Examination of a witness by mistake does not give the other side a right to cross examine So where the plaintiff's Counsel called "Captain S" and Captain Hugh S answered and was sworn, and the plaintiff's Counsel, after asking him a few questions, ascertained that it was Captain Francis S whom they meant to examine, this was held not to give the other side a right to cross examine Captain Hugh S, as he was only examined by mistake (12) A witness called merely to produce a document under a *subpoena duces tecum* need not be

(1) Field Ev 6th Ed 447

(2) S 143

(3) S 144

(4) S 145

(5) Ss 146—153

(6) *Gorachand Sircar v Rani Narain* 9 W R 587 588 (1868) per Phear J and see *Radha Jeebun v Taramonce Dossee* 12 Moo I A 380 (1869)

(7) *Ram Baks v Kisori Mohan* 3 B L R A C, 273 (1869)

(8) *Sadasiv Singh v R* 41 C 299 (1914)

(9) Taylor Ev § 1469 Phipson Ev

5th Ed 471 and cases there cited

(10) *R v Brooke* 2 Stark R 472 *Phillips v Gomes* 1 Esp 357 L T, March 15 (1890), per Stephen, J, as to liability to cross-examination where an affidavit has been filed and withdrawn see *Re Quartz Hill Co* Ex parte Young, 21 Ch D, 64

(11) *R v Ishan Dutt* 15 W R Cr 34 (1871)

(12) *Clifford v Hunter*, 3 C & P 16 and see *Rush v Smith* 16 M & R, 94 *Wood v Mackinnon* 2 M & R 273; *Reed v James* 1 Stark, 132

sworn if the document either requires no proof, or is to be proved by other means, and if not sworn he cannot be cross examined (1) Witnesses to character may be cross examined (2) As a rule, the proper and convenient time for the purpose of cross examination of the witnesses for the prosecution is at the commencement of the accused person's defence but it is in the discretion of the Criminal Court to allow the accused to recall and cross examine the witnesses for the prosecution at any period of defence, when the Court thinks that such a step is necessary for the purposes of justice (3) But it has been held by the Calcutta High Court that section 347 of the Criminal Procedure Code cannot be read as subject to section 208, so as to render it imperative on a Magistrate, after he has decided to commit a case to Sessions, to allow the accused to cross examine the prosecution witnesses and to call witnesses in his own defence, and that when the accused did not cross examine the prosecution witnesses immediately, but applied for leave to examine them, after the close of the case for the prosecution, and to call witnesses, the Magistrate was justified in refusing the application and committing the case (4) Though a Magistrate is bound to examine all witnesses produced by the accused before commitment (5), he is not obliged to postpone it till he has examined those whom accused is prepared to produce after process for their appearance (6) As to cross examination by co accused and co defendants, *v post*, p 952

A witness ought to be allowed on cross examination to qualify or correct any statement which he has made in his examination-in chief (7) A witness is not always compellable to answer questions put to him in cross examination (8), and though he may be contradicted on all matters directly relevant to the issue he cannot [except in the cases mentioned in section 153, *post* (9)] be so contradicted on matters relevant merely as affecting his credit A witness's credit may be impeached either by cross examination (10) or by calling independent testimony to prove the facts mentioned in section 155, *post* (11) Cross-examination is notice to the opposite party of the line of defence adopted and will therefore in some cases prevent evidence being given in reply (12) The decisions on the question whether or not a party is entitled to see a document which has been shown to one of his witnesses while under cross examination by the other party, the whole, however, the practice after putting a paper into the hands of the witness, as to its general nature or identity, his adversary will have no right to see the document, but that if the paper be used for the purpose of refreshing the memory of the witness, or if any

(1) S 139 *post* It has been held in England that a witness whose examination has been stopped by the Judge before any material question has been put is not liable to cross examination *Creedy v Carr*, 7 C & P 64

(2) S 140 *post*

(3) *Khurndharce Singh v Prosladce Mundul* 22 W R, Cr 44 (1874) *see* Cr Pr Code ss 356 257 In *re Thakoor Dyal* 17 W R, Cr 51 (1872), *R v Ram Kishan* 25 W R Cr 48 (1876), *Talluri Venkayya v R* 4 M 130 (1881), *R v Boli o Sahai* 2 A 253 (1879), *Fais Ali v Koromdi* 7 C 28 (1881), 8 C L R, 325

(4) *Phanindra Nath Mitter v R* (1908) 36 C 48, following in *re Clive Durant*, 1898 Ratanlal's Unrep Cr Ca p 975, dissenting from *R v Ahmad* (1898), 20 A 264, and *R v Muhammad Hadi* (1903) 26 A 177 and distinguishing *R*

v Sagal Samba 1893, 21 C, 643

(5) *Jabbar Shah v Tanis Shah* 39 C 931 (1912)

(6) *R v Surath*, 42 C 608 (1915)

(7) *R v Tulsi Dosadh*, 18 W R 57 (1872)

(8) Ss 147 148, *post*

(9) *See* s 153 *post*, and *see also* s 155 cl (2)

(10) *See* s 146 *post*

(11) In this Act the term "impeaching credit" is confined to the latter of these modes The English and American writers often use the term in a wider sense It is obvious that a witness's character may often be successfully impeached by cross examination without recourse to independent testimony under the provisions of s 155

(12) *Wharton v Lewis* 1 C & P, 529, *ante*, pp 890-891

questions be put respecting its contents, or as to the handwriting in which it is written, a sight of it may then be demanded by the opposite Counsel (1)

Cross-examination may be, and in this country, not unfrequently is inordinately long (2) Where the Court is satisfied that the cross examination of any witness on commission is being unnecessarily prolonged, it will order such cross-examination to be concluded within a certain time (3)

Length of cross examination

As to this Professor Wigmore remarks —

"An intimidating manner in putting questions may so coerce or disconcert the witness that his answers do not represent his actual knowledge on the subject So also questions which in form or subject cause shame or anger in the witness may unfairly lead him to such demeanour and utterance that the impression produced by his statements does not do justice to his real testimonial value These are two of the notorious abuses of cross examination, and always have been, both in the early period when it was still chiefly used by Judges only, and also since the time of its mature elaboration, more than a century ago as the greatest weapon of truth ever forged In two noted passages of fiction its inveterate abuse has been satirized" (Dickens, *The Pickwick Club*, Ch XXIV Anthony Trollope "*The Three Clerks*," Ch XL)

Intimidating cross-examination

"The same is to be seen on the hands of the Judges The de

tender quiddities of the law that favour guilty persons—such as the rules for confessions and the privilege against self crimination For the probably guilty when brought to book, there is often an abundance of protection, while for the uncomplicated and innocent witness, coming to serve justice and truth there is scanty assistance The sport is of more interest than the victim Such Judges, as well as Counsel, were justly pilloried by the great novelist (Dickens), and his pen expressed only the widespread feeling of dread and disgust among the laity for the abuses of the witness box Those abuses it is true are, as a whole probably less to day than they formerly were, but they are in many places still not uncommon They are too frequent when they occur at all The just denunciations of high minded Judges have sometimes stigmatized these practices as they deserve (4), and there can be no doubt that the law sanctions the power and establishes the duty of the trial Judge to use a proper discretion to prevent and rebuke them" (5)

Mr W D Evans, in his Notes on the French Jurist Pothier says —

"The abuses to which this procedure is liable are the subject of very frequent complaint, but it would be absolutely impossible by any but general rules to apply a preventive to these abuses without destroying the liberty upon which the benefits above adverted to essentially depend, and all that can be

(1) Taylor Ev § 1452 and cases there cited where the document is used to refresh memory see s 161 post The right should be exercised before or at the moment the witness uses the document In re *Hibboo Mahton* 8 C 739 744 (1882)

(2) See as to such cross examination *Golden River Mining Co v Buxton Mining Co* 97 Fed Rep 414 (Amer) cited in 4 C W N cxxi

(3) *Suraj Prasad v Standard Life Insurance Co* 30 C 625 (1903)

(4) Mr Baron Alderson once remarked to a Counsel of this Mr — you seem to think that the art of cross examination is to examine crossly (Sergeant Ballantine's Experiences 105)

(5) Wigmore Ev § 781 referring also to Cross examination—A Socratic Dialogue by E Manson (8 Law Quart. Rev 160) and Smolett's letter of rebuke to a Counsel who had wantonly abused him. (Foss Mementos of Westminster Hall I, 235)

effected by the interposition of the Court is a discouragement of any virulence towards the witnesses which is not justified by the nature of the cause, and a sedulous attention to remove from the minds of the jury the impressions which are rather to be imputed to the vehemence of the advocate than to the prevarication of the witness. Whatever can elicit the actual dispositions of the witness with respect to the event,—whatever can detect the operation of a concerted plan of testimony, or bring into light the incidental facts and circumstances that the witness may be supposed to have suppressed,—in short, whatever may be expected fairly to promote the real manifestation of the merits of the cause, is not only justifiable but meritorious. But I conceive that a client has no right to expect from his Counsel an endeavour to assist his cause or what is a *modus operandi* to gratify his vanity by unmerited abuse, by embarrassment, by he has no real suspicion, or by does not actually feel, and that is an imperious duty upon the

advocate, who while the protector of private right, is also the minister of public justice, which requires them to be repelled. Considering the subject merely as a matter of direction, the adoption of an unfair conduct in cross examination has often an effect repugnant to the interest which it professes to promote.

But, however unfavourable an injudicious asperity of cross examination may be to the advancement of a cause, it, for the most part is congenial to the wishes of the party, the neglect of it is regarded as an indifference to his interest and a dereliction of duty, and the practice of it is one of the surest harbingers of professional success' (1)

On the same point Bentham remarks —

' Under the name of *brow beating* (a mode of oppression of which witnesses in the station of respondents are the more immediate objects) a practice is designated which has been the subject of a complaint too general to be likely to in this form has a particular propensity been called upon that side of the cause it on its side, because the more clearly

a side is in the right the less need has it for any such assistance as it is in the nature of any such dishonest arts to administer to it. *Brow beating* is that sort of offence which never can be committed by any advocate who has not the Judge for his accomplice. Rule 1. Every expression of reproach, as if for established mendacity every such manifestation, however expressed—by language, gesture, countenance, tone of voice (especially at the outset of the examination)—ought to be abstained from. If the tendency of such style of address were to truth, at the same time that the action of by any other plan of examination—the soever) not being of any considerable duration the liberty might be allowed, with preponderant advantage for the furtherance of justice. But, on a close

aspect of fur
of this kind
rson invested
ll as natural
recollection

and due utterance, and even (through confusion of mind) betrayed into self contradiction and involuntary falsehood, as that a dishonest witness should be detected and exposed. The quiet mode above described is not in any degree

(1) W D Evans in his Notes to Pothier ii 229 (1806) as regards however the last observation the date of it is to be

observed and it has not the same truth at the present day

susceptible of this sort of abuse the outrageous mode seems more likely to terminate in the abuse than in the use. Rule 2 Such unwarranted manifestations if not abstained from by the advocate, ought to be checked, with
 In the presence of the Judge, any mis-
 at the time by the Judge, is regarded by him
 the act, the misbehaviour, of the Judge

On him more particularly should the reproach of it lie, because for the con-
 vivance (which is in effect the authorization) of it, he cannot ever possess any
 of those excuses which may ever and anon present themselves on the part of
 the advocate The demand for
 of the Judge will appear the
 strength of the temptation, to
 cate is exposed Sinister interests in considerable variety concur in instigating
 him to this improper practice Rule 3 When on the false supposition of a
 disposition to mendacity, an honest witness has been treated accordingly by
 the cross examining advocate (the Judge having suffered the examination
 to be conducted in that manner for the sake of truth)—at the close of which
 examination all doubts respecting the probity of the witness have been dispelled,

now and then observed the Judge to interpose, for the purpose of applying a
 check to the petulance of the witness For one occasion in which, under the
 spur of the injury, the injured witness has presented himself to my conception
 as overstepping the limits of a just defence,—ten, twenty or twice twenty, have
 occurred, in which the witness has been suffering, without resistance and with-
 out remedy, as well as under the torture inflicted on him by
 advocate Scarcely ever, I think
 interpose to afford his protection
 the persecution, for the purpose
 of staying or alleviating the injury, or at the conclusion, for the purpose of
 affording satisfaction for it,—such inadequate satisfaction as the nature of the
 case admits of"(1)

and parti-
 erroneous
 the situa-
 tion, the agitation and hurry which accompanies it the cajolery or intimidation
 to which the witness may be subjected, the want of questions calculated to
 excite those recollections which might clear up every difficulty and the confusion
 occasioned by cross examination, as it is too often conducted, may give rise to
 important errors and omissions"

Lowrie, J, in *Elliott v Boyles*(3) said 'It is entirely natural that in the
 public trial of causes the earnestness of Counsel should often become unduly
 intense, and it is not possible to prevent this without such an attribution and
 exercise of power as would be entirely inconsistent with the freedom of thought
 that is necessary to all thorough investigation The remedy for it is to be found
 in inner rather than in outer discipline Those who are zealously seeking the
 truth cannot always be watchful to measure their demeanour and expressions
 in accordance with the feelings or even with the rights of others This zeal, even

(1) Jeremy Bentham *Rationale of Judicial Evidence* B II c IX B III c 5
 (2) 5 Beav 601 (1843)

(3) 31 Pa 66 (Amer.), (1857), cited in
 Wigmore p 876

when inordinate, must be excused, because it is necessary in the search of truth, and generally it is not possible to condemn it as misguided or excessive until its fault has been proved by the discovery of the truth in the opposite direction, and possibly its very excess may have contributed to the discovery. When the presiding Judge is respected and prudent a hint kindly given is generally all that is needed to restrain such ardour, when it does not arise in any degree from habitual want of respect for the rights of others and for the order of public business. Witnesses often suffer very unjustly from this undue earnestness of Counsel, and they are entitled to the watchful protection of the Court. In the Court they stand as strangers surrounded with unfamiliar circumstances giving rise to an embarrassment known only to themselves, and in mere generosity and common humanity they are entitled to be treated, by those accustomed to such manifest that they it becomes the Court and jury, and all harsh and unfair treatment of them and the cause that adopts such treatment is very apt to suffer by it. It is only where weakness sits in judgment that it can benefit any cause. Add to this that a mind rudely assailed naturally shuts itself against its assailant, and reluctantly communicates the truths that it possesses."

Insulting
and other
observa-
tions on the
evidence

"There is another matter connected with cross examination in which there is no room or doubt as to the duty of Counsel and as to the duty incumbent upon Judges to enforce that duty stringently. The legitimate object of cross examination is to bring to light relevant matters of fact which would otherwise pass unnoticed. It is not unfrequently converted into an occasion for the display of wit and for obliquely insulting witnesses. It is not uncommon to put a question in a form which is in itself an insult, or to prepare a question or receive an answer with an insulting observation. This naturally provokes retorts and cross examination so conducted ceases to fulfil its legitimate purpose and becomes a trial of wit and presence of mind which may amuse the audience, but is inconsistent with the dignity of a Court of Justice and unfavourable to the object of ascertaining the truth. When such a scene takes place the Judge is the person principally to blame. He has a right on all occasions to exercise the power of reproving observations which are not questions at all, of preventing questions from being put in an improper form and of stopping examinations which are not necessary for any legitimate purpose. (1) In *Ing's Trial* (2)

1800. "I think you I for the same plot) that did may be I will not pretend to say, that the next time I come up here I can communicate as I have done to day." Q "Certainly not there are people that proverbially ought to have a good memory?" A "Yes certainly." Q "You make your evidence a little longer or shorter according as the occasion suits?" A "Yes I mention the circumstances as they come to my recollection." Mr Gurney "That is observation and not question." Mr Adolphus "I am asking him a question." L C J Dallas "You should not now describe the evidence." Mr Adolphus "This about the digging entrancement you did not state on Monday?" A "No I forgot that." Q "The next time there will be a new story?" Mr Gurney "I must interpose my lord." L C J Dallas "All these observations are certainly incorrect." Mr Adolphus "He has said it himself 'when next I come into the box I shall recollect other things,' and upon that I put the question whether he would tell another story the next time he comes." L C J Dallas "Ask him the question if you wish it." Mr Adolphus "Shall you tell us a new story the next time?"

(1) Stephens's History of the Criminal Law of England vol 1 pp 433 436 See

as to offensive questions s 152 post
(2) 33 How St C 957 999 (1870)

"No If anything new occurs to my mind when I come to stand here, I will state it."

In *Hardy's Trial*(1), Mr *Erskine*, cross examining a witness to the proceedings of an alleged seditious meeting: "Then you were never at any of those meetings but in the character of a spy?"—"As you call it so, I will take it so" "If you were not there as a spy, take any title you choose for yourself, and I will give you that" L C J *Eyre* "There should be no name given to a witness on his examination He states what he went for, and in making observations on the evidence, you may give it any appellation you please" After a repetition of the practice, Mr *Gibbs* "I am sorry to interrupt you, but your questions ought not to be accompanied with those sorts of comments. they are the proper subjects of observation when the defence is made The business of a cross examination is to use all sorts of arts to prove a witness as closely you can; but it is not the object of a cross examination to introduce that kind of periphrasis as you have just done" Mr *Erskine* "But on a cross examination, Counsel are not called upon to be so exact as in an original examination, you are permitted to lead a witness," L C J *Eyre* I think, it is so clear that the questions that are put are not to be loaded with all the observations that arise upon all the previous parts of the case, they tend so to distract the attention of everybody, they load us in point of time so much, and that that is not the time for observation upon the character and situation of a witness is so apparent that as a rule of evidence it ought never to be departed from"

"It is an established rule, as regards cross examination that a Counsel has no right, even in order to detect or catch a witness in a falsity, falsely to assume or pretend that the witness had previously sworn or stated differently to the fact, or that a matter had previously been proved when it had not Indeed, if such attempts were tolerated, the English Bar would soon be debased below the most inferior of society"(2)

Questions which mislead or assume facts not proved

A question which assumes a fact that may be in controversy is leading, when put on direct examination because it affords the willing witness a suggestion of a fact which he might otherwise not have stated to the same effect Similarly, such a question may become improper on cross examination, because it may by implication put into the mouth of an unwilling witness a statement which he never intended to make and thus incorrectly attribute to him testimony which is not his (3)

In the *Parnell Commission's Proceeding*(4), the "Times" having charged the Irish Land League with complicity in crime and outrage, a constable testifying to outrages was cross examined by the opponents as to his partisan employment by the "Times" in procuring its evidence Mr *Lockwood* How long have you been engaged in getting up the case for the 'Times?' Sir *H James* "What I object to is that Mr *Lockwood* without having any foundation for it, should ask the witness 'How up the case for the Times'" Mr *Lockwood* learned friend as to the exact form of the question, it is perfectly proper and regular If the man has not been engaged in getting up the case for the 'Times' he can say so" Sir *H James* I submit that my learned friend has no right to put this question without foundation Counsel has no right to say 'When did you murder A B?' unless there is some foundation for the question In this same way he has no right to ask 'How long have you been engaged in getting up this case?' for it assumes the fact President *Hannan*. "I do not consider that Mr *Lockwood* was entitled to put the question in that form and to assume that the witness has been employed by the Times"

(1) 24 How St. Tr 754 (1794)

(3) Wigmore Ev. § 780

(2) Joseph Chitty Practice of the Law 2nd Ed in 901

(4) 19th Day Times Rep pt 5 p 221

Co-defendants, Co-accused

The Evidence Act gives a right to cross-examine witnesses called by the adverse party (1) One accused person therefore may cross-examine a witness called by another co accused for his defence when the case of the second accused is adverse to that of the first (2) The section does not make special provision for the case of a co-accused.

It was seen further held that all evidence taken, whether in examination in chief or cross-examination, is common and open to all the parties (4) It follows that if all evidence is common and that which is given by one party may be used for or against another party, the latter must have the right to cross examine. The right therefore of a defendant (and *a fortiori* an accused) to cross examine a co defendant or co accused is, according to the English cases, unconditional and not dependant upon the fact that the cases of the accused and co accused are adverse, or that there is an issue between the defendant and his co defendant (5) If a defendant may cross examine a co-defendant's witnesses *a fortiori* he may cross examine his co defendant if he gives evidence (6)

Re-examination

The party who called the witness may, if he like, and if it be necessary, re examine him. The re examination must be confined to the explanation of matters arising in cross examination. "The proper office of re examination is to explain all the things adverse to the party by a witness during the examination proper for that purpose, so as to draw forth an explanation of the meaning of the expressions used by the witness in cross examination, if they be in themselves doubtful, and also of the motive or provocation which induced the witness to use those expressions, but, a re examination may not go further and introduce matter new in itself and not suited to the purpose or the motives of the witness" (7) So a former inconsistent statement, he may for so doing (8) Even if inadmissible matters are introduced, the right to re examine upon them remains (9) But, as observed, new facts or matters which

lated (10) If facts are called out on cross examination which tend to impeach the witness, make explanation, make explanation, make explanation, New matter may

(1) *Ram Chand v Hanif Shakh* 21 C 401 (1893), for the rule prior to the Act see *R v Surroop Chunder* 12 W R Cr, 75 (1889) cited in the last case. See *R v Burdett* 6 Cox 458. *Lord v Colvin* 3 Drew 222 225

(2) *Ram Chand v Hanif Shakh*, 21 C, 401 (1893)

(3) *Allen v Allen* L R P D (1894) 248 254

(4) *Lord v Colvin* 3 Drewery 222

(5) *Lord v Colvin* 3 Drewery 222 followed in *Allen v Allen* supra the only other alternative which is however hardly practicable is to declare the evidence

given not to be common to all the parties see *R v Surroop Chunder* 2 W R Cr 75 *supra*

(6) *Allen v Allen* supra 254

(7) *Taylor* Ev § 1474 *Greenleaf* Ev 467

(8) *R v Woods* 1 Cr & D 439 *The Queen's case* 2 B & B 297

(9) *Blewett v Trefrenning* 3 A & E 554

(10) *Prince v Samo* 7 A & F 627 *Burr Jones* Ev 876

(11) *Burr Jones* Ev § 875 So where a witness had stated that he came from jail it was held proper for the party

however, be introduced by permission of the Court, in which case the adverse party may further cross examine upon the matter (1)

139. A person summoned to produce a document does not become a witness by the mere fact that he produces it, and cannot be cross-examined unless and until he is called as a witness

Cross-examination of person called to produce a document

COMMENTARY.

Any person may be summoned to produce a document without being summoned to give evidence, and any person summoned merely to produce a document shall be deemed to have complied with the summons if he cause such document to be produced instead of attending personally to produce the same (2) This section is in accordance with the English practice by which if the witness be called under a *subpœna duces tecum* merely for the purpose of producing a document, which either requires no proof or is to be identified by another witness, he need not be sworn, and, if unsworn, he cannot be cross examined (3)

Cross examination of person called to produce a document

When a person called only to produce a document is sworn as a witness by a mistake, and a question is put to him, which he does not answer, the opposite party is not entitled to cross examine him (4) In the case undermentioned (5), a witness was summoned to produce a document in Court in connection with a certain suit. He attended the Court, but did not produce the

his possession. But this statement was under section 174 of the former

Held, that the fine was illegally levied. The jurisdiction of the Court to punish under section 174 of that Code existed only in the case of a witness, who not having attended on summons has been arrested and brought before the Court. Under the corresponding provisions of the present Code, it applies to any one who without lawful excuse

The case of a witness who having a document will not produce it, is provided for by section 175 of the Indian Penal Code (Act XLV of 1860) and section 480 of the Code of Criminal Procedure (Act V of 1898). Where a witness denies on oath that he has the possession or means of producing a particular document, he can, if he has been guilty of falsehood, be prosecuted for giving false evidence in a judicial proceeding.

140. Witnesses to character may be cross-examined and re examined

Witnesses to character

COMMENTARY.

According to English practice it is not usual to cross examine except under special circumstances, witnesses called merely to speak to the character of a prisoner, but there is no rule which forbids the cross examination of such witnesses (7)

Witnesses to character

calling him to ask on what charge he had been committed. *State v Fsell* 41 Tex 35 (Amer)

(1) S 138 see Taylor Ev § 1477
(2) Civ Pr Code O XVI r 6 Woodroffe and Amir Ali 2nd Ed p 829 Cr Pr Code s 94

(3) Steph Dig Art 126, *Summers v Mosely*, 2 Cr & M 477 *Perry v Gibson* 1 A & F 84 *Rush v Smith* 1 C M &

R 94 Taylor Ev § 1429 That the other side cannot insist upon the person called being sworn see *Davis v Dale* M & M 514 R v *Murks* id 515, *Evans v Mosely* 2 Dowd P C 364

(4) *Rush v Smith* 1 C M & R 94
(5) In re *Premchand Doslatram* 10 B 63 (1887)

(6) P 804—807

(7) Taylor Ev § 1429

Leading
questions

141. Any question suggesting the answer which the person putting it wishes or expects to receive is called a leading question

When they
must not be
asked

142. Leading questions must not, if objected to by the adverse party, be asked in an examination-in-chief or in re-examination, except with the permission of the Court.

The Court shall permit leading questions as to matters which are introductory or undisputed, or which have, in its opinion, been already sufficiently proved.

When they
may be
asked

143. Leading questions may be asked in cross-examination

Principle—Leading questions in examination or re-examination are generally improper, as the witness is presumed to be biased in favour of the party examining him and might thus be prompted. In cross-examination as the reason generally ceases so does the rule. See notes *post*

Taylor, Ev., §§ 1404, 1405; Greenleaf, Ev., § 434; Burr Jones, 815; Best, Ev., §§ 641 642 643; Phipson, Ev., 5th Ed., 464, *et seq.*; Norton, Ev., 325; Starkie, Ev., 167; Ahson's Practice of the Criminal Law, 546; Wigmore, Ev., § 769 *et seq.*

COMMENTARY.

Leading
questions

"A question," says Bentham, "is a leading one, when it indicates to the witness the real or supposed fact which the examiner expects and desires to have confirmed by the answer. Is not your name so and so? Do you reside in such a place? Are you not in the service of such and such a person? Have you not lived so many years with him? It is clear that under this form every sort of information may be conveyed to the witness in disguise. It may be used to prepare him to give the desired answers to the questions about to be put to him, the examiner—while he pretends ignorance and is asking for information, is in reality giving instead of receiving it" (1). It has often been declared that a question is objectionable as leading which embodies a material fact and admits of answer by a simple affirmative or negative (2). While it is true that a question which may be answered by "Yes" or "No" is generally leading, there may be such questions which in no way suggest the answer desired and to which there is no real objection. On the other hand, leading questions are by no means limited to those which may be answered by "Yes" or "No." A question proposed to a witness in the form whether or not, that is, in the alternative, is not necessarily leading. But it may be so, when proposed in that form, if it is so framed as to suggest to the witness the answer desired (3). It would answer no practical purpose to cite the numerous decisions which determine whether particular questions are leading or not, as each case as it arises must be determined with reference to its own particular circumstances and to the question is leading which make, or which puts into his is a relative not an absolute abstract—for the identical closest kind in one case or

(1) Bentham's Rationale of Judicial Evidence. Thus also a witness called to prove that A stole a watch from B's shop must not be asked 'Did you see A enter B's shop and take a watch?' The proper inquiry is 'What he saw A do at the time and place in question,' Phipson, Ev., 5th Ed. 464 "A question shall not be so pro-

pounded to a witness as to indicate the answer desired' per McLean J. in *U S v Dickinson* 2 McLean 331 (Amer).
(2) See Taylor Ev., § 1401, Greenleaf Ev., § 434.
(3) Burr Jones Ev. § 815 Best Ev. § 641

state of facts might be not only unobjectionable but the very fittest mode of interrogation in another (1) If a question merely suggests a *subject* which suggests an answer or a specific thing it is not leading. A question is proper which merely directs the attention of the witness to the subject respecting which he is questioned (2) It follows from the broad and flexible character of the controlling principle that its application is to be left to the discretion of the trial Court (3) Evidence improperly obtained by leading questions without first declaring the witness hostile should not be considered (4)

Leading questions are here generally improper because a witness is presumed to be biased in favour of the party calling him who knowing exactly what the former can prove, might prompt him to give only favourable answers. Such evidence would obviously be open to suspicion as being rather the pre-arranged version of the witness (5)

The section says if questions are often a practice leading and sometimes by tacit consent. This latter occurs where the questions relate to matters which though strictly speaking in issue the examiner is aware are not meant to be contested by the other side or where the opposing Counsel does not think it worth his while to object. On the other hand however very unfounded objections are constantly taken on this ground. (6) If the objection is not taken at the time the answer will have been taken down in the minutes and the Court will interfere and the Counsel the objection is advisedly not taken) it is only through want of practical skill that the omission occurs. At the same time it is to be observed that if evidence elicited by a series of leading questions unobjected to the effect of evidence so obtained is very much weakened. It is advisable therefore (except where permissible) not to put such questions whether it be likely that objection be taken to them or not (7) The proper way to exclude evidence obtained by

case where the Judge caused part of the interrogatory and part of the answer to be suppressed and the remainder which appeared not affected by the context to be read in evidence was held to be correct

As however the rule is merely intended to prevent the examination from being conducted unfairly (10) the rule is subject to three specific exceptions mentioned in this section and in section 154. These exceptions are —

(1) Best Ev § 641

(2) *Ib* *Nicholls* *Dorling* 1 Qark R 81. It is necessary to some extent to lead the mind of the witness to the subject of the enquiry per Lord Ellenborough

(3) *Wignore* L 770

(4) *Jagdeo* E 24 Cr L J 69 (1922)

(5) *Pherson* Ev 5th Ed 464 c n g Best Ev 64

(6) *Best* F § 641 v post

(7) *Norton* Ev 325. It is often useful in place of pressing the objection or when the objection is so errud to ask that the question appears upon the notes when the value of the answer will become

apparent to the Appellate Court before which the case may again come for trial

(8) *Thaya Ra* T ps Koe 3 W P Cr 23 4 (871) see observations in *P v Bisoati* W R C 3 (1859) a witness when under examination should not lead his attention directed to his deposition before the Magistrate *Ran* *Cl* *der* 13 W R Cr 18 (180)

(9) *Sall* Va c Q B 840 1849)

(10) See *R* *Abd Hal* 7 A 385 39 1885). The objection to leading questions is not that they are absolutely illegal but only that they are unfair per Pethe *ra* C I

In examination in chief and re-examination

(1) *Introductory and undisputed or sufficiently established matter*—The rule must be enforced in a reasonable sense, and must therefore not be applied to that part of the examination which is introductory to that which is material. If

to him the acknowledged facts of the case which have been already established (1)

(2) *Adverse witness*—A witness who proves to be adverse to the party calling him may in the discretion of the Court be led or rather, cross examined (2)

(3) *Leading questions may be asked with the permission of the Court* (3)—The Court has a wide discretion with reference to this, which is not controllable by the Court of Appeal (4), and the Judge will always relax the rule whenever he considers it necessary in the interests of justice and it is always relaxed in the following cases—

(a) *Identification*—For this purpose a witness may be directed to look at a particular person and say whether he is the man. Indeed wherever from the nature of the enquiry form (5)

case and it is often advisable not to lead even where permissible. Thus in a criminal trial where the question turns on identity although it would be perfectly regular to point to the accused, and ask a witness if that is the person to whom his evidence relates yet if the witness can unassisted single out the accused his testimony will have more weight (6)

(b) *Contradiction*—Where one witness is called to contradict another as to the expressions used by the latter, but which he denies having used he may be asked directly 'Did the other witness use such and such expressions?' The authorities are however, stated to be not quite agreed as to the reason of this exception, and some contend that the memory of the second witness ought first to be exhausted by his being asked what the other said on the occasion in question (7). So a leading question may be asked to contradict a witness on the other side as to the facts of the case. — a contradiction is been destroyed (8). The case last cited was *the goods on board of a ship*. The defence was that the goods were not lost, and that the plaintiff himself had written a letter to his son stating that he had disposed of all his goods at a profit of 30 per cent. The son was called and cross examined as to the contents of the letter. He swore it was lost but it contained no intimation of the kind supposed, and only said that plaintiff might have disposed of his goods at a great profit as he had been offered 8s for a pair of cotton stockings he then wore. To contradict his testimony several witnesses were produced to whom the letter had been read when received in London. One of these, having stated all that he recollected of it, was asked 'if it contained anything about the plaintiff having been offered 8s for a pair of cotton stockings'. This being objected to as a leading question, Lord Ellenborough ruled, that after exhausting the witness's memory as to the contents of the letter, he might be asked, if it contained a particular passage recited to him which has been sworn to on the other side, otherwise it would be impossible ever to come to a direct contradiction.

(1) Taylor Fv § 1904 s 142
(2) S 154 post Best Ev § 642 See
Amrita Lal Harro v R., 42 C., 957
(1915)
(3) S 142
(4) Taylor Fv § 1405

(5) *Id*
(6) Best Fv § 643 Field Ev 615
Fd 451
(7) Best Fv § 642
(8) *Curteen v Touse* 1 Camp 42

(c) *Defective memory*—The rule will be relaxed where the inability of a witness to answer questions put in the regular way obviously arises from defective memory (1). It is common practice, when a witness cannot recollect a circumstance, to refresh his recollection by a leading question after the Court is satisfied that his memory has been exhausted by question framed in the ordinary manner (2). So where a witness stated that he could not remember the names of the members of a firm so as to repeat them without suggestion but thought that he might recognise them if read to him this was allowed to be done (3). A question is not objectionable which merely directs the attention of the witness to a particular topic without suggesting the answer required. Thus to prove a slander imputing that 'A' was a bankrupt whose name was in the bankruptcy list and would appear in the next Gazette "a witness who had only proved the first two expressions was allowed to be asked, "Was anything said about the Gazette?" (4). Upon a similar principle the Court will sometimes allow a pointed or leading question to be put to a witness of tender years whose attention cannot otherwise be called to the matter under investigation (5).

(d) *Complicated matters*—The rule will also be relaxed where the inability of a witness to answer questions put in the regular way arises from the complicated nature of the matter as to which he is interrogated (6).

The above instances are mentioned as those in which the rule is generally and commonly relaxed, but it will be remembered that the Court has a wide discretion to allow leading questions, not only in these but in any other cases in which justice or convenience requires that they should be put. As already observed, very unfounded objections are constantly taken on this ground. In the case undermentioned in which it was held that *prima facie* evidence of a partnership having been given, the declaration of one partner is evidence against another partner, a witness, called to prove that A and B were partners, was asked whether A had interfered in the business of B, and it was held not

the subject of enquiry. In general no objections are more frivolous than those which are made to questions as leading ones" (7).

As soon as the witness has been conducted to the material portion of his examination, as soon as the time and place of the scene of action have been fixed, 'it is generally the easiest course to desire the witness to give his own account of the matter making him omit, as he goes along, an account of what he had heard from others which he always supposes to be quite as material as that which he himself has seen. If a vulgar, ignorant witness be not allowed to tell his story in his own way, he becomes embarrassed and confused and mixes up distinct branches of his testimony. He always takes it for granted that the Court and the Jury know as much of the matter as he does himself, because it has been the common topic of conversation in his own neighbourhood, and, therefore his attention cannot easily be drawn so as to answer particular questions, without putting them in the most direct form. It is difficult, therefore, to extract the important parts of his evidence piecemeal, but if his attention be first drawn to the transaction by asking him when and where it happened, and he be told to describe it from the beginning he will generally proceed in his own way to detail all the facts in the order of time (8)'. So also Mr

(1) Best Ev § 642

(2) Norton Ev 325

(3) *Acerra v Petron* 1 Stark 100
Taylor Ev § 1405(4) *Nicholls v Douling* 1 Stark 81
Best Ev § 641

(5) Taylor Ev § 1405

(6) Best Ev § 642

(7) *Nicholls v Douling* 1 Stark R.

81

(8) Stark Ev 167

Alison says(1)—“It is often a convenient way of examining to ask a witness whether such a thing was said or done, because the thing mentioned aids his recollection and brings him to that state of the proceeding on which it is desired that he should dilate. But this is not always fair, and when any subject is approached on which his evidence is expected to be really important, the proper course is to ask him what was done, or what was said, or to tell his own story. In this way, also, if the witness is at all intelligent a more consistent and intelligible statement will generally be got than by putting separate questions, for the witnesses generally think over the subjects on which they are to be examined in criminal cases so often, or they have narrated them so frequently to others, that they go on much more fluently and distinctly, when allowed to follow the current of their own ideas, than when they are at every moment interrupted or diverted by the examining Counsel.”

Cross-examination

It has always been an admitted rule that leading questions may in general be asked in cross examination. But there are some circumstances in which leading questions ought not to be put even in cross examination. For though leading questions may (perhaps in England and certainly under the terms of this section) in strictness be put in cross examination, whether the witness be favourable to the cross examiner or not, yet where a vehement desire is betrayed to serve the interrogator, it is certainly improper and greatly lessens the value of the evidence to put the very words into the mouth of the witness which he is expected to echo back (2). It is also to be remembered that questions which assume facts to have been proved, which have not been proved or that particular answers have been given, which have not been given, will not, as being an attempt to mislead the witness, be at any time, or in any examination, permitted (3).

Evidence as to matters in writing

144 Any witness may be asked, whilst under examination, whether any contract, grant or other disposition of property as to which he is giving evidence was not contained in a document, and if he says that it was, or if he is about to make any statement as to the contents of any document, which in the opinion of the Court, ought to be produced, the adverse party may object to such evidence being given until such document is produced, or until facts have been proved which entitle the party who called the witness to give secondary evidence of it.

Explanation—A witness may give oral evidence of statements made by other persons about the contents of documents if such statements are in themselves relevant facts.

Illustration

The question is whether *A* assaulted *B*.

O deposes that he heard *A* say to *D*—“*B* wrote a letter accusing me of theft and I will be revenged on him.” This statement is relevant, as showing *A*’s motive for the assault and evidence may be given of it, though no other evidence is given about the letter.

Principle.—See Note, post

- 3 (‘Document’)
- 3 (‘Court’)

ss 91 92 (Exclusion of oral evidence in case of documents)

(1) Practice of the Criminal Law, Scotland 546

(2) Phipson Ev., 5th Ed 473, Taylor

1 v 1 1431

(3) Taylor Ev II 1404 1431 See notes to s 138 ante Wigmore, Ev. I 771

COMMENTARY.

This section merely points out the manner in which the provisions of sections 91 and 92 *ante*, as to the exclusion of oral by documentary evidence may be enforced by the parties to the suit (1). If the adverse party do not object it is the duty of the Judge in criminal trial (2), to prevent [and he may also in civil cases (3), prevent] the production of inadmissible evidence notwithstanding the absence of objection (4).

145 A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question (5), without such writing being shown to him, or being proved, but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

Principle—The furnishing of a test by which the memory and integrity of a witness can be tried. See Note *post*.

s 155 CL (3) (*Previous verbal statements*)

Taylor, Ev. § 1140 1451 Wharton, Ev. §§ 531, 68

COMMENTARY.

This rule is in the nature of an exception to the general principle forbidding all use of the contents of a written instrument until the instrument itself be produced. The section re-enacts the provisions of Act II of 1855 (6), and is nearly the same as section 24 of the Common Law Procedure Act of 1854 (7) which altered the rule laid down in *The Queen's case* (8), namely, that the cross-examining party was obliged, when the statement was in writing to show it to the witness and afterwards put it in as his own evidence, a rule which it has been remarked (9) excluded one of the best tests by which the memory and integrity of a witness can be tried, it being clear that if the object of the cross-examination was to test the witness's memory this would be entirely frustrated by reading out the document to him before asking him any question about it.

The section says—“may be cross examined.” A witness when under examination in chief before the Court of Session should not have his attention directed to his deposition before the Magistrate (10). The section does not say that the writing must be shown before the cross-examination, but that if it is intended to put in such writing to contradict called to those parts which are to be used for him. That is, not that he is to be allowed to frame his answers accordingly, but that, if his answers have differed from his

(1) Cunningham Ev. note to s 144

see *The Queen's Case* B & B 292

(2) Cr Pr Code s 298

(3) v *ante* pp 130 131

(4) Field Ev 6th Ed 453

(5) See for examples *Oriental Government etc Co Ltd v Narasimha Chari* 25 M 183 210 (1901) *Suresh Chandra v Emp* 24 Cr L J 757 (1923)

(6) See *R v Ram Chunder* 13 W R Cr 18 (1870) *Tukheya Rai v Tupsee* 15 W R Cr 23 (1871)

(7) 17 & 18 Vic Cap 125 which however contained the following proviso *viz*

Provided always that it shall be competent for the Judge at any time during the trial to require the production of the writing for his inspection and he may thereupon make such use of it for the purposes of the trial as he shall think fit. This proviso is however substantially contained in s 165 *post* Field Ev 6th Ed 453

(8) 2 B & B 286

(9) Taylor Ev § 1447

(10) *R v Ram Chunder* 13 W R Cr 18 (1870)

previous statements reduced to writing, and the contradiction is intended to be used as evidence in the case, the witness must be allowed an opportunity of explaining or reconciling his statements, if he can do so, and if this opportunity is not given to him, the contradictory writing cannot be placed on the record as evidence (1). It was held by the Privy Council that the opportunity of tendering an explanation is still more essential when a witness's character and reputation are at stake, and that the Court is precluded both by this section and by general principles, from treating his oral testimony as rebutted by statements by him contained in documents in evidence unless such statements were put to him in cross examination (2). The previous statements must be really those of the witness. So where A was employed by B to write up B's account books, B furnishing him with the necessary information either orally or from loose memoranda, it was held that the entries so made could not be given in evidence to contradict A, as previous statements made by him in writing the statements being really made not by A but by B, under whose instructions A had written them (3).

The section applies to both criminal and civil cases, and its provisions are therefore applicable at trials before the Court of Session to depositions taken before the committing Magistrate (4). In the undermentioned case (5) one of the witnesses for the prosecution was asked if he had made a certain statement before the Magistrate, but Wilson, J., held it was unnecessary to ask this question, as the depositions showed what the witness had said before the Magistrate, and added that the attention of the jury might be called to

out, was held by the Calcutta and Bombay to give to the prosecutor no right of reply to the statements of the witnesses recorded by the same witnesses at the Sessions, with examination, the answers to which may possibly elicit facts favourable to the prisoners (9). A Judge is bound to put to the witnesses whom he proposes to contradict by their statements made before the committing Magistrate, the whole or such portion of their depositions as he intends to rely upon in his decision so as to afford them an opportunity of explaining their meaning or denying that they had made any such statements, and so forth (10). "The depositions taken by the committing Magistrate are always sent up and are with the Sessions Judge during the trial. The accused can, if he wishes, have a copy of these depositions (11). He or his counsel or pleader can therefore inform himself of what the witnesses said before the Magistrate, and is in a position to question any witness who varies in the Court of Session from his former statement. The Sessions Judge ought if asked, to allow the original deposition to be used for this purpose. Where the Sessions Judge himself noticed the discrepancy, and it was material, there can be little doubt

(1) *Tukheya Rai v. Tufsee Koer* 15 W. R. Cr. 23 24 (1871). *Krishnamachariar v. Krishnamachariar* 38 M. 166 (1915).

(2) *Bal Gangadhar Tilak v. Shrinivas Pandit* P. C. 39 B. 441 (1915). 19 C. W. N. 729, 42 I. A. 135, *Valubai v. Govind Kashinath* 24 B. 218 (1900).

(3) *Muncherchaw Deronji v. The N. Dhurumsey S. H. Co.* 4 B. 576 (1890).

(4) Field Ev. 6th Ed., 453 456.

(5) *R. v. Hari Charan* 6 C. L. R. 390

(1880)

(6) Field Ev. 6th Ed. 456.

(7) *R. v. Zia-ur-Rahman* 31 C. 147, 6 C. W. N. 222 (1902). I. B.

(8) Ante p. 675.

(9) *R. v. Bindabun Bowree* 5 W. R. Cr. 54 (1866). The section of Cr. Pr. Code relating to right of reply has been recently amended.

(10) *R. v. Dan Saha* 7 A. 862 (1895).

(11) See Cr. Pr. Code s. 543.

that in using the original deposition for the same purpose himself, he would be acting wholly within the scope of his duty as indicated by the provisions of the Evidence Act and of the Code of Criminal Procedure"(1) Although previous statements made by witnesses may be used under this section for the purpose of contradicting statements made by them subsequently at the trial of an accused person, they cannot, if they have been made in the absence of the accused, be treated as independent evidence of his guilt or innocence; nor will section 288 of the Criminal Procedure Code avail anything for this purpose (2)

In England the settled practice in Criminal Courts is now as follows. A witness may be cross examined as to what he said before the Magistrate, the Counsel cross examining may show the witness the deposition and ask him whether he still adheres to the statement he made, without the Counsel reading the deposition or putting it in evidence, but he is then bound by the answer of the witness unless the deposition is put in to contradict him, and it is not admissible to state that the deposition does contradict him unless it is so put in (3)

A police diary cannot be used as containing entries which can of themselves be taken as evidence of any date, fact or statement, but it can be used to assist the Court by suggesting means of elucidating material points (4) Only the police-officer who kept such a diary can be confronted with it (5) "If a police-diary is used by the officer who made it to refresh his memory, or if the Court uses it for the purpose of contradicting such police officer, the provisions of section 161 or 145 of this Act, as the case may be, shall apply (6)

If the special diary is used by the Court to contradict the police officer who made it, the accused person or his agent has a right to see that portion of the diary which has been referred to for this purpose. That is to say, the particular entry which has been referred to, and so much of the diary as is necessary to the full understanding of the particular entry so made but no more (7)

The Act is silent upon the case where the document has been lost or destroyed, and upon the question whether in these or in any other cases a copy can be used instead of the originals. It has however, been stated that in such a case the witness might be cross examined as to the contents of the paper, notwithstanding its non production, and that, if it were material to the issue he might be afterwards contradicted by secondary evidence. In such a case the cross examining party may interpose evidence out of his turn to prove the events, such as loss, etc., relating to the document and to furnish secondary evidence thereof (8)

The section only relates to previous statements made in or reduced into, writing. If however, the previous statement has been *verbal* and not reduced to writing, it may also be proved to impeach the witness's credit, if such former statement be inconsistent with any part of the witness's evidence which is liable to be contradicted (9) The Act makes no express provision to the effect that the witness's attention must first be drawn to the previous verbal statement and the witness asked whether he made such a statement before his credit can be impeached by independent evidence but there can be little doubt that

(1) Field Ev. 6th Ed. 456 See observations in *R v Arjun Megha* 10 Bom H C R 281 282 (1874)

(2) *Alimuddin v R* 23 C 361 (1895)

(3) *R v Riley* 1866 4 F & F 964
I v Wright 1866 4 F & F 967
Taylor Ev §§ 1449—1450

(4) *Dal Singh v Emperor* 44 I A 137 (1917) approving *R v Mannu* F B 19 A 390 (1897)

(5) *Id*

(6) Cr Pr Code s 172 and see *Dadan Ga v R* (1906) 33 Cal 1073 See as to the amended section of the Cr Pr Code Woodroffe's Criminal Procedure in British India

(7) See *ib R v Mannu* 19 A 390 (1897) See also as to police-diaries *R v Jadb Das* 4 C W N 129 (1899)

(8) *Taylor Ev* § 1447

(9) S 155 cl (3) *post*

here also circumstances of such previous statement, sufficient to designate the particular occasion, ought to be mentioned to the witness and he ought to be asked whether or not he made such a statement (1)

"The decisions upon the question, whether or not a party is entitled to see a document which has been shown to one of his witnesses while under cross examination by his opponent, are somewhat conflicting. On the whole, however, the practice seems to be, that if the cross examining Counsel, after putting a paper into the hands of a witness, merely asks him some question as to its general nature or identity, his adversary may ask him, but that if the paper be used for the witness, or if any questions be put re writing in which it is written, a sight of it may then be demanded by the opposite Counsel. But such opposing Counsel has no right to read such document through, or to comment upon its contents, till so used or put in by the cross examining Counsel" (2)

146 When a witness is cross-examined he may, in addition to the questions hereinbefore referred to, be asked any question which tend—

- (1) to test his veracity;
- (2) to discover who he is and what is his position in life; or
- (3) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture (3)

147. If any such question relates to a matter relevant to the suit or proceeding(4), the provisions of section 132 shall apply thereto (5)

148 If any such question relates to a matter not relevant to the suit or proceeding, except in so far as it affects the credit of the witness by injuring his character, the Court shall decide whether or not the witness shall be compelled(6) to answer it, and may, if it thinks fit, warn the witness that he is not obliged to answer it. In exercising its discretion the Court shall have regard to the following considerations: (7)

- (1) such questions are proper if they are of such a nature that the truth of the imputation conveyed by

Inspection of document shown to witness

Questions lawful in cross-examination

When witness to be compelled to answer

Court to decide when questions shall be asked and when witness compelled to answer

(1) Field, Ev., 6th Ed., 458 see Taylor Ev. § 1451, and *Carpenter v Wall*, 3 P & D 457, where Patterson, J said "I like the broad rule that when you mean to give evidence of a witness's declaration for any purpose, you shall ask him whether he ever used such expression"

(2) Taylor Ev. § 1482 *Jarat Kumar Das v Bissessar Dutt* (1911), 39 C., 245 *Peck v Peck* (1870) 31 L. T. R.,

670

(3) See *R v Gopal Dass* 3 M 271 278 (1881)

(4) This means the same as relevant to a matter in issue" in s 132, *ante*

(5) *Id*

(6) See as to meaning *Moher Sheth v R* 21 C., 392 400 (1893)

(7) See *R v Gopal Dass* *supra* at p 278

them would seriously affect the opinion of the Court as to the credibility of the witness on the matter to which he testifies :

- (2) such questions are improper if the imputation which they convey relates to matters so remote in time or of such a character that the truth of the imputation would not affect, or would affect in a slight degree, the opinion of the Court as to the credibility of the witness on the matter to which he testifies
- (3) such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence :
- (4) the Court may, if it sees fit, draw, from the witness's refusal to answer, the inference that the answer given would be unfavourable

Principle.—The credibility of the witness is always in issue it being necessary to ascertain the value and weight to be attached to the *media* through which the proof is presented to the Court. But at the same time it is necessary to protect the witness against improper cross examination

ss 137, 138 (*Cross examination*)

s 3 (*Court*)

s 132 (*Incriminating questions*)

s 165, PROV 2 (*This section is binding upon Judge*)

O R 36 38, Taylor Ev §§ 1426 1427 1440, 1459—1462, Phipson Ev 5th Ed, 474—479 Markby Ev 106 107 Norton, Ev, 328, Field Ev 6th Ed, 460 461 Taylor Ev, §§ 1460—1467

COMMENTARY.

Sections 132, 146—148 together embrace the whole range of questions which can properly be addressed to a witness (1) The words in section 146 *in addition to, &c.* refer to the second paragraph of section 138 *ante*. In addition then to the questions which may be asked in cross examination under the provisions of section 138 a witness may be further asked the questions mentioned in section 146, which latter section extends the power of cross-examination far beyond the limits of section 138, which in terms confines the cross examination to relevant facts, including, of course, facts in issue. The language of section 146, coupled with that of sections 138—147, makes it appear as if the 'additional facts spoken of in section 146 were considered as not relevant'. But of course this cannot be the case. As is indicated in section 148 these facts are relevant as tending to show how far the witness is trustworthy, and the only object of classing these facts apart from other relevant facts is in order that special rules may be laid down as to when they may be contradicted and when a witness may be compelled to answer them (2) The questions which may be put under the provisions of section 146 may relate to matters which are

Questions in cross examination

(1) *R v Gopal Dass* 3 M 271 278 (1881)

(2) Markby Ev 106 None but relevant questions can be asked but relevancy is of a two-fold character it may be directly relevant in its bearing on the very

merits of the point in issue or it may be relevant collaterally to the issue as in the case of facts relating to the character of a witness which are always relevant Norton, Ev, 328

either *directly* relevant to the suit, or relevant only as affecting the credibility of the witness. As a general rule, all questions as to facts relevant in the first mentioned sense must be answered whether or not the answer will criminate the witness (1) and evidence will be admissible to *contradict* his answers. If, on the other hand, the facts to which the questions relate are relevant only as tending to impeach the witness's credit, it lies in the discretion of the Court to compel the witness to answer or not, dealing with the matter not under the rule contained in section 132 but under the provisions of sections 148—152 (2). Evidence in such a case will not be admissible to contradict the answer when given, unless in the case provided for by the *exceptions* to section 153, *post*.

Indecent and scandalous questions may be put either to shake the credit of a witness, or as relating to facts in issue, or to determine whether or not a fact in issue existed. If they are put merely to shake the credit of a witness, the Court has complete dominion over them and may forbid such questions, even though they may have some bearing on the question before the Court. But if they relate to facts in issue or to matters necessary to be known in order to determine whether or not the facts in issue existed, the Court has no jurisdiction to forbid such questions though they may be indecent or scandalous (3).

No question respecting any fact irrelevant to the issue can be put to a witness for the mere purpose of contradicting him, it being only with regard to relevant matters that a witness can be contradicted by proof of previous statements inconsistent with any part of his evidence (4). The provisions of sections 148—150, 153, are restricted to questions relating to facts which are relevant only in so far as they affect the credit of the witness by *injuring his character*, whereas some of the additional questions enumerated in section 146 do not necessarily suggest any imputation on the witness's character. Nevertheless, it is believed to have been the intention of the Act, as also the practice, to consider all the questions covered by section 146 to be governed by the provisions of sections 148—150 and 153 (5).

Section 148, together with sections 149—152, was designed to protect the witness against improper cross examination (*et post*) (6). Sections 148, 149, are as binding upon the Judge as upon the parties (7). Under the first mentioned section, when a question is relevant only as affecting credit the Court has a discretion (for the exercise of which certain rules are laid down) as to compelling an answer, and section 153, *post*, enacts that where such a question has been answered the usual rule as to the inadmissibility of evidence to contradict answers to irrelevant questions shall apply save and except in two cases, but that if the witness answers falsely he may afterwards be charged with giving false evidence.

Under the first and second clauses of section 148, the fact asked must be such as if true would really and seriously affect the *credibility* of the witness on the matter to which he testifies. The abuse of examination against which these clauses are directed is illustrated by the incident in the *Titchborne* case, where a witness, an elderly man who was called to disprove the identity of the claimant

(1) Ss 132 147

(2) *R v Pramall a Nath Bose* (1910) 37 C 878

(3) *Mahomed Mian v Emp* 20 Cr L J 566 s c 52 I C., 54

(4) *ante* notes upon cross examination in s 138 and *post* s 153 cl (3)

(5) *Markby* Fv 107

(6) In Field Fv 643 (Ib 6th Ed 460)

(7) It is said with reference to s 149 'if the witness either of his own accord

or being compelled by the Court, answers a question which is irrelevant or which is relevant only in so far as it affects his credit and if such question criminate him or expose him to a penalty or forfeiture he is entitled to the protection afforded by s 132 *ante*. It would appear that he is not. But it is submitted that the protection should be extended to such a case." See notes to s 132 *ante*.

(7) S 165 *post* Prov (2)

with the real Roger Tichborne, was most improperly asked in cross examination whether in early life he had not had an intrigue with a married woman. Questions respecting alleged improprieties of conduct, which furnish no real ground for assuming that a witness who could be guilty of them would not be a man of veracity, should be checked (1) "If a woman", says Sir J F Stephen in his *General View of the Criminal Law of England*, 'prosecuted a man for picking her pocket it would be monstrous to enquire whether she had not had an illegitimate child ten years before, though circumstances might exist which

it owe a grudge
circumstances
large for that

reason (2) A Magistrate it was held should have disallowed upon the principle embodied in this section a question as to previous conviction thirty years old put to an intended surety, on the ground that it related to matter so remote in time that it ought not to influence his decision as to the fitness of such surety (3) "Where the facts which form the subject of the question are comparatively recent they are more important as bearing upon the moral principles of the witness than when they are of remote date, because a man may reform and become in later years incapable of conduct to which in earlier life he was prone. The interest of justice can seldom require that the errors of a man's life long since repented of, and forgiven by the community, should be recalled to remembrance at the pleasure of any future litigant" (4)

Third *Clause* declares it to be improper to make serious accusations against a witness who is called to prove some comparatively unimportant fact in the case. With reference to the *fourth Clause*, read *Illustration (h)* section 114, *ante* and also the other matter which may be considered in connection with the same *Illustration*. It has been sometimes stated that if witness declines to answer, no inference of the truth of the fact can be drawn from this. But this general statement is open to question. It is going too far to say that the guilt of the witness must be implied from his silence, but it is in consonance with justice and reason that the Court should (as it indeed can scarcely help doing), consider that circumstance as well as every other, when deciding on the credit due to the witness (5)

Where a party gave evidence in his own case, it was held by a majority of two out of three Judges that he might be asked, on cross examination, with a view of testing his credit, whether an action had not previously been brought against him in respect of a similar claim, upon which he had given evidence, and the verdict of the jury was notwithstanding against him, and this without producing the record of the proceedings in the previous case (6)

But though as was done in the case last mentioned, evidence may be given of facts, as that the witness has brought or defended actions which have been dismissed or decreed against him, that the witness gave his evidence in such actions, that he made false charges and so forth, yet evidence of the particular opinion formed by a Judge in another case of the credit to be attached to the testimony of witness who is cross examined in a subsequent trial, is inadmissible (7)

(1) Taylor Ev § 1460

(2) See *Staines v Stewart* 2 S & T 330 332 want of chastity is not always a ground for discrediting a witness per Sir C Cresswell

(3) *R v Ghulam Mustafa* 26 A 371 (1904) at p 374

(4) Taylor Ev § 1460

(5) Taylor Ev § 1467

(6) *Henman v Lester*, 31 L J C P, 366

(7) In re *Pasumarty Jagappa* 4 C W N 684 following *Searian v Nethercliff* L R 2 C P D 53 and distinguishing *Henman v Lester*, supra.

No weight ought to be attached to the evidence of a witness who himself deposes to his own turpitude (1)

Question not to be asked without reasonable grounds

149 No such question as is referred to in section 148 ought to be asked unless the person asking it has reasonable ground for thinking that the imputation which it conveys, is well founded

Illustrations

(a) A barrister is instructed by an attorney or vakil that an important witness is dākāt. This is a reasonable ground for asking the witness whether he is a dākāt.

(b) A pleader is informed by a person in Court that an important witness is a dākāt. The informant on being questioned by the pleader gives satisfactory reasons for his statement. This is reasonable ground for asking the witness whether he is a dākāt.

(c) A witness of whom nothing whatever is known is asked at random whether he is dākāt. There are here no reasonable grounds for the question.

(d) A witness of whom nothing whatever is known is being questioned as to his mode of life and means of living gives unsatisfactory answers. This may be a reasonable ground for asking him if he is a dākāt.

Procedure of Court in cases of question being asked without reasonable grounds

150 If the Court is of opinion that any such question was asked without reasonable ground it may if it was asked by any barrister, pleader, vakil or attorney report the circumstances of the case to the High Court or other authority to which such barrister, pleader, vakil or attorney is subject in the exercise of his profession.

In recent and scandalous questions

151 The Court may forbid any questions or inquiries which it regards as indecent or scandalous although such questions or inquiries may have some bearing on the questions before the Court unless they relate to facts in issue or to matters necessary to be known in order to determine whether or not the facts in issue existed.

Questions intended to insult or annoy

152 The Court shall forbid any question which appears to it to be intended to insult or annoy or which, though proper in itself, appears to the Court needlessly offensive in form.

Principle—See Notes *post*

s 148 (*Questions affecting credit*)

s 3 (*Fact in issue*)

s 3 (*Cont*)

s 165 (*Questions by Judge*)

Markby Ev 107 Steph Dig pp 149 160 Taylor Ev §919 Powell Ev 9 b Ed 77 and see authorities cited in last section and in section 139 *ante*

COMMENTARY.

Sections 149—152

a witness against him

very much required

section 148 is not very effectual because an innocent man will be eager to answer the question and one who is guilty will by a claim for protection nearly confess his guilt and that the threats contained in sections 149 150 do not

Questions in cross examination

(1) *Kal Chandra v Sh b Chandra* P C 12
6 B L R 501 507 (1870) sc 15 W R

carry the matter much further (1) These latter sections were substituted while the bill was in committee for certain other sections in the original draft to which much objection was taken and the discussion with reference to which will be found in the Proceedings in Council (2) Speaking of the substituted sections including sections 146—152 Sir J F Stephen said — The object of these sections is to lay down in the most distinct manner the duty of Counsel of all grades in examining witnesses with a view to shaking their credit by damaging their character I trust that this explicit statement of the principles according to which such questions ought or ought not to be asked will be found sufficient to prevent the growth in this country of that which in England has on many occasions been a grave scandal I think that the sections as far as their substance is concerned speak for themselves and that they will be admitted to be sound by all honourable advocates and by the public Section 165 *post* further prohibits the Judge himself from asking any question which it would be improper for any other person to ask under section 148 or 149 But whatever doubts there may be as to the efficacy of sections 148—150 sections 151 and 152 ought to prove effectual For in cases where it will be for the reasons mentioned of little use for the witness to decline to answer the Judge may at once interpose and stop the question (3) With reference to section 151 it may be observed that in absence of evidence is no objection to its being received where it is necessary to the decision of a civil or a criminal right (4) The Court cannot forbid indecent or scandalous questions if they relate to facts in issue (5) or to matters necessary to be known in order to determine whether or not the facts in issue existed If they have however merely some bearing on the question before the Court the latter has a discretion and may forbid them Where a question is intended to insult or annoy or though proper in itself appears to the Court needlessly offensive in form the Court must interpose for the protection of the witness (6) protect himself by showing (7) there is a presumption of guilt (8) s 138 *ante*

153. When a witness has been asked and has answered any question which is relevant to the inquiry only in so far as it tends to shake his credit by injuring his character, no evidence shall be given to contradict him, but if he answers falsely he may afterwards be charged with giving false evidence

Exclusion of evidence to contradict answers to questions testing veracity

Exception 1—If a witness is asked whether he has been previously convicted of any crime and denies it evidence may be given of his previous conviction (8)

(1) Markby Ev 107

(2) See Proceedings of the Legislative Council Supplement to the Gazette of India 30th March 1872 pp 233 238 With reference to ss 149 150 it may be observed that an advocate cannot be proceeded against either civilly or criminally for words uttered in his office as advocate *Sullivan v Norton* 10 M 38 (1886) As to the extent of the privilege of speech accorded to advocate see *R v Kashi Nath Dinkur* 8 Bom H C R Cr 142—146 (1871)

(3) Markby Ev 107

(4) *Da Costa v Jones* Cowp 734 per Lord Mansfield Steph Dg pp 159 160 Taylor Ev § 949 Powell Ev 9th Ed 227

(5) See *Roarso v Ingles* 18 B 468 470 (1893) *Mahomed Mian v Emp* 20 Cr L J 566 57 I C 54

(6) *Heston and others v Peary Mohan Das* 40 C., 898 (1913)

(7) *Nik nja Behari Sen v Harendra Chandra* 41 C 514 (1914)

(8) See 28 & 29 V c Cap 18 § 1 Taylor Ev § 1437

Exception 2—If a witness is asked any question tending to impeach his impartiality, and answers it by denying the facts suggested, he may be contradicted (1)

Illustrations

- (a) A claim against an underwriter is resisted on the ground of fraud
The claimant is asked whether, in a former transaction, he had not made a fraudulent claim. He denies it
Evidence is offered to show that he did make such a claim
The evidence is inadmissible
- (b) A witness is asked whether he was not dismissed from a situation for dishonesty
He denies it
Evidence is offered to show that he was dismissed for dishonesty
The evidence is not admissible
- (c) A affirms that on a certain day he saw B at Lahore
A is asked whether he himself was not on that day at Calcutta. He denies it
Evidence is offered to show that A was on that day at Calcutta
The evidence is admissible not as contradicting A on a fact which affects his credit but as contradicting the alleged fact that B was seen on the day in question in Lahore (2)
- In each of these cases the witness might, if his denial was false, be charged with giving false evidence
- (d) A is asked whether his family has not had a blood feud with the family of B against whom he gives evidence. He denies it. He may be contradicted on the ground that the question tends to impeach his impartiality

Principle—The reason of this rule, which restricts the right to give evidence in contradiction, is that it is an object of primary importance to confine the attention of the Court as much as possible to the specific issues. Without rise of a of and matters at the

very proof of the witness's trustworthiness, while no great expenditure of time need be involved in ascertaining how the facts stand (4)

s 146 (Questions to credit)

Taylor, Ev. §§ 1436 1437, 1439, 1440—1442, 1444, 1490, Stewart Rapalje's Law of Witnesses §§ 208—210, Markby Ev. 108, Roscoe, N P Ev. 182, Steph Dig. Art. 130, Roscoe, Cr Ev. 13th Ed. 88—90, Norton, Ev. 332

COMMENTARY.

Exclusion of evidence to contradict

den be

(1) See *Att Genl v Hitchcock*, 1 Ex. 93, Taylor, Ev. § 1442

(2) See *R v Sakharum Mukundji*, 11 Bom H C R. 166 169 (1874)

(3) *Kazi Ghulam v Aga Khan*, 6 Bom. H C R. 93, 96 (1869), Taylor, Ev. § 1439

(4) *Cunningham Ev* § 153

(5) See Illustration (c) and Taylor, Ev. § 1438 where the rule is stated to be that — if the questions relate to relevant

facts, the answers may be contradicted, if to irrelevant they cannot and enquiries respecting the previous conduct of a witness will almost invariably be regarded as irrelevant if not connected with the cause or the parties' In *Field, Ev.* 6th Ed. 464 it is said, "The Act does not lay down this rule in so many words, but its provisions as to relevancy and other matters necessarily involve this rule" The express provisions of s 5, ante,

for the defence that a witness for the prosecution was at a particular place at a particular time and consequently could not then have been at another place where the latter states he was and saw the accused person is properly admissible in evidence even though the witness for the prosecution may not himself have been cross-examined on the point (1) But where the fact inquired after is only collaterally relevant to the issue as is the case with the character of the witness Counsel must be content with the answer which the witness chooses to give him If he denies the imputation the answer is conclusive for the purposes of the suit (2) the matter cannot be carried further at the trial except in the two cases provided by this section which however does not appear to be very accurately expressed as there is at least one other common case where the witness may be contradicted (see section 155 *post*) The only redress which a party has is to charge the witness with giving false evidence and to try him for it To this general rule there are however, as already observed two exceptions contained in the above section and taken from English law

test being whether the fact is one which the party proposing to contradict would have been allowed himself to prove in evidence (3) The object of section 153 is to prevent trials being spun out to an unreasonable length If every answer given by a witness upon the additional facts mentioned in section 146 could be made the subject of fresh inquiry, a trial might never end These matters are after all not of the first importance beyond what is comprised in the exceptions (4)

Under the terms of the first *Exception* above referred to when a witness denies that he has been previously convicted his previous conviction may always be put in to refute him (5) Section 511 of the Criminal Procedure Code declares the manner in which the previous conviction may be proved in an enquiry trial or other proceeding under that Code In the absence of any especial provision the only medium of proof is the record of conviction (6)

Whether the evidence referred to in the *second Exception* can be given has

however renders unnecessary this recourse to an implied rule see s 155 *post*

(1) *R v Sakrahan Mukhundji* 11 Bom H C R 166 (1874)

(2) See Illustrations (a) and (b)

(3) *Kazi Ghulam v Aga Khan* 6 Bom H C R O C J 93 (1869) citing *All Gen v Hitchcock* 1 Ex 91 99

(4) *Markby Ev* 108

(5) A similar rule prevails in England see *Taylor Ev* § 1437 *All Gen v Hitchcock* *supra*

(6) *R v Watson* 2 Stark 149 see ss 76 77 *ante*

(7) 1 Ex. 93 see *Taylor Ev* §§ 1440—1442

(8) See s 155 cl (2) *post All Gen v Hitchcock* *supra*

(9) *Norton Ev* 332 *Taylor Ev* §

1440 *Stewart Rapalje op cit* 346 347 *eg* that the witness is the kept mistress of the party calling her (*Thomas v Davd* 7 C & P 350) or that the witness has suborned false witnesses against the opposite party (*Queen's Case* 2 B & B 11 *All Gen v Hitchcock* *supra*) or has had quarrels with or expressed hostility towards him (*R v Shaw* 16 Cox 503) see *Roscoe N P Ev* 182 *Steph Dg Art* 130 *Roscoe Cr Ev* 13th Ed 83—90 *Taylor Ev* § 1490 *et seq* More over if a plaintiff's witness denies a material fact and states that persons connected with the plaintiff have offered him money to assert it, the plaintiff may call those persons not only to prove the fact but to disprove the attempt at subornation *Melhuish v Collier* 15 B B 878

The distinction made between cases coming within the section and those within the second *Exception* is exemplified in the undermentioned case (1) There a person named Yewin was indicted for stealing wheat. The principal witness against him was a boy of the name of Thomas his apprentice. The Judge allowed the prisoner's Counsel to ask Thomas in cross examination whether he had not been charged with robbing his master and whether he had not afterwards said he would be revenged on him and would soon fix him in Monmouth gaol? He denied both. The prisoner's Counsel then proposed to prove that he had been charged with robbing his master and had spoken the words imputed to him. The Court ruled that his answer must be taken as to the former, but that as the words were material to the guilt or innocence of the prisoner, evidence might be adduced that they were spoken by the witness.

Care must be taken to distinguish between that contradiction of answers really disallowed and contradiction of answers. In the latter case such answers may always be given by the party's own witness for the object is to show the true facts not merely to discredit the witness. If a witness state facts in a cause which make against the party who called him yet the party may call other witnesses to prove that these facts were otherwise, for such facts are evidence in the cause and the other witness is not called directly to discredit the first, but the impeachment of his credit is incidental and consequential only." (2) The rule is thus expressed in the American cases —

Although a party may not discredit his own witness by testimony as to his general character, he may give evidence to contradict any particular and material fact to which the witness has testified. He may show that the witness is mistaken or that the facts are different from the version he gives of them *etc.*, for the purpose of upholding his cause of action or defence (not for the purpose of impeaching the witness) he may show how the fact really is. If he calls a witness to prove a particular fact and fails in establishing it by him (or if he disproves it) the fact may nevertheless be proved by another witness, or the first one's account shown to be incorrect. A party may always correct his own witness, even though by directly contradicting him. If such evidence were to be excluded the consequences would be most injurious to the administration of justice as well in criminal as in civil cases (3)

154. The Court may in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party.

Principle.—A party may therefore, with the permission of the Court put leading questions to the witness under the provisions of section 143 or cross examine him as to the matter mentioned in sections 145 146. The rule which excludes leading questions being chiefly founded on the assumption that a witness is called by whom he is called and he is either hostile in his discretion allow a party is held to recommend him as worthy of credence, and so it is not in general open to him to test his credit, or impeach his truthfulness. But there exist cases in which the rule should be relaxed at the discretion of the Court, as for instance, where

(1) *R v Yewin* 2 Camp 638n

(2) B N P 397

(3) Stewart Rapalje's Law of Witnesses 355 356 *see also* *Alexander v Gibson* 2 Campb 556 *Friedlander v London Assurance Co* 4 B & Ad 193 *Bradly*

R v Ricardo 8 Bing 57 *Phipson* Ev. 5th Ed 469, *Best* Ev § 645, *Taylor* Ev.

§ 939 n 4

(4) *Best* Ev § 647 *Wharton* Ev § 499

there is a surprise the witness unexpectedly turning hostile in which and in other cases the right of examination *ex adverso* is given (1) And when the defence has elicited new matter from a witness for the prosecution in cross examination the Court may under this section permit the prosecution to test the witness's veracity on this point by cross examining him in turn (2) A witness whether of the one or the other party ought not to receive more credit than he really deserves and the power of cross examination is therefore sometimes necessary for the purpose of placing the witness fairly and completely before the Court (3) But evidence improperly obtained by leading questions without first declaring the witness hostile should not be considered (4)

s 3 (Court)

s 145 163 (Questions on cross examination)

s 143 (Leading questions)

Taylor Ev §§ 1404 1406 Stark Ev 167 168 Phipson Ev 4th Ed 468 Ph & Arn Ev 489 504—540 Wharton Ev §§ 600 549 *et seq* Stewart Rapalje's Law of Witnesses §§ 749 211—216 Burr Jones Ev 807—809 Best Ev §§ 642 643 pp 696 6 69

COMMENTARY.

This section under which the Court cross-examine and put leading questions of great practical importance it not has been called in the expectation of a peculiar state of facts pretends non remembrance of those facts or deposes to an entirely different set of circumstances in which case the question arises whether the witness has by his conduct entitled the party to cross-examine him This question has in such cases generally been argued with reference to the English cases explaining the meaning of the term *adverse* used in the twenty-second section of the Common Law Procedure Act of 1854 as meaning either 'hostile or unfavourable' respectively A witness is considered *adverse* when in the opinion of the Judge he bears a hostile animus to the party calling him and not merely it is said (5) when his testimony contradicts his proof though it is to be observed that that fact may under the circumstances be evidence of hostility It has been also held (6) that even where a witness stands in a situation which naturally makes him *adverse* (7) to the party desiring his testimony the party calling the witness is not as of right entitled to cross examine him the matter being solely in the discretion of the Court to permit the person calling the witness to put any questions to him which might be put in cross examination by the *adverse* party A witness who is unfavourable is not necessarily hostile A hostile witness is one who from the manner in which he gives his evidence shows that he is not desirous of telling the truth (8) It is however to be marked in the first place, that the English Statute dealt with the question of the admissibility of evidence to contradict the party's own witness a matter which is dealt with by the next section of this Act, and that the question whether a party can cross examine

the right of
the party to
cross examine
and impeach his
own witness

(1) *Id* p 600

(2) *A v L. Lal Hara v R* 47 C 957 (1915)

(3) *Ph & Arn E* 540 528

(4) *Jagdeo v Emp* 24 Cr L J 69 (1922)

(5) *Srendra Krishna Mandal v Rance Dassee* 33 C L J 34 (1921)

(6) *Luchram Motilal Boud v Radla Charan Poddar* 49 C 93 (1922)

(7) So the head note but should not the proposition be which might naturally make him *adverse* for if he is in fact *ad*

verse then cross examination should be allowed Probably what is meant is that though the witness's position is such that he might be *adverse* it must be shown that he is in fact so or that there are grounds for so supposing

(8) *Luchra v Motilal Boud v Radha Charan Poddar* 49 C 93 (1922) ref to *Srendra Krishna Mandal v Rance Dassee* 47 C 1043 1057 The section was recently applied in *Moti Ram v Emp* 24 Cr L J 904 (1923)

his own witness as to (for example) whether he had not upon another occasion given a different account of the transaction from that which he then deposed to, is not the same as the question whether, if the witness denies having done so, the party calling him is at liberty to call other witnesses to prove it (1). Nextly, the Statute mentioned is not in force in this country, and the section of this Act makes no mention either of the terms "hostile", "adverse" or "unfavourable," or of any others, but leaves the matter entirely to the discretion of the Court, which discretion must obviously be exercised with reference to the particular circumstances of each case (2). It is much to be desired that the matter should, if possible, be set at rest by judicial decision more especially since, as will hereafter be observed, the English cases lack unanimity. Some of the cases here cited deal with the right to discredit the party's own witness by calling other testimony, but such as are authorities for this right are *a fortiori* also authorities for the right to cross examine one's own witness, though, as already observed, the converse may not be the case. The question of the right of a party to impeach and contradict his own witness is properly the subject matter of the next section but being closely allied to that of the present section it is here alone treated to avoid unnecessary repetition.

Cross-examination

Prior to the Common Law Procedure Act, 1854, it had been held, with regard to cross examination, that the party who calls a witness may cross examine him if on the trial he shows any unfair bias(3), or be unwilling(4), or by his conduct in the box shows himself decidedly adverse(5), or in the interest of the opposite party(6), or if the witness be the party's opponent in the case (7).

And it was also held that a party's own witness who having given one account of the matter to his attorney, when called on the trial, gives a different

(1) See *Greenough v Eccles* 5 C B N S 796 *arguendo*

(2) See *Bastin v Carey* R & M 177 (1824) when Abbott Ld C J said upon allowing cross examination of an adverse witness — I mean to decide this and no further. That in each particular case there must be some discretion in the presiding Judge as to the mode in which the examination shall be conducted in order best to answer the purposes of justice cited in *Price v Manning* 1 R 42 Ch D 372 (1887)

(3) *R v Chapman* 8 C & P 558 559 (1838), see also *R v Murphy* 8 C & P 308 (1837)

(4) *R v Ball* 8 C & P 745 (1839) [The situation in which a witness stands towards either party does not give the party calling the witness a right to cross examine him unless the witness's evidence be of such a nature as to make it appear that the witness is an unwilling one]. *Parkin v Moon* 7 C & P 408 409 (1836)

(5) *Clarke v Saffery* R & M 126 (1824) *Bastin v Carey* ib 127 (1824)

(6) *Ph & Arn* Ev 462

(7) *Clarke v Saffery* R & M 126 (1824) that is when the witness stands in a situation which naturally makes him adverse to the party who desires his testimony as for example a defendant called

as the plaintiff's witness *Radha Jeelji v Taramonee Dassi* 12 Moo 1 A 389 393 (1869). It is however now settled law in England that a party when called by his opponent cannot as of right be treated as hostile the matter being solely in the discretion of the Court. *Price v Manning* 42 Ch D 372 (1887), since which decision also it would seem that the older cases (see *Bowman v Bowman* 2 M & R 501 *Jackson v Thomason* 1 B & S 745, *Coles v Coles* L R 1 P & M 71) holding that a necessary witness i.e. one whom a party is compelled to call and who may therefore be considered rather the witness of the Court than of the party as an attesting witness to a will can be discredited (as of right) by his own side are no longer law. *Phipson* F. 5th Ed 469. The same rule applies in India see *Subbaji v Shiddappa* 26 B 392 395 (1901). Where however the accused applied for an adjournment to enable them to cross-examine the prosecution witnesses which was refused and subsequently had the witnesses summoned for the defence it was held that the mere fact that the accused had been compelled to treat the witnesses for the prosecution as their own witnesses did not change their character and that they were entitled to cross-examine them. *Seoprasadh Singh v Rawlins* 23 C 594 (1904)

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gives a totally different version. Then when asked by the counsel of the party calling him whether he has not previously made a statement different from his present evidence, objection is commonly taken by the other side on the ground that the witness has not yet appeared adverse. A similar objection was taken in the case undermentioned(2), upon which counsel, seeking to cross examine, replied that it might not at present appear that the witness was adverse, but that he desired to prove that it was so, and it could only appear how it was, by the question which he proposed to ask, which in effect was whether the witness did

the attorney, to prove which
—“The defendant's Counsel
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to get rid of part of his testimony
it will show that he is not trust-
to call the attesting witnesses to

a will or codicil may cross-examine them, as these are technically not the witnesses of either party but of the Court (4)

Passing from the question of the cross examination of the party's own witness(5) to the question of his impeachment, it was settled law in England(6) prior to the Common Law Procedure Act, 1854, that a party could not impeach his witness's credit by general evidence of his bad character(7), but he might contradict him by other evidence on points directly relevant to the issue. It was, however, an unsettled point whether the witness could be discredited

(1) *Melhuish v Collier*, 19 L. J. Q. B. 493, s. c. 15 Q. B. 878 (see this case cited on another point at p. 969 ante, note 7) where Erle J. observed — “There are treacherous witnesses who will hold out that they can prove facts on one side in a cause and then for a bribe or from some other motive make statements in support of the opposite interest. In such cases the law undoubtedly ought to permit the party calling the witness to question him as to the former statements and as certain if possible what induces him to change it. And for similar cases subsequent to the Act of 1854 see *Dear v Knight* 1 F. & F. 433 (1859) where the prior statement was made to the party *Faulkner v Brine* 1 F. & F. 254 (1858) where it was made to the party's attorney *Pound v Wilson* 4 F. & F. 301 (1865) where the prior statement was made in the bankruptcy Court and *R v Little* 15 Cox 319 (1883) where the prior statement was made to the mother of the prosecutrix. In two cases in the Calcutta High Court *Barloa v Chun Lal Small Cause Court Transfer Suit No. 15 of 1899* 3rd Jan. 1901 *McLeod v Sirdarmull* Suit No. 833 of 1900 13th Aug. 1901 the Court allowed cross examination it appearing that the witness had made a statement to the attorney of the party calling him.

(1858)

(3) See also to the same effect *Amstell v Alexander* 16 L. T. N. S. 830 (1867), [A witness called on behalf of the plaintiff gave evidence quite different from the proof in brief of plaintiff's counsel and from the heads of evidence as taken down in writing by the plaintiff's attorney and alleged to have been read over by him to the witness. The witness was considered sufficiently adverse to be examined as to his previous statements to the plaintiff's attorney and the Judge allowed the witness to be asked whether he did not say the several things stated in the paper containing the heads of his evidence as taken down by plaintiff's attorney.] See as to this case *post*.

(4) *Jones v Jones* (1908) Times L. R. v. 24 p. 839.

(5) As to which see further Taylor Ev. § 1404 Starkie Ev. 167 168 Phipson Ev. 5th Ed. 468 Ph. & Arn. Ev. 462 Wharton Ev. § 500 Stewart Rapalje's op. cit. §§ 242 216 Best Ev. § 642.

(6) See *Greenough v Eccles* 5 C. B. N. S. 802 per Williams J. and see generally Taylor Ev. § 1426 Ph. & Arn. 524 540 Stewart Rapalje's op. cit. §§ 211—216 Wharton Ev. § 549 et seq. Burr Jones Ev. §§ 857—862, Best Ev. § 645.

(7) This is not the law in India under ss. 154 155 and *post*.

(2) *Faulkner v Brine* 1 F. & F. 254

154, the party calling a witness may, with the consent of the Court, impeach his credit by cross examination by putting all the questions mentioned in section 146 and may, under the provisions of section 155, impeach his credit by the independent testimony of persons who testify that they from their knowledge of the witness believe him to be unworthy of credit. It is, of course, clear that the mere fact that a witness tells two different stories does not necessarily and in all cases show him to be hostile. So it has been held that the mere fact that at a Sessions trial a witness tells a different story from that told by him before the Magistrate does not necessarily make him hostile. The proper inference which may be drawn in such a case from contradictions going to the whole texture of the story being that the witness is neither hostile to this side nor that, but that the witness is one who ought not to be believed unless supported by other satisfactory evidence (1). But it is also submitted to be clear that where these conflicting statements involve great discrepancies and contradictions and are the outcome of fraud, dishonesty and treachery on the part of the witness, the party calling him should be permitted to cross examine him under this section as to the fact and cause of the discrepancies and contradictions, and if necessary to impeach his credit under section 155 by substantiating the facts contained in the questions put to him by independent testimony. "If a party, not acting himself a dishonest part, is deceived by his witness—or if a witness professing himself a friend, turns out an enemy, and after promising proof of one kind gives evidence directly contrary—is the party to be restrained from laying the true state of the case before the Court?" The common sense of mankind might be expected to answer this proposition in the negative, and to decide that the true state of the case should be made known (2). There is no distinction in principle between an attesting witness whom a party is obliged to call and any other witness whom he may cite of his own choice (3). When further a witness is treated as hostile and cross examined by the party calling him, this must be done to discredit the witness *altogether and not merely to get rid of part of his testimony* (4).

The rules considered are applicable to both criminal (5) and civil cases. And in England it seems to have been held that the opinion of the Judge as to last sta

it can only be admitted for the purpose of neutralising or raising doubt and suspicion as to those parts of the witness's testimony with which the contrary statement is at variance (7).

See further as to the impeachment of the witness the notes to the following section

155. The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the Court, by the party who calls him —

- (1) by the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit;

prove him to be of such a general bad character as would render him unworthy of credit Ph & Arn, 526 527

(1) *Kalachand Sircar v R* 13 C 53 (1883) *R v Sagal Samba*, 2 C 642 654 (1893)

(2) Ph & Arn Ev § 555 see *ib*, 528 540

(3) *Surendra Krishna Mondal v Ranee*

Dassee 33 C L J 34 (1921), S C 24 C W N 860

(4) *ib Satyendra v Emp* 24 Cr L J 93 (1923)

(5) *R v Murphy* 8 C & P 297 308, *R v Little* 15 Cox 319

(6) *Rice v Howard*, 15 Q B D, 681

(7) Ph & Arn 528 *Wright v Beckett*, 1 Moo & R, 414

impeachment
credit of
witness

- (2) by proof that the witness has been bribed, or has [accepted](1) the offer of a bribe, or has received any other corrupt inducement to give his evidence ;
- (3) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted ;
- (4) when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.

Explanation.—A witness declaring another witness to be unworthy of credit may not, upon his examination-in-chief, give reasons for his belief, but he may be asked his reasons in cross-examination, and the answers which he gives cannot be contradicted, though, if they are false, he may afterwards be charged with giving false evidence.

Illustrations

(a) *A* sues *B* for the price of goods sold and delivered to *B*, *C* says that he delivered the goods to *B*

Evidence is offered to show that, on a previous occasion, he said that he had not delivered the goods to *B*

The evidence is admissible

(b) *A* is indicted for the murder of *B*

C says that *B*, when dying, declared that *A* had given *B* the wound of which he died

Evidence is offered to show that, on a previous occasion, *C* said that the wound was not given by *A* or in his presence

The evidence is admissible

Principle—The witness being the medium through which the Court is to arrive at the truth or falsity of the claim or charge in litigation, it is always necessary to ascertain the trustworthiness of this medium. This is the common function of cross examination, which is, however, not in all cases adequate. It is necessary, therefore, that the parties should be empowered to give independent testimony as to the character of the witness with a view to showing that he is unworthy of belief by the Court, which may be done in the four ways specified in this section.

s 3 ("Court")

s 3 ("Evidence")

s 137 (*Examination-in-chief and cross-examination*)

Steph Dg, Arts 131, 133 134, Taylor, Ev. §§ 1445, 363, 1470—1473, 1476. Ph & Am, 503—540, Wharton, Ev. §§ 549—571, Burr Jones Ev. §§ 864, 865, 866, 849, 854, 870, 871, 868, Stewart Rippe's Law of Witnesses, §§ 190—216, Markby, Ev. 109; Norton, Ev. 334

COMMENTARY.

The credit of a witness may be impeached in the following ways: (a) by cross examination(2), that is, by eliciting from the witness himself facts disparaging to him, (b) by calling witnesses to disprove his testimony on material

Impeaching
credit of
witness

(1) The word in brackets was substituted for "had" by s 11 of the Amending Act XVIII of 1872

(2) See ss 138, 140, 145, 146, 147—154

points (1) The credit of a witness is of course indirectly impeached by evidence disproving the facts which he has asserted, (c) by eliciting in cross examination, or if denied independently proving the partiality or previous conviction of the witness(2), or that he has been bribed, or made previous inconsistent statements or the immoral character of the witness if she be the prosecutrix in a trial for rape(3), (d) by independent proof that the witness bears such a reputation as to be unworthy of credit (1)

This classification though corresponding with that generally given in the English text books, is not that adopted by the Act, which deals with the above mentioned matters under the classes of (a) cross examination(5), (b) contradiction(6), (c) impeachment of credit (7)

(a) Cross-examination may or may not have the effect of impeaching the credit of the witness, a result which depends upon the nature of the questions put to the witness and the answers which he gives to them (b) A distinction also appears to be drawn between contradicting a witness and impeaching his credit(8) Where the facts stated by the witness are relevant to the issue evidence may always be given to contradict them under the provisions of the fifth

of the credit of a witness is considered and set apart from both cross examination and contradiction apparently because under the Act a witness's credit may be impeached upon a point upon which there has been no cross examination and therefore no room for contradiction

This question of classification is, however, of no great practical importance, as the provisions of this section are in substantial accordance with those of English law on the point though it is useful to bear it in mind, in order to avoid the confusion which is not unlikely to result from the novel view of the matter presented by this Act The two main points upon which this section differs from English law are that under the first *Clause* a party may discredit his own witness by proof of such a reputation as renders him unworthy of belief, which may not be done in England, and that apparently it is not necessary under the third *Clause* to lay a foundation by interrogation of the witness for

(1) Under s 5 ante see Taylor Ev § 1470 Field Ev 6th Ed 467

(2) S 153

(3) S 155 clauses (2) (3) (4)

(4) S 155 clause (1)

(5) *Ss* 138 140 142—152 154

(6) *Ss* 5 153

(7) S 155

(8) See Field Ev 6th Ed 467

(9) See Cunningham Ev 372 The Bomlay High Court in *R v Sakharan Milk ndj* 11 Bom H C R 469 (1874) appear to consider that the provisions of the Indian Evidence Act for the contradiction of witnesses is less extensive than that of the English law If however s 5 be read with these sections it will I think be seen that they are identical And see Field Ev 651 where it is said the Evidence Act assumes that where the facts are relevant evidence may be given to contradict The express provisions of s 5 however render unnecessary this recourse to an implied rule It is also to be observed that the question

whether contradicting evidence upon relevant points may be given is in part a question of procedure see Field Ev 651 652 and the *Explanation* to s 5 ante (ib 6th Ed 467 468)

(10) *S* 153 *v* *ib* *Exceptions* (1) and (2) This section does not appear to be accurately expressed for there is at least one other common case where the witness may be contradicted If the witness be asked in cross examination whether he made a previous inconsistent statement and denies having done so independent evidence may be given to contradict that statement under s 154 cl (3) In Field Ev 6th Ed 467 the following explanation is given In these two exceptional cases [those mentioned in s 152] the evidence is allowed to contradict answers to questions actually put The evidence allowed by s 155 to impeach the witness's credit may apparently be given although the witness has not been questioned upon the point unless some other portion of the Act prohibit it—see *eg* s 145

subsequent evidence in proof of the previous inconsistent statements (1) In England, further, a party may give proof of such statement by his own witness only where the witness is, in the opinion of the Judge, "adverse" And though doubtless the English practice will be in a large number of cases followed in this respect, yet it will be remembered that the Act has left the discretion of the Court wholly unfettered, either to allow or disallow such impeachment as the justice and the particular circumstances of each case may require "The importance of the section lies in this that it by implication restricts the evidence which may be given (otherwise than in the exceptional cases mentioned in section 153) to impeach a witness's credit—to that specified in the section" (2)

The rules with regard to the impeachment of witnesses apply to both criminal and civil cases, and by the terms of the section, the same impeaching evidence may be given in the case both of the adversary's and the party's own witness As to the cases in which a party may discredit his own witness, see the Notes to the preceding section It is to be here observed that though this section renders former statements relevant only to contradict or negative the statements made previously, yet section 287 of the Criminal Procedure Code goes further in making previous statements before the Committing Magistrate "evidence in the Case" that is substantive evidence of the facts therein deposed to (3)

Clause (1)

Independent evidence may be given that an adversary's (or with the leave of the Court a party's own) witness bears such a general reputation for untruthfulness (4), or perhaps for moral turpitude generally (5), that he is unworthy of credit According to the theory of English law such evidence should relate to *general reputation* only and not express the mere opinion of the impeaching witness It is not sufficient that the impeaching witness should profess merely to state what he has heard "others" say; for those others may be but few He must be able to state what is *generally said* of the person by those among whom he dwells, or by those with whom he is chiefly conversant, for it is this only which constitutes his general reputation Though as observed, the English theory requires that the witness should not express his own opinion, yet in ss whether he knows what that reputation is, or whether he knows the person whose

veracity is impeached, upon his oath (6) The application to this section is in accordance with English law upon the point in direct examination give particular instance

towards him and the like, and contradicted (7) Where a witness's

(1) *ante*, s 145

(2) Markby, Ev., 109

(3) *Emp v Marath Shinde*, 46 B 97, 23 Bom L R, 820 (1922), following *Queen Empress v Dorasami Ayyar*, 24 M 414 (1901), *Emp v Duarka Kurmi*, 28, A, 683 (1906); referring to *Queen Empress v Jadab Das*, 27, C, 295 (1899)

(4) Taylor, Ev., §§ 1470—1473

(5) Taylor, Ev., § 1471, where the view is expressed that the enquiry need not be restricted to reputation for veracity, but may involve the witness's entire moral character, the opposite party being at liberty to enquire whether in spite of bad character in other respects the impeached witness has not preserved his

reputation for truth The weight of American authority confines the enquiry to the reputation of the witness for truth and veracity *Burr Jones Ev* § 864

(6) Taylor, Ev. § 1470 In practice the question is generally shortened thus "from your knowledge of the witness would you believe him on his oath," *R v Brown*, 1 C C R, 70 See the question of the propriety of this question discussed in *Burr Jones Ev*, § 865

(7) Steph Dig., Art 133, Taylor, Ev. § 1473, Norton, Ev., 334 There are peculiar reasons for allowing a searching cross-examination of the impeaching witness, see *Burr Jones, Ev.*, § 864

testified to a fact cannot be regarded as relevant to the issue and cannot therefore be given in evidence (1)

When it is intended to throw discredit upon the evidence of any witness nothing is more common in practice (especially in criminal cases) than for the Counsel for the defence to prove, if it can be proved, that that witness has previously made statements inconsistent with his evidence at the trial. When this fact is satisfactorily established, the Court cannot but regard the evidence of such witness with suspicion, and the fact is established by the evidence of *any one* to whom such statements were made, or in whose presence or hearing they were made (2). As to statements reduced to writing by a police officer under section 162 of the Code of Criminal Procedure, *see note* (3).

Where the impeaching declarations were oral, it is of course necessary to call the persons who heard them (4). A statement by *J* to *H* was reported at the *thana* by the latter and there recorded. *held* that though the evidence of *J* could be contradicted by the evidence of *H* proving the statement made to him by *J*, it could not under this clause be contradicted by what the police recorded as the first information (5). Generally, whenever on a former occasion it was the duty of the witness to state the whole truth, it is admissible to show that the witness in his evidence omitted facts sworn to by him at the trial and that he now states facts which he then did not state (6). To make the impeaching statement admissible, it must be in some point a contradictory opposite of the statement made by the witness on trial. If the two statements are reconcilable, one cannot be received to contradict the other (7). Impeaching evidence is admissible, even though the witness when cross examined as to the contradicting expressions should say he is uncertain whether he made them or not (8). According to the English Statute (9), it is required that before proof of such statement can be given the circumstances of the supposed statement, sufficient to designate the particular occasion should be mentioned to the witness and he must be asked whether or not he had made such statement. In other words, it is necessary, before giving evidence for the purpose of contradicting a witness to lay a foundation for the evidence to be given. *See note* of the witness himself and by obtaining his denial or non admission by the terms of the present section (10) and just to the witness to first interrogate him in order that he may be able to deny, admit, or explain his statement (11). The Act has made this necessary in the case of written statements (12), (*ante*). Except where the witness is a party [in which case his previous statement may be relevant as an admission] (13), the previous contradictory statement is not admissible as proof of the facts therein asserted. It can only be admitted to impeach the credit of the witness and for the purpose of neutralising or raising doubt or suspicion as to those parts of the witness's testimony with which the contrary

(1) *Ib* and *see* Wharton Ev § 551

(2) *R v Uttanhand* 11 Bom H C R., 120 121 122 (1874) *per* Nanabhai Haridas J

(3) *See* cases cited in Woodroffe's "Criminal Procedure in India"

(4) Wharton Ev § 553

(5) *R v Dina Bandhu* 8 C W N 218 (1901) at p 221

(6) Wharton Ev § 554

(7) Wharton Ev § 558

(8) *Crowley v Page*, 7 C. & P 791

(9) 28 & 29 Vic c 18 s 1 Taylor Ev § 1445

(10) *Cunningham v* 372 Field Ev 6th Ed 468 469

(11) Wharton Ev § 555 *Burr Jones* Ev § 849. This was laid down to be the proper course in *R v Madho* 15 A. 25 (1892) and *ante* last note to s 145. When witnesses under examination make statements which are contrary to statements previously made by them the Court ought to draw their attention to the contradiction. *Sham Lal v Anuntie Lal* 24 W R 312 (1874)

(12) S 145

(13) *See Burr Jones* Ev. § 854

statement is at variance (1) So two persons made statements to the effect that C and another had robbed them and caused hurt while doing so One statement was made to their employer and the other to the Head Constable C was subsequently charged, and these two persons were called as witnesses for the prosecution, but they then denied that C was one of the men who had assaulted them It was held that the former statements referred to, and which implicated the accused, could be used only under this clause for discrediting their evidence and not as substantive evidence against the accused (2) It is not necessary in order to introduce such contradictory evidence that it should contradict statements made by the witness in his examination in chief Ordinarily the process is to ask the witness on cross examination whether on a former occasion he did not make a statement conflicting with that made by him on his examination in chief But the conflict may take place as to matters originating in the cross examination, and then if such matters are material contradiction by this process is equally permissible (3) A statement to contradict the evidence of a witness may be contained in a series of documents not one of which taken by itself would amount to a contradiction of his evidence (4) As to the use of previous statements under section 288 of the Criminal Procedure Code see note (5)

The Act as originally drafted contained the following additional section Clause (4) relating to the subject of *character* — "In trials for rape or attempts to commit rape the fact that the woman on whom the alleged offence was committed is a common prostitute or that her conduct was generally unchaste is relevant" It was, however, thought unnecessary to retain this as a separate section and it was accordingly incorporated with the present one In the case now mentioned evidence is receivable not so much to shake the credit of the witness as to show directly that the act in question has not been committed In trials for rape or attempts to commit that crime, not only is evidence of general bad character admissible under the first Clause "to show that the prosecutrix ought not to be believed upon her oath" but so also is proof that she is a reputed prostitute for it goes far towards raising an inference that she yielded willingly In such cases general evidence of this kind will on this ground be received though the — — — — —

prisoner unless he has first given the prosecutrix an opportunity of denying or explaining them Moreover the prosecutrix if cross examined as to particular acts of immorality with other men, may decline to answer such questions, while if she answers them in the negative witnesses cannot be called to contradict her (6)

The Act does not in terms provide for either of these but as already observed (7) according to English practice when a witness's character for truth and veracity has been *directly impeached* character by countervailing proof and for truth and veracity may itself be admits sustaining testimony that is whether such a course is open where the

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(1) *v a te* p 974 and *R v Jagdeo Pand* (1906) A W N 64 (examination of police to prove former statement)

(2) *R v Clerath Choy* 26 M 191 (1902)

(3) Wharton Ev § 552

(4) *Jackson v Tisonson* 1 B S 745

(5) Woodroffe's Criminal Procedure in India

(6) Taylor Ev § 363 But to show

consent she may be cross examined as to other immoral acts with the *prisoner* and if she denies them they may be independent by proof *R v Riley* 18 R B D 481 Taylor Ev § 1441

(7) *a te* p 978 and Wharton Ev §§ 568 569 and as to the order of introduction of evidence which is at discretion of the Court *v id* § 571

witness is attacked upon the other grounds mentioned in this section, or in sections 153, 146, is a matter upon which there has been conflict in the reported cases here referred to (1) It has been held in America that a witness's character is so far impeached by putting in evidence his conviction of felony that evidence is admissible of his good reputation for truth (2) It is a matter of doubt whether such testimony

of the witness

cross examination

opposing case is that the witness testified under corrupt motives this being involved in the attack on his credibility, it is but proper that such evidence

exist for sustaining the witness, as where witnesses are called to testify directly to his bad reputation, on the other hand it is said that the admissibility of the evidence in all cases may lead to confusion and the multiplicity of collateral issues (5) It is of course clear that in any case, and as a general rule, a party cannot fortify the credit of his witness by proving good character for truth until the credibility of the witness has been assailed (6)

156. When a witness whom it is intended to corroborate gives evidence of any relevant fact, he may be questioned as to any other circumstances which he observed at or near to the time or place at which such relevant fact occurred, if the Court is of opinion that such circumstances, if proved, would corroborate the testimony of the witness as to the relevant fact which he testifies

Questions
tending to
corroborate
evidence of
relevant
fact
admissible

Illustration

A, an accomplice gives an account of a robbery in which he took part He describes various incidents unconnected with the robbery, which occurred on his way to and from the place where it was committed

Independent evidence of these facts may be given in order to corroborate his evidence as to the robbery itself

Principle.—See Note, *post*

* 3 (Fact)

s 3 (Court)

s 3 (Relevant)

Markby, Ev 109 110 Cunningham Ev 156

COMMENTARY.

Corrobor-
ation of
witness

This section provides for the admission of evidence given for the purpose not of proving a directly relevant fact but of testing the witness's truthfulness There is often no better way of doing this than by ascertaining the accuracy

(1) See the subject discussed in Burr Jones Ev § 870

(2) *State v Roe* 12 Vt 111 (Amer) *Pan. v Tilden* 20 Vt 554, Wharton Ev § 569, Burr Jones Ev § 870

(3) Wharton Ev p 557 note (1) and cases there cited, Burr Jones § 870 It is said to be the better view that the evidence is not admissible though there are cases to the contrary Burr Jones Ev §§ 871 870 In Taylor Ev § 1476 however the rule is stated to be that "where evidence of contradictory statements or of

other improper conduct on his part has been either elicited from a witness on cross-examination or obtained from other witnesses with the view of impeaching his veracity—his general character for truth being thus in some sort put in issue general evidence that he is a man of strict integrity and scrupulous regard for truth will be admitted

(4) Wharton Ev § 570

(5) Burr Jones Ev §§ 871 870

(6) *Ib* §§ 868 870

of his evidence as to surrounding circumstances, though they are not so immediately connected with the facts of the case as to be in themselves relevant. While on the one hand, important corroboration may be given in the case of a truthful witness, a valuable field for cross examination and exposure is afforded in the case of a false witness. In corroboration, it is necessary to elicit instance from the witness himself. This section, in effect, declares evidence of certain facts to be admissible, and if it had not been inserted, the Judge would have had to determine the relevancy of these facts by reference to the 7th and 11th section, and he might perhaps have been influenced by the practice in England which has been against the admission of such evidence (2). It is not incumbent on a party to give corroborative evidence of statements not challenged by the other party (3). In the case noted it was held that where witnesses for the prosecution were proved to be untruthful in the greater part of their evidence, it would be dangerous to convict on the residue unless it was corroborated (4).

157 In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.

Former statements of witness may be proved to corroborate later testimony as to same fact

Principle—The force of any corroboration (which assumes that there is something to corroborate) (5) by means of previous consistent statements depends upon the truth of the proposition that he who is consistent deserves to be believed. The corroborative value, however, of such previous statements is of a very varying character, dependent upon the circumstances of each case and a person may equally persistently adhere to falsehood once uttered if there be a motive for it (6).

s 3 (Fact)

s 3 ('Proved')

Gilbert, Ev 13, 136 Wharton Ev § 570 Taylor, Ev § 1476 Starkie Ev, 253, Best, Ev p 600, 11th Ed, pp 580 etc, Phipson Ev, 5th Ed 480 481, Markby Ev, 10th 110 Field, Ev 6th Ed 470

COMMENTARY.

A deposition admitted under s 288 of the Criminal Procedure Code is testimony within the meaning of this section (7). This section is not in accordance with English practice, according to which evidence of prior statements is not generally admissible to corroborate a witness (8). It is argued that by offering a witness a party is held to recommend him as worthy of credence, and warranting his veracity, corroboration is not permitted (9), that former statements are no proof that entirely different

Former statements provable in corroboration

- (1) Cunningham Ev s 156
- (2) Markby Ev 109 110
- (3) *Moult v Mahomed Ibrahim Huq v Wilkie* (1907) 11 C W N 946
- (4) *Hari Krishna v R* 42 C 784 (1915) see *R v Babar Ali Gazi* 42 C 789 (1915) corroboration of confession of co accused
- (5) *Nagana v Emp* 19 All L J 947 (1921)
- (6) *R v Malabar* 11 Bom H C R 196 198 (1874)

- (7) *Ielliah Kone v Emp* 24 Cr L J 417 (1922) diss from *Emp v Akbar* 34 B 599 followed in *Man Chand v Emp* 25 Cr L J 1201 See *Addendum to s 8 s c 5 L 324* (1924)
- (8) Wharton Ev § 570 Taylor Ev § 1476 Starkie Ev 253 Best Ev p 600 In certain cases previous similar statements are admissible see Phipson Ev 5th Ed 483
- (9) Best Ev 11th Ed pp 580 etc

statements may not have been made at other times and are therefore no evidence of constancy, that if the sworn statements are of doubtful credibility those made without the sanction of an oath, or its equivalent, cannot corroborate them(1), that a witness having given a contrary account, although not upon oath, necessarily impeaches either his veracity or his memory but his having asserted the same thing does not in general carry his credibility further than nor so far as his oath (2) The section, however, proceeds upon the principle that consistency is a ground for belief in the witness's veracity (3) So Chief Baron Gilbert was of opinion that the party who called a witness against whom contradictory statements had been proved(4) might show that he had affirmed the same thing before on other occasions and that he was therefore "consistent with himself"(5)

The section thus declares certain statements to be relevant which, but for *arsay*(6), the only condition made (a) either about the authority This condition is to some extent, a safeguard against fictitious statements designedly made to support subsequent evidence, but it is obvious that the corroborative value of such previous statements depends entirely on the circumstances of each case and that they may easily be altogether valueless The mere fact of a man having on a previous occasion made the same assertion generally, though not always(7) adds but little to the chances of its truthfulness, and such evidence should be distinguished from that which is really corroborative(8) One may persistently adhere to falsehood once uttered, if there is a motive for it and should the value of such a corroboration ever come to be rated higher than it is now, nothing would be easier than (to take an example) for designing and unscrupulous persons to procure the conviction of any innocent men who might be obnoxious to them, by first committing offences and afterwards making statements to different people and at different times and places implicating those innocent men(9) "The statement, which may be proved under the section in order to corroborate, may be a statement made either on oath or otherwise and either in ordinary conversation or before some person who had authority to question the person who made it It may also be verbal or in writing If not made before any person legally competent to investigate the fact, it would seem that it must have been made *at or about the time when the fact took place* (10) In India perhaps more particularly than in other countries the statements made by those who have knowledge of the circumstances connected with the commission of an offence, immediately after the occurrence and before they can be tampered with by the police or others, are important to the ascertainment of truth"(11) Where a person making a dying declaration chances to live he

(1) Wharton Ev § 570

(2) Starkie Ev 253

(3) *R v Malapa bin* 11 Bom H C R 196 198 (1874) *R v Bepin Biswas* 10 C 970 973 (1884) It had long been the practice in India to admit this evidence see Act II of 1855 s 31 the provisions of which have been simplified and reproduced in the above section See *R v Dishonath Pal* 12 W R Cr 3 (1869) *R v Bissen Nath* 7 W R Cr, 31 (1867) *Muthukumaraswami Pillai v R* 35 M 397 (1912) *Mussamat Naina Koer v Gobardhan Singh* (1919) Pat 352 (admissibility of entries)

(4) This is not necessary under the section

(5) Gillert Ev 135 136

(6) Markly Ev 110 in Gilbert Ev.,

135 136 these statements are treated as exceptions to the hearsay rule

(7) An instance of the value of such evidence in this country is pointed out in the quotation from Field Ev 6th Ed 470 cited post

(8) Cunningham Ev s 157

(9) *R v Malapa bin* 11 Bom H C R 196 198 (1874)

(10) See *Oriental Government et Co Ltd v Narasimla Chari* 25 M 210 (1901)

(11) Field Ev 6th Ed 470 and see Markly Ev 100 "There is no doubt that this kind of evidence is extremely useful in criminal cases where there is a suggestion that a witness is telling a made up story

statement cannot be admitted in evidence as a dying declaration under s. 32, but it may be relied on under this section to corroborate the complainant when examined in the case (1). It has been held by the Calcutta High Court that section 162 of the Criminal Procedure Code prohibits the use of the record of the statement of a witness taken under section 161 as evidence, but does not override the general provisions of this Act as to proof of such statement by oral evidence, and such statement is admissible under this section in corroboration of the evidence of the witness given at the trial (2). And a Full Bench of the Madras High Court has later agreed with this ruling (3), and in another case the Bombay High Court has followed it though with hesitation (4). But the amended Code excludes both the written record and *viva voce* statement (5).

The evidence is only admissible in corroboration. In the undermentioned case (6), in which the prisoner had been tried and convicted of an offence the depositions of witnesses given in a previous trial of other persons charged with having been engaged in the same offence were used against him. The witnesses were re-sworn and said 'I gave evidence in the former trial and what I said is true'. The irregularity and

injustice of this mode of proceeding were commented upon and it was pointed out that the depositions containing the statements of a witness as to the commission of the offence in the earlier trial would have been admissible to corroborate his testimony given in the trial of the prisoner. The evidence of the witness whose testimony it was proposed to corroborate should have been first taken and after such witness had finished his evidence and not before the former deposition might have been put in not to add to his testimony but simply to corroborate it by showing that the statements made by him while the facts were still fresh in his memory correspond with those made by him in the Court of Session in the present case. In the case cited at the time when each deposition was put in the evidence of the witness not having been given in the Court of Session there was nothing in the record which made it admissible. There was in fact nothing which was corroborated by it. In the undermentioned case (7) a witness was asked with a view to corroborating another person intended to be called as a witness whether or not the latter person had made any statement to him with respect to one of the matters in suit. It was

allowed evidence to be given under this section out of the regular order upon an undertaking by Counsel to call the witness sought to be corroborated, though such a course will be found in most cases to be inconvenient. If necessary a witness will be allowed to be recalled to give evidence under this section after the person sought to be corroborated has given his evidence (8). And in the undermentioned case where an advocate was charged with having advised bribery and the charge was founded on conversations with another Counsel it was held that evidence of persons to whom the latter had in the absence of the accused repeated the conversation was admissible under this section but did not help the determination of the real issue (the truth of the charge) (9).

(1) *R v Ra a Satt* 4 Bom L R 434 (1902)

(2) *Fandra Nath Banerjee v R* (1903) 36 C 281

(3) *Muthukumaras a n Pillai v R* 35 M 397 (1912) per *Crisnam*

(4) *R v Han oraddi* 39 B 58 (1915) per Shah J. I incline to this view. But this point is difficult and the cases opposed. See *R stam v R* 7 A L J 468 (1907) *R v Balaji* 9 Bom L R

366 (1907)

(5) See Woodroffes Criminal Procedure in India s 162

(6) *R Bisio atl* 17 W R Cr 3 (1869)

(7) *N starvi Dossee v Nundo Lall* 5

C W N xvi (1900)

(8) *Ib*

(9) In the matter of *Bomanjee Cowas*, 1 C P C (1906) 34 C 129 34 I A 5

Such statements must also be regularly *proved* by the person who receives them or by some one who heard them given (1). When it is desired to corroborate a witness by a previous deposition or by a first information report recorded under s 151, Criminal Procedure Code, these documents must be produced, for they are documents required by law to be reduced to writing and secondary evidence of their contents cannot be given (2). The case of statement by way of complaint against the commission of a crime has been already dealt with by the eighth section, *Illustrations* (j) and (k), *ante*. A independent evidence of a fact, statements are, by that section, relevant to a conduct, if they accompany and explain facts other than statements (3). By a Full Bench of the Madras High Court it was held that previous statement of an accomplice may sometimes legally amount to corroboration of evidence given by him at the trial and that an Inspector of the Criminal Investigation Department is "an authority legally competent to investigate" within the meaning of this section (4). And in a case in the Bombay High Court where a witness had varied his story in different statements it was held that under this section previous statements are only admissible to corroborate statement made at the trial (5).

What matters may be provable in connection with proved statements relevant under section 32 or 33

158. Whenever any statement, relevant under section 32 or 33, is proved, all matters may be proved either in order to contradict or to corroborate it, or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved if that person had been called as a witness and had denied upon cross-examination the truth of the matter suggested.

Principle.—See note *post*

- | | |
|---|----------------------------|
| * 3 (Relevant) | * 3 (' Prove ') |
| * 23 33 (Statements by persons who can not be called as witnesses) | * 157 (Corroboration) |
| * 135 (Evidence to contradict) | * 155 (Impeaching credit) |

Steph Dig Art 135 Burr Jones Ev § 849 Norton Fr 33 336 Cunningham Ev § 119

COMMENTARY.

Corroboration or contradiction of statements under section 32 or 33

This section refers to certain statements made by persons who from some unavoidable cause cannot be produced, and of which under sections 32 or 33 evidence may, in the circumstances there described, be given. The present section, when admitted, as far as the credit of the person making it is concerned, is an exception to the general rule that evidence is only admitted from the impossibility, improbability or great inconvenience of producing the witness. It is only just, therefore, that the evidence should be admitted on oath and cross-examination (6). The general rule applies where the witness whose testimony is attacked is

(1) *R v Bissen* (1877) 12 Q.B. 31 (1877)

(2) Field Ev 6th Ed 470 see s 91 *ante* for an instance of the use of a deposition in corroboration see *R v Isher Singh* 8 A 672 (1896)

(3) *ante* s 8

(4) *Muthu Kumar & An v Pillai & An* F B 35 M 397 (1912)

(5) *K v Akbar Badoo* (1910) 34 B 599

(6) Norton Fr 335 336 Cunningham Ev s 158

deceased or absent. Thus where the testimony given on a former trial by a witness, since deceased, was read to the jury, it was held competent to show that such witness had stated since the trial that such statement was untrue (1)

159. A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory.

Refreshing
memory

The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it he knew it to be correct.

Whenever a witness may refresh his memory by reference to any document, he may, with the permission of the Court, refer to a copy of such document: Provided the Court be satisfied that there is sufficient reason for the non-production of the original.

When witness may use copy of document to refresh memory

An expert may refresh his memory by reference to professional treatises

160. A witness may also testify to facts mentioned in any such document as is mentioned in section 159, although he has no specific recollection of the facts themselves, if he is sure that the facts were correctly recorded in the document

Testimony to facts stated in document mentioned in section 159

Illustration

A book-keeper may testify to facts recorded by him in books regularly kept in the course of business, if he knows that the books were correctly kept, although he has forgotten the particular transactions entered

161. Any writing referred to under the provisions of the two last preceding sections must be produced and shown to the adverse party if he requires it; such party may, if he pleases, cross-examine the witness thereupon

Right of adverse party as to writing used to refresh memory

Principle.—Though there are some objections to such a course (2), it is yet clear that an important aid to exactness would be neglected, if, human memory and inaccuracy being what they are, a witness were not at liberty to justify his recollection of facts by reference to written memoranda concerning them (3). It is desirable to secure the full benefit of the witness's recollection as to the whole of the facts (4), and that a witness should not suffer from a

(1) *Craft v Com*, 81 Ky 250 (Amer) cited with other American cases in *Burr Jones* Ev § 849 where the passage reads "incompetent," but this appears to be a mistake. For another instance of the application of this section see the case of *Fool Kissory v Nobin Chunder* 23 C 441. See *Mussumat Naina Koer v Gobardhan Singh* (1919) Pat 352

(2) See *Gondwe Ex* 207 citing *Ben tham*. See also his *Judicial Evidence* Ch II. Notes whether consultable

(3) *Cunningham Ex* 377 for the grounds of admission where the document cannot be said strictly to refresh the memory see *Notes post*

(4) In *re Jhubboo Mahton* 8 C 739 744 745 (1882) per Field, J

mistake and may explain an inconsistency (1) Indeed a witness is under an obligation to refresh his memory if he can and is invited by the Court to do so it being his duty to lay the whole truth before the Court to the best of his ability (2) It is further to be observed that the committing of a statement to writing calls forth unavoidably a greater degree of attention than the exhibition of it *live voce* in the way of ordinary conversation If this be done honestly at the time of the occurrence which forms the subject of the statement or so soon afterwards that the incidents must have been fresh in the witness's memory the writing is a most reliable means of preserving the truth more reliable indeed than simple memory itself (3) The law however here prescribes certain conditions with a view to securing that the memoranda so employed shall be trustworthy These conditions are laid down by the sections above mentioned (4) The witness may be cross examined as to the paper in his hands since in no other way can the accuracy and recollection of the witness be ascertained, and it is only by the production and inspection of the document and by such cross examination that it can be ascertained whether the memorandum does assist the memory or not (5) The right of production inspection and cross examination is necessary to check the use of improper documents and to compare the witness's oral testimony with his written statement (6)

s 3 (Court)

s 3 (Document)

Steph Dg Art 136 Taylor Ev §§ 1406—1413 2 Ph & Arn 480—487 Greenleaf Ev §§ 437—439 Wharton Ev §§ 516—520 Stewart Rapalje's Law of Witnesses §§ 79—98, Burr Jones Ev §§ 877—886 Powell Ev 9th Ed §§ 169—172 Jackson's Ev § 1779 Woods Pricetice Ev §§ 129—136 Goodeve Ev §§ 207 209 Wigmore Ev §§ 758—764

COMMENTARY.

A witness will be allowed to have his memory respecting anything upon which he is questioned refreshed by means of written memoranda It is not necessary that the document referred to should be one which is admissible in evidence So in an action for money lent an insufficiently stamped promissory note purporting to be signed by the defendant and expressed to be given for money lent was put into the defendant's hands by the plaintiff's Counsel for the purpose of refreshing his memory and obtaining from him an admission of the loan *held* that the plaintiffs were entitled to use the note for that purpose notwithstanding the provisions of the Stamp Act that an instrument not duly stamped shall not be given in evidence or be available for any purpose whatever (7) It has been said (8) that there are three classes of cases in which this may be allowed —(a) the memory of the witness and the document referred to in such sense used to *refresh* the memory that is the witness *has a present memory of the facts* after the inspection of the writing In this case the document is resorted to to *revive a faded memory* and the witness swears from the actual

Refreshing
memory

Section
159

(1) *Halliday v Holgate* 17 I T O S 18

(2) *Harkiss v F* 19 All L J 76 (1921) s c 23 Cr L J 143 (1920) but see *In re Kati Churn* 12 C L R 233

(3) Field Fv 6th Ed 472 473 citing Bentham Jud Ev

(4) Cunningham Fv 377

(5) Wharton Fv 525 Burr Jones Fv § 89

(6) *In re Hubbard Mahton* 8 C. 739

745 (1897) per Field J

(7) *Burchard v Blough* 1 Q B (1896) 325

(8) 2 Ph & Arn §§ 480 481 (Howe) in Greenleaf Fv § 43 Burr Jones Fv §§ 878 884 Stewart Rapalje's op cit 461 462 Starkie Ev 177 178 Taylor Fv § 1412 Powell Ev 9th Ed 169 and other writers These sections substantially follow the English rules in these matters

recollection of the facts which the document evokes (1) *Memory* is in other the writing before, mentioned in it, & contents to be correct, see section 160, *Illustration* (2) In this case the witness has no present memory of the fact itself, but if the witness be correct in that which he does positively state from present recollection viz, that at a prior time he had a perfect recollection and having that recollection, says, *it was truly stated in the document produced*, the writing though its contents are thus but mediately proved, must be true (3) (c) Where it brings to the mind of the witness *neither* any recollection of the facts mentioned in it, *nor* any recollection of the writing itself, but which nevertheless enables him to swear to a particular fact from the conviction of his mind on seeing a writing which he knows to be genuine In this case the testimony of the witness is admissible to prove a fact although he has neither any recollection of the fact itself, *nor* *mediate knowledge* of the fact by means of a memorial of the truth of which he has a present recollection This happens when the memorandum is such as to enable the witness to state with certainty that it would not have been made had not the fact in question been true Here the truth of the evidence does not wholly depend on the contents of the document itself or on any recollection of the witness of the document itself, or of the circumstances under which it was made, but upon a conviction, arising from the knowledge of his own habits and conduct, sufficiently strong to make the existence of the document wholly irreconcilable with the non-existence of the fact, and so to convince him of the affirmative (4) Thus, in proving the execution of an instrument (one of the most ordinary and cogent cases within this class) where a witness, called to prove the execution of a deed, sees his signature to the attestation, and says he is thereby sure that he saw the party execute the deed, that is a sufficient proof of the execution of the deed, although the witness should add that he has no recollection of the fact of the execution of the deed (5) The admission of such evidence is however, not confined to attestations of the execution of written instruments (6)

These last two classes, which may logically be considered together, are Section 160 the subject matter essential course essential positively to the present recollection with cases in v

(1) Goode v Ev 209 213 Burr Jones v § 884

(2) And cases cited in Taylor v § 141?

(3) Starkie v 177 178

(4) Starkie v 178

(5) Per Bayley J in Maugham v Hubbard 8 B & C 14 and see Bringle v Goodson 5 Bing N C 738 see Taylor v § 1412

(6) Maugham v Hubbard supra

(7) Field v 6th Ed 472 473 The want of recollection of the facts mentioned in the two latter classes though it does not affect the admissibility of the evi-

dence in it yet be considered in deciding upon the amount of value to be assigned to it ib 657 658

(8) 2 Ph & Arn v 481 Starkie 179 Maugham v Hubbard 8 B & C 14 R v St Martins Le Cester 2 A & E 210

(9) Goode v Ev 209 In the first of the three classes memory is restored and in the second history is verified ib 213

(10) So s 160 speaks of 'testify to facts instead of refresh his memory' as in s 159 But the witness can only testify in the manner mentioned in the text see Markby v 111 112

fact not because he remembers it but because of his confidence in the correctness of the writing (1) As to the use of a copy in the cases dealt with in section 160 *v post* The meaning of the expression "if he is sure" is that the witness must satisfy the Court with reference to ordinary probabilities of his right to be sure that the record relied upon by him is correct (2)

Any
writing

The section says the witness may refer to any writing It is immaterial therefore what the document is whether it be a book of account letter, bill of particulars of articles furnished, including such items as dates, weights and prices, way bills, notes made by the witness, or any other document whatsoever which is effectual to assist the memory of the witness (3) As to the significance of the words "while under examination" *v post*, note to section 161 If the witness has become blind, the paper may be read over to him for the purpose of exciting his recollections (4) And it has been held in America that where a paper is signed with the mark of a witness, who cannot read or write it may be read over to him to the same purpose (5)

A statement reduced to writing by a police officer under section 162 of the Criminal Procedure Code cannot be used as evidence But though it is not evidence, the police officer to whom it was made may (it was held) use it to refresh his memory under section 159 of this Act the party against whom the testimony can be used to assist the Court as by otherwise left in doubt, but cannot be themselves be accepted as evidence of any date, fact or statement recorded in it (7) Only the Police officer who kept such diary can be confronted with it (8) The statement of a person recorded under section 161 of the Criminal Procedure Code is inadmissible under that section, though it may be used by the Police officer who recorded it to refresh his memory (9) Under the amended Criminal Procedure Code a statement made to the Police cannot be used for any purpose except as provided in s 162 of that Code (10)

the presence of
in evidence
may be proved
in the ordinary way by the person who heard it, and the writing may be used for the purpose of refreshing the witness's memory (11) The oral statement itself is admissible under section 32 (cl 1) and not merely the record of it (12)

(1) *Davis v Field* 56 Vt 426 (Amer) It has also been said that the witness is allowed to testify to the matter so recorded because he knows he could not have made the entry unless the fact had been true *Costello v Council* 133 Mass 352 (Amer) See *Abdul Salm v King Emp* 35 C. L. J 279 (1922) s c 49 C. 573
(2) *Yesutadiyan v Subba Naker* 52 I C 704 The statement of law given in the first two paragraphs was approved in *Abdul Salm v Emp*, 23 Cr L J 657 (1921)

(3) See cases in Taylor Ev § 1406—1410 *Burr Jones Ev* §§ 878 880 881 Ig a horoscope *Harbaladur Lal v Chandraj Bahadur* 21 O C 298 s c 48 I A 100

(4) Taylor Ev § 1410

(5) *Commonwealth v Fox* 7 Gray (Mass) 558 (Amer) cited Stewart *Lapaljes of cit* § 285 it should not be read before the jury but the witness

should withdraw with one of the Couns l for each side and have it read to him by them without comment ib and see *Burr Jones Ev* § 883

(6) *R v Sitaran Visthal* 11 B 657 (1887) following *P v Uttamchand Kapreel and* 11 Bom H C R 170 (1874) And see to same effect *R v Ismail talal Fataru* 11 B 659 (1887) *Rogh ni Singh v R* 9 C 455 453 (1882)

(7) *Dal Singh v R* 44 I A 137 (1917) approving *R v Mannu* F B 19 390 (1897)

(8) *Id*

(9) *R v Ste art* 31 C 1050 (1904) at p 1052

(10) See Woodroffe's Criminal Procedure in India

(11) *R v Samruddin* 8 C 211 (1887) s c 10 C L R., 11

(12) *Gowridas Namasudra v R.* A C (1909) 36 C., 665

A medical man in giving evidence may refresh his memory by referring to a report which he has made of his *post mortem* examination, but the report itself cannot be treated as evidence and no facts can be taken therefrom (1) In Scotch law, in the case of medical or other scientific reports or certificates which are lodged, in process before the trial and labelled on as productions in the indictment, the witness is allowed to read the report as his deposition to the jury, confirming it at its close by a declaration on his oath that it is a true report (2) ' In India the rule is slightly different though similar in principle Where a dead body is sent to the Civil Surgeon in order to the making of a *post mortem* examination a printed form is sent therewith, which the Civil legal evidence who refreshes

In order to be useful for the purpose of refreshment a document need not be admissible itself as independent evidence So though *Jumma wasil baki* papers are not admissible as independent evidence of the amount of rent mentioned therein, yet it is right that a person who has prepared such papers on receiving payment of the rents should refresh his memory from such papers when giving evidence as to the amount of rent payable (4) Nor does a writing used to refresh the memory thereby become evidence of itself Consequently it is not necessary that it should even be admissible, and a document which cannot be read for want of a stamp may be referred to by the witness in giving his evidence (5) The question sometimes arises whether memoranda used for refreshment are themselves to be admitted in evidence When the witness after reference, finds his memory so refreshed that he can testify recollection independently of the memorandum, there is no reason or necessity for the introduction of the paper or writing itself and it is not admissible But another rule prevails when the witness cannot testify to the existing knowledge of the fact independently of the memorandum but can testify that at or about the time the writing was made, he knew of its contents and of their truth or accuracy In such cases both the testimony of the witness and the contents of the memoranda are held admissible 'The two are the equivalent of a present positive statement of the witness affirming the truth of the memorandum (6) A witness may refresh his memory from a writing made by another person and inspected and signed by him at the close of the day on which it was made when it brings to his mind neither any recollection of the facts mentioned therein, nor of the writing itself but when it nevertheless enables him to testify to a particular fact from the conviction of his mind on seeing the writing which he knows to be genuine (7) In a case in the Madras High Court the relevancy of the notes of a speech was considered and it was held that while it was best to set out the words as fully as possible in such a report it was not necessary that the speech should be proved *verbatim* and it was held that such notes were admissible if the witness was sure that they were substantially accurate (8)

(1) *Raghunath Singh v R* 9 C 455 460 461 (1887) s c 11 C L R 569 see 2 W R Cr Let 14 6 W R Cr Let 3 R v *Jadab Das* 4 C W N 129 (1899)

(2) *Dickson's Law of Evidence in Scotland* Vol II § 1779 *Alison's Criminal Law* 540—542 cited in *Taylor Ev* § 1413 p 1019 note (1) where the reasons are given for the rule

(3) *Feld Ev* 661 ab 6th Ed 475 476

(4) *Akhil Chandra v Niy* 10 C 248 (1883) and see as to collection papers *Mahomed Mahnood v Safar Ali* 11 C 407 409 (1885) so though neither state

ments under s 161 Cr Pr Code (v a te p 948) nor police d a res (v supra) are evidence in the case they may still be used for the purpose of refreshing memory And see *Tarakanath Mullick v Jeemai Nozja* 5 C 353 (1879) See *Wharton E* § 519

(5) *Taylor Ev* § 1411 *Wharton Ev* § 520 as to want of stamp see *Phipson E* 5th Ed 468 and ante

(6) *Burr Jones Ev* § 886

(7) *Abd l Salim v Emp* 49 C 573 (1922)

(8) *Mylapore Krishnasami v R* (1909) 32 M 384 (*Sankaran Nair J* dissenting)

Any Criminal Court may send for the police-diaries of a case under inquiry or trial, and may use such diaries, not as evidence in the case but to aid it in such inquiry or trial. As to their use for refreshing *see* note (1). It has been held that a witness, who has the means of aiding his memory by a recourse to memoranda or papers in his power, *can lawfully be required* to look at such papers, to enable him to ascertain a fact with more precision, to verify a date, or to give more exact testimony than he otherwise could as to times, numbers, quantities, and the like (2).

Made by
himself or
by any
other
person

The writing may have been either 'made by himself or by any other person provided the witness examined it and knew it to be correct when the facts were fresh in his mind (3). It is not necessary that the writing should have been made by the witness, for it is the recollection and not the memorandum which is evidence. Thus a seaman has been allowed to refer to a logbook which though not written by himself, had from time to time and while the occurrences were recent, been examined by him (4). So it has been said that a witness at Sessions might be shown his former deposition before the committing Magistrate in order to refresh his memory a couple of months after, if such first deposition were taken immediately after the occurrence (5).

But it is clear that a witness should not be allowed to use any document to refresh his memory which was made by another person unless he knows it to be correct.

Time
when
the writing
must have
been made

Section 159 substantially follows the English rule as to the time when the writing must have been made, this rule being that a writing can be used to refresh the memory of a witness only where it has been made, or its accuracy recognised, at the time of the fact in question or at furthest so recently afterwards as to render it probable that the memory of the witness had not then become defective (6). Its own peculiar circumstances and the discretion of the trial Judge must govern each case raising this question which in part also depends on the mental character and capacity of the witness. It is clear that the memorandum must not be used to convey *original information* to the witness. It is, however, impossible to lay down any precise rule as to how nearly contemporaneous with the fact or facts recorded the memorandum must be (7). It has however, been said (8), that usually "If the witness swears positively that the notes, though made *ex post facto* were taken down at a time when he had a distinct recollection of the facts there narrated he will be allowed to use them, though drawn up a considerable time after the transaction had occurred. But if there are any circumstances casting suspicion upon the memoranda, the Court should hold otherwise as when the subsequent memorandum is prepared by the witness at the instance of an interested party or his attorney (9) or if the memorandum has been revised or corrected by such party or attorney (10).

and holding that the actual words were the facts to be proved) *1 R v Rankin*, 7 Q T N S 190 and *Subramaniam v The Queen* (1909) 32 M 12.

(1) *See* Woodroffe's Criminal Procedure in India s 167.

(2) *Chapin v Lapham* 23 Pick. 467 (Amer) *State v Stason* 114 N C 813 (Amer) cited in *Burr Jones v* 1877.

(3) *Taylor v* 1410 Wharton Ex 522 *Burr Jones v* 1880 and numerous cases there cited.

(4) *Burrough v Martin* 2 Camp 112.

(5) *Field v*, 6th Ed 473 citing *R v Williams & Cox* 343. As to the use of

depositions for refreshment, see *Lapham v Martin* 1 Esp 440 *Hood v Cooper* 1 C & K 645 *Wharton v* 574.

(6) *Ph & Arn Ex*, 484. For a criticism of this rule *see* *Wigmore v* 761.

(7) Recently an expression of some latitude *see* *Greenleaf v* 432.

(8) *Taylor v* 1407 and *see* *Furr Jones v*, 1882.

(9) *Steinkeller v Venton* 9 C & P. 313.

(10) *Anon* cited by Lord Kenyon in *Doe v Perkins* 3 T R. 752 754.

With regard to the use of a copy of the document, the section lays at rest a doubtful question of English law (1) The Act treats the copy as *primarily* inadmissible, though it provides for its reception under the *leave of the Court* in a case in which the non-production of the original is sufficiently accounted for by its existence and its use as made by the party in such a manner

as to enable the witness to swear to its accuracy (3) The words "*such document*" in section 160 might be thought to include "a copy of such document" to which reference is made in the last paragraph of section 159 But whatever may be held to be the rule in the second (4) of the three classes of cases above mentioned (5), a copy is clearly inadmissible in the third class (6) Where the witness neither recollects the fact, nor remembers to have recognised the written statement as true, and the writing was not made by him, his testimony so far as it is founded upon the written paper, is but hearsay, and a witness can no more be permitted to give evidence of his inference from what a third person has written than from what a third person has said (7) But the Court will not compel a witness to refresh his memory when the result of his doing so would enable cross-examining Counsel to see a document which is otherwise privileged. (8)

The rule of exclusion on the ground of a document being a copy (and the Use of a copy in form a copy, copy nature of an original which was one of a

transcript from a waste book kept by the clerk, copied thence into the ledger day by day under his checking, the ledger was admitted without production of the waste book And though a mere *extract* from the original is sufficient, if the original is but a *partial* statement only, as for example, such a case as or the like, where it failed to set out the whole of the facts, and was used to refresh should the witness swear undermentioned case (11) arbitration proceedings had been held some years prior to suit, and at their close a draft minute of the proceedings was prepared by the arbitrators and then fair copied by their clerk A witness who was present at the arbitration, who had compared the draft and fair copy minutes made by the clerk, and had found the latter to be correct, was allowed under s 159 to refresh his memory as to what occurred at the arbitration by reference to the fair copy minutes made by the arbitration clerk

Experts may refresh their memory by reference to professional treatises (12), tables calculations lists of prices and the like (13) So an actuary may refer to

(1) Taylor Ev § 1408

(2) *Ib* *Burton v Plummer* 2 A & E 341 It has been held in America in some cases that the best evidence rule has here no application *Burr Jones* § 881

(3) Taylor Ev § 1408

(4) *ante* pp 988—989 The English rule is that if the copy be an imperfect extract or be not proved to be a correct copy or if the witness have no independent recollection of the facts narrated therein the original must be used *11 Ev* § 1409

(5) *ante* pp 988—989

(6) *ante* pp 988—989 See also the question *Markby* Ev 112 (copy not allowed under s 150) *Cunningham* Ev 378 (the same) *Norton* Ev 139 (s 159 read

with s 160 would admit the copy) *Field* Ev 6th Ed 475 (Act is silent as to use of copy under s 160)

(7) *Greenleaf* E § 436

(8) *Acorn Char* 1 *Hallac* 4 C L J 768

(9) *Burton v Plummer* 2 A & E 344 and see *Horne v Mackenzie* 6 C & F 628 630 645 *Phipson* E 3rd Ed 445 *ib* 5th Ed 467

(10) *The O'Connor Case* *Armstrong* and *Trevor* 235

(11) *Aristaridis* *Dass* 1 *Lal* 5 C W N 161 (1900)

(12) *s* 159 In this case there is a proviso in condition attached as to the persons by whom or the time when the document must have been made

(13) *Taylor* Ev, §§ 1422, 1406

"the Carlisle Tables" when called upon to give evidence respecting the value of an annuity on joint lives, an architect may refresh his memory with any price list of generally acknowledged correctness, a medical man may strengthen his recollection by referring to books which he considers to be works of authority, and so forth (1)

This section awards to the adverse party a right to the production and

might be matter of observation(3) though if produced, the other side have a right to see it and cross examine upon it. This Act, however, by the use of the words "*while under examination*" in section 159, apparently contemplates the use of the document in Court, whether or not it has also been previously referred to, and section 161 enacts that the document referred to while under examination "*must be produced and shown to the adverse party*" It would seem therefore that in every case where a document is used to refresh the memory it must be produced at the trial (4). The adverse party is apparently entitled under the section to cross-examine not only on the particular part referred to, but on the document generally (5). As to cross examination on matters other than those referred to, *vide post*.

The section says the document must be shown to the adverse party *if it requires it* or if the object of the question be attained it may be unnecessary for the Counsel for the other side to ask to look at the document (6). The opposite party has a right to look at any particular writing before or at the moment when the witness uses it to refresh his memory in order to answer a particular question, but if he then neglects to exercise his right, he cannot continue to retain the right throughout the whole of the subsequent examination of the witness (7). And it does not follow that because a party is entitled to see a writing which contains the statement of a witness taken down by the police, that he is therefore entitled to see other writings which contain the statements of persons other than that witness, and which have no connection with the witness's statement except that they were taken in the course of the same enquiry by the police (8). It is not necessary for the adverse party to put in the document as part of his evidence, merely because he has looked at it or has cross-examined the witness respecting entries which have been previously referred to (9). It has however been held in England that if he goes further and cross-examines as to other parts of the memorandum, he thereby makes it his own evidence(10), a matter as to which the section is silent.

(1) *Ib.*, *vide ante*, p. 421.

(2) *vide ante* pp. 991—992.

(3) *Kensington v Inglis* 8 East 273.
Burton v Plummer 2 A & E 341. 2 Ph & Arn, Ex. 841, it is however usual and reasonable to produce the document, Taylor Ex. § 1413.

(4) See observation in *Goodeve* Ex. 212 on s. 46 Act II of 1855 which ran — "A witness shall be allowed before any such Court or person aforesaid to refresh his memory." With regard to police-diaries *vide ante* and *Lachmi v Emp.* 23 Cr. L. J. 591 (1922) and now Woolfson's "Criminal Procedure in India".

(5) See *Goodeve* Ex. 212 and Taylor Ex. § 1413 cited *post* but in *re Shubboo Mahton*, 1 C. 739 745 (1882),

Field J. said — The opposite party may look at the writing to see what kind of writing it is in order to check the use of improper documents but I doubt whether he is entitled except for this particular purpose to question the witness as to other and independent matters contained in the same series of writing. The Court may limit the right of inspection to such portions of the paper as are relevant. *Wharton* Ex. § 525.

(6) See for example *In re Shubboo Mahton* 8 C. 739 743 (1882).

(7) In *re Shubboo Mahton* 8 C. 739 744 (1882).

(8) *Ib.*

(9) Taylor Ex. § 1413.

(10) *Ib.*

It is to be observed that it is only when a document is used for purposes referred to in sections 159, 160, that the adverse party has a right to see and cross-examine upon it, and therefore, if a paper be put into the hands of a witness merely to refresh his memory, or if being given to the witness to refresh his memory, the question founded upon is not entitled to see it, except sufficiently to enable him to recognise it, if it be subsequently offered in evidence or to re-examine upon it and may not comment upon its contents. Indeed, if under these circumstances he read it or comment on it, he may be required by his adversary to put it in (1)

There are other modes of refreshing the memory of witnesses than the use of memoranda in writing. While a party cannot as a rule cross examine his own witness if a witness have given an ambiguous or indefinite answer, or if his memory is at fault, the Court, in the exercise of a proper discretion, may allow verbal enquiry as to statements or circumstances which may tend to enable the witness to recollect more clearly the fact sought to be proved (2)

162. A witness summoned to produce a document shall, if it is in his possession or power, bring it to Court notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the Court

The Court, if it sees fit, may inspect the document, unless it refers to matters of State, or take other evidence to enable it to determine on its admissibility

If for such a purpose it is necessary to cause any document to be translated, the Court may if it thinks fit, direct the translator to keep the contents secret, unless the document is to be given in evidence and, if the interpreter disobeys such direction, he shall be held to have committed an offence under section 166 of the Indian Penal Code

Principle.—The summons to produce a document is like the summons to appear as a witness of compulsory obligation and must be obeyed by the witness who has no more right to determine whether the documents shall be produced than whether he shall appear as a witness. It is his duty therefore to attend and bring out the documents referred to in the summons if he is able to do so. If he is unable to do so, he may apply to the Court for an order that he should be excused from producing the documents if he is unable to do so.

* 3 (Document) s 123 (Documents referring to matters of State)
 ss 121—131 (Privilege)
 * 3 (Court)

Taylor Ev § 1240 2 Ph & Arn Ev 425 Roscoe Nisi Prius Ev 154—156 Field Ev 6th Ed 476 477 409 410

(1) Taylor Ev § 1413 and cases there cited

(2) Burr Jones Ev § 886 and ante s 143 Defective Memory

(3) Burr Jones Ev § 801 citing *Aney v Long* 9 East 483 *Doe v Kelly* 4 Dowd 273 *R v Russell* 7 Dowd 693 *R v Dixon* 3 Burr (1687)

COMMENTARY.

Production
of docu-
ments

The rule of English law is similar. For when a witness is served with *subpoena duces tecum*, he is bound to attend with the documents demanded therein, and he must leave the question of their actual production to the Judge who will decide upon the validity of any excuse that may be offered for withholding them (1). When so brought into Court the production of the documents in evidence will be excused where it has been declared to be privileged from disclosure under this Act, as where it is the third party's title-deed (2) or a confidential communication professionally made between a legal adviser and his client (3) or the like. When the production is excused secondary evidence is admissible (4) and if the document be brought into Court by a witness who says that he is instructed by the owner to object to the production of it this is enough to justify secondary proof without subpoenaing the owner himself to make the objection in person (5). It is obvious that a witness cannot be compelled to produce a document by a summons unless such document is under his control or possession. So a mere clerk in a bank is under no obligation to produce its books when they are under the control of the cashier (6) and it was so held as to the secretary of a railway company, as he was only the employee of the directors (7), nor are documents filed in a public office so in the possession of a clerk there, as to render it necessary, or even allowable for him to bring them into Court without the permission of the head of the office (8). But on having the *actual custody* of documents may be compelled to produce them although they are owned by others (9). The validity of any objection made by the person producing the document will be decided by the Court. And the Court has jurisdiction to punish disobedience to a *subpoena* by attachment even when the disobedience is not wilful (10).

The provision that the Court may, if it sees fit, inspect the document (and if it refers to matters of State) appears not to be in accordance with the rule as laid down in some English cases. For it has held that when the witness declines to produce a document on the ground of professional confidence the witness was one which he ought to withhold on oath by the solicitor that it is conclusive (11).

(1) *Aties v Long* 9 East 473 *Roscoe N P Ev* 154—156 *Taylor Ev* § 1240

2 Ph & Arn 425. An attachment will lie for contempt in case of disobedience even though it may be very questionable whether the person summoned would be bound to submit the document to examination in the event of his bringing it into Court. *R v Greenaway* 7 Q B 126. *R v Carey* ib. as to the penalty for non production see Penal Code s 175. As to care in summoning Government Officials for production of documents see *Laxman Rao v Luloba* 45 I C 898.

(2) s 130 ante

(3) s 126—127 ante and see generally ss 121—131 ante

(4) *Doc v Post* 7 M & W 102. *Marston v Dornes* 1 A & E 31 see ante pp 511—515 where this question is discussed.

(5) *Phelps v Penn* 3 F & B 430 it seems to be sufficient if one only of several interested parties object. *Newton v Chopin* 19 I J, C P 374 see also

Aearsley v Phillips 10 Q B D 43. *Roscoe N P Ev* 156

(6) *Bank of Utica v Hillard* 5 Cow 154 (Amer). *United States Exp Co v Henderson* 69 Iowa 40 (Amer) etc. *Burr Jones Ev* § 802

(7) *Croucher v Apply* 1 R & C P 27

(8) *Thornhill v Thornhill* 2 J & W 347. *Austin v Evans* 2 M & Gr 432

(9) *Aties v Long* 1 Camp 17 s c 9 East 473. *Corsen v Dubois* 1 Ho 239

(10) *P v Daye* (1903) 2 K B 333 (Divn Ct.)

(11) *Roscoe N P Ev* 156 c r *D v James* 2 M & Rob 47, *So v Soyser* 13 C B 231. "There have been ever been cases in which the Judge has inspected documents in order to be upon their aims only. If it be so in the one case that it is impossible for a Judge who discharges the function of Judge and Jury to avoid receiving an impression from the document if he do

The Court may also, in order to decide on the validity of the objection, take other evidence to enable it to determine on its admissibility. "All questions as to the admissibility of evidence are for the Judge. It frequently happens that this depends on a disputed fact, in which case all the evidence adduced both to prove and disprove that fact must be received by the Judge,—and however complicated the facts or conflicting the evidence—must be adjudicated on by him alone" (1). Thus the Judge must equally (for example) decide whether a confession should be excluded by reason of some previous threat or promise, and whether a document is protected from disclosure as being a confidential communication or the like (2).

O XI r 14(3) of the Civil Procedure Code empowers the Court during the

held that the right to the production and inspection of documents does not apply to documents which are not in the sole possession or power of the party to the suit who is called upon to produce them but are only in his possession or power jointly with some other person, who is not before the court (4). The provision that the translator may be ordered to keep the contents of a document secret refers to cases where a document is claimed to be privileged from production in evidence but its translation is necessary in order that the Court may ascertain whether the claim of privilege is well founded or not. Section 166 of the Penal Code deals with the case of a public servant disobeying a direction of the law with intent to cause injury to any person. Of course secrecy is unnecessary, if the document is to be given in evidence. In connection with this subject it may be noted that when documents are put in for the purpose of formal proof, it is in the discretion of the Court in criminal proceedings to interpret as much thereof as appears necessary (5).

Documents referring to matters of State stand upon a peculiar footing. Section 123 makes the giving of evidence derived from unpublished official records relating to affairs of State entirely dependent upon the discretion of the head of the department concerned (6). It may be therefore perhaps said to be unnecessary for character (7), the other privileged document and obligatory production in evidence. The person in custody of what he considers a privileged State document must bring it with him to Court, that the latter may decide whether it is a document of that character or not. The position of

look at it it may be urged on the other side that the rule of inspection provides a safeguard against futile or dishonest objections and effects a great saving of the time of the Court. Field Ev 64h Ed 476—477

(1) Taylor Ev § 21A

(2) *Ib*

(3) Woodroffe and Ameer Ali Civil Procedure 2nd Ed p 793

(4) *Kearsley v Phillips* 10 Q B D 465 followed in *Murray v Walter Cr & Ph* 114. See the latter and kindred cases discussed with reference to the procedure to be adopted in this country in *Haji Jakaria v Haji Kasim* 1 B 496 (1876) where it was held that one partner of a firm represents the other partners for the purposes of production of documents. See also *Taylor v Rundell Cr & Ch* 104

1 Philips 222 226 *Kettlewell v Barstow* L R 7 Ch App 686 [the fact that persons not parties to the suit are interested in the document is no ground for resisting production] *London and Yorkshire Bank, Ltd v Cooper* 15 Q B D 473 [custody of liquidator]

(5) Cr Pr Code s 361 see also *R v Amiruddin* 7 B L R 36 71 (1871)

(6) Being in this in accordance with *Beatson v Skene* 5 H N 838 see *Nagaraja Pilla v Secretary of State* 39 M 304 (1916)

(7) *Cunningham Ev* 380 In *Hennessey v Wright* 1 Q B D 509 515 Field J., said that he should consider himself entitled privately to examine the document to see whether the fear of injury to the public service was the real motive for the objection

the words "unless it refers to matters of State" in the second paragraph of the section, appears to show that the Court, although it may not inspect a document relating to matters of State, may yet take other evidence to enable it to determine on its admissibility (1). Apparently, upon the objection and statements of the person appearing with the document, the Court will determine whether it is or is not a State document. If the Court decides that it is a State document, then it is for the head of the department alone to determine whether evidence shall be given of it or not (2).

It has been said that in the case of State proceedings the Court cannot inspect them for the purpose of seeing if they are privileged and must take their character upon the word of the public officer, who has them in his custody (3). But by this it is conceived, is meant that the officer states those facts touching the document which in his opinion show that it is one coming within the purview of section 123 and the Court then (though bound by the officer's statement and forbidden to inspect the document) determines whether those facts do or do not give the document the character claimed for it. Otherwise it does not appear that there is any function assigned to the Court in the matter or that there is any reason why such a document is required to be produced in Court unless it be that the officer may publicly and in the presence of the Judge claim privilege from production. The oath of secrecy which is taken by income tax officers does not apply to cases in which they are summoned to give evidence in a Court of Justice (4). Rule 16 of the rules made by the Local Government under s. 38 of the Income tax Act (II of 1886) does not apply to the production of income tax papers in a Court of Law in a suit between two partners (5). In a later case in the Privy Council it was said that a presiding Judge should endorse with his own hand on every document proved or admitted in evidence a statement that it was so proved against or admitted by the party against whom it was used, as enjoined by the Civil Procedure Codes of 1877 and 1882 and practically re-enacted by the present Civil Procedure Code (O. XIII r. 4) and that for the future the Privy Council in hearing Indian Appeals would refuse to read or to permit to be read any such document not so endorsed (6).

In the undermentioned case (7), the Magistrate of a district refused to produce a written report made to him by a Magistrate in charge of a division of a district as to the result of an enquiry made by the latter under the provisions of section 135 of the Criminal Procedure Code, into the cause of a sudden and unnatural death. When the case came before the High Court the District Magistrate appeared, through Counsel with the report ready to produce it if the High Court held it not to be privileged, or to show it to the Judges if they desired to see it before making their order, but submitted amongst other

(1) See Field Fv. 6th Ed. 409—410 where also other tentative interpretations of this section so far as it concerns State documents are to be found which appear to the author to be hardly supportable.

(2) Cunningham Fv. 380 but there is no necessity as has been held in England (*Kain v. Farrer* 27 L. T. N. S. 466), doubted in *Hennessy v. Wright* 21 Q. B. D. 59 523) for him to give his reasons for the non-production of the document (assuming that it is found to be in fact a document of State) and to come and say that he objects to the production on grounds of public policy. *Ib.* see s. 123 ante.

(3) Mayne's Criminal Law 86.

(4) *Ib.* citing *Lee v. Birrell* 3 Camp. 337 and stating that Scotland C. J., in

R. v. Yakata Khan 2 Mad. Sessions 1863 compelled the production of income tax schedules though the objection was taken by the officer who appeared and see *Venkataschella Chettiar v. Sampath Chettiar* 32 M. 67. Ref. to in Col. 170 of *Jaunpur v. Janna Prasad* 44 A. 360.

(5) *Jadobra v. Dey v. Bulloram Dey* 26 C. 281 (1899). Ref. to in *Col. 170 of Jaunpur v. Janna Prasad* 44 A. 360.

(6) *Sadik Husain Khan v. Hashim Khan* 1 C. 38 A. 677 (1916). O. XIII r. 4 only provides that certain parts shall be endorsed and that the Judge shall sign or initial such endorsement. See Woodroffe and Ameri Ali's Civil Procedure Code second edition p. 497.

(7) In re *Troil Khanath Burzur* 3 C. 742 (1878).

grounds, that the report was a communication privileged under section 124 of this Act. It was held that this report was not a judicial proceeding and that the District Magistrate was justified in refusing to produce it.

163. When a party calls for a document which he has given the other party notice to produce, and such document is produced and inspected by the party calling for its production, he is bound to give it as evidence if the party producing it requires him to do so.

Giving as evidence document called for and produced on notice

Principle.—See note *post*

s. 3 (*Documents*)

ss 65 66 (*Notice to produce*)

Taylor Ev § 1719 Wharton Ev, § 156

COMMENTARY.

The production of papers upon notice does not make them evidence in the cause unless the party calling for them *inspects* them, so as to become acquainted with their contents, in which case he is obliged to use them as his evidence at least if they be in any way material to the issue (1). Where a party to a case calls for a document from the other party and inspects the same, he takes the risk of making it evidence for both parties. It rests, however, upon the party who calls for and inspects a paper to adduce evidence of its genuineness if that be not admitted (2). The reason for this rule is that it would give into the affairs risk of making

Documents produced after notice

When *A* calls upon *B* to produce a document and *B* produces it, this *prima facie* avoids the necessity of proving such document on *A*'s part where it is relied on by *B* as part of his title (4). Where notice has been given to the opponent to produce papers in his possession or power, *the regular time* for calling for their production is not until his case has been entered upon by the party who requires them, till which time the other party may, in strictness, refuse to produce them, and no cross examination as to their contents is then allowable. Still, it is considered rigorous to insist upon this rule and as a due adherence to it would be productive of inconvenience, the Judges are very unwilling to enforce it (5). And according to the English practice, a party who has given his opponent notice to produce certain documents is allowed to call for them at any stage of the hearing.

164 When a party refuses to produce a document which he has had notice to produce, he cannot afterwards use the

Using as evidence documents production of which was refused on notice

(1) Taylor Ev § 1817 and cases there cited. If the party giving the notice declines to use the papers when produced this though matter of observation will not make them evidence for the adverse party. *Sayer v Kitchen*, 1 Esp 210 for if notice to produce invested the instrument called for with the attribute of evidence testimony incapable of proof might be brought into a case by such notice. Wharton Ev § 156, though it is otherwise as the section says if the papers are inspected by the party calling for them see Norton Ev 252. A person is

not obliged to put in evidence the papers called for by him. Wharton Ev § 156

(2) *Mahomed v Abdul*, 5 Bom. L. R., 380 (1903)

(3) Taylor Ev § 1817, in *Wharton v Routledge* 5 Esp 235, Lord Ellenborough said you cannot ask for a book of the opposite party and be determined on the inspection of it whether you will use it or not. If you call for it you make it evidence for the other side if they think fit to use it.

(4) Wharton Ev § 156

(5) Taylor Ev § 1817

the words "unless it refers to matters of State" in the second paragraph of the section, appears to show that the Court, although it may not inspect a document relating to matters of State, may yet take other evidence to enable it to determine on its admissibility (1). Apparently, upon the objection and statements of the person appearing with the document, the Court will determine whether it is or is not a State document. If the Court decides that it is a State document, then it is for the head of the department alone to determine whether evidence shall be given of it or not (2).

It has been said that in the case of State proceedings the Court cannot inspect them for the purpose of seeing if they are privileged and must take their character upon the word of the public officer, who has them in his custody (3). But by this it is conceived, is meant that the officer states those facts touching the document which in his opinion show that it is one coming within the purview of section 123, and the Court then (though bound by the officer's statement and forbidden to inspect the document) determines whether those facts do or do not give the document the character claimed for it. Otherwise it does not appear that there is any function assigned to the Court in the matter or that there is any reason why such a document is required to be produced in Court, unless it be that the officer may publicly and in the presence of the Judge claim privilege from production. The oath of secrecy which is taken by income tax officers does not apply to cases in which they are summoned to give evidence in a Court of Justice (4). Rule 16 of the rules made by the Local Government under s. 38 of the Income tax Act (II of 1886) does not apply to the production of income tax papers in a Court of Law in a suit between two partners (5). In a later case in the Privy Council it was said that a presiding Judge should endorse with his own hand on every document proved or admitted in evidence a statement that it was so proved against or admitted by the party against whom it was used, as enjoined by the Civil Procedure Codes of 1877 and 1882 and practically re enacted by the present Civil Procedure Code (O XIII r 4) and that for the future the Privy Council in hearing Indian Appeals would refuse to read or to permit to be read any such document not so endorsed (6).

In the undermentioned case (7), the Magistrate of a district refused to produce a written report made to him by a Magistrate in charge of a division of a district as to the result of an enquiry made by the latter under the provisions of section 135 of the Criminal Procedure Code, into the cause of a sudden and unnatural death. When the case came before the High Court, the District Magistrate appeared, through Counsel with the report ready to produce it if the High Court held it not to be privileged, or to show it to the Judges if they desired to see it before making their order, but submitted amongst other

(1) See Field Ev 6th Ed 409—410 where also other tentative interpretations of this section so far as it concerns State documents are to be found which appear to the author to be hardly supportable.

(2) Cunningham Ev 380 but there is no necessity as has been held in England (*Kam v Farrer* 37 L. T. N. S. 467 doubted in *Hennessy v Wright* 21 Q. B. D. 509 523) for him to give his reasons for the non production of the document (assuming that it is found to be in fact a document of State) and to come and say that he objects to the production on grounds of public policy. *Ib* see s. 123 ante.

(3) Maynes Criminal Law 86.

(4) *Ib* citing *Lee v Burrell* 3 Camp 337 and stating that Scotland C. J. in

R v Yakata Khan 2 Mad. Sess. ors 1863 compelled the production of income-tax schedules though the objection was taken by the officer who appeared and see *Venkatachella Chettiar v Sampaila Chettiar* 32 M. 62 Ref. to in *Collector of Jaunpur v Jamna Prasad* 44 A. 350.

(5) *Jadobran Dey v Bullora Dey* 26 C. 281 (1899) Ref. to in *Collector of Jaunpur v Jamna Prasad* 44 A. 360.

(6) *Sadif Husain Khan v Hasm Al Khan* P. C. 38 A. 627 (1916) O. XIV r 4 only provides that certain particulars shall be endorsed and that the Judge shall sign or initial such endorsement. See Woodroffe and Ameer Ali's Civil Procedure Code second edition p. 807.

(7) *In re Trojlokianath Buxas* 3 C. 742 (1878).

grounds, that the report was a communication privileged under section 124 of this Act. It was held that this report was not a judicial proceeding and that the District Magistrate was justified in refusing to produce it.

163. When a party calls for a document which he has given the other party notice to produce and such document is produced and inspected by the party calling for its production, he is bound to give it as evidence if the party producing it requires him to do so.

Giving as evidence document called for and produced on notice

Principle.—See note post

s 3 (Documents)

ss 65 66 (Notice to produce)

Taylor Ev § 118 Wharton Ev § 16

COMMENTARY

The production of papers upon notice does not make them evidence in the cause unless the party calling for them inspects them so as to become acquainted with their contents in which case he is obliged to use them as his evidence at least if they be in any way material to the issue (1). Where a party to a case calls for a document from the other party and inspects the same he takes the risk of making it evidence for both parties. It rests however upon the party who calls for and inspects a paper to adduce evidence of its genuineness if that be not admitted (2). The reason for this rule is that it would give a party to enable him to pry into the affairs to the risk of making

Documents produced after notice

When A calls upon B to produce a document and B produces it this *prima facie* avoids the necessity of proving such document on A's part where it is relied on by B as part of his title (4). Where notice has been given to the opponent to produce papers in his possession or power the regular time for calling for their production is not until his case has been entered upon by the party who requires them, till which time the other party may in strictness refuse to

it is allowable

his opponent notice to produce certain documents is allowed to call for them at any stage of the hearing.

164. When a party refuses to produce a document which he has had notice to produce, he cannot afterwards use the

Using as evidence documents production of which was refused on notice

(1) Taylor Ev § 1817 and cases there cited. If the party giving the notice declines to use the papers when produced this though matter of observation will not make them evidence for the adverse party. *Sayer v. Kitchen* 1 Esp 210 for if notice to produce invested the instrument called for with the attribute of evidence testimony incapable of proof might be brought into a case by such notice. Wharton Ev § 156 though it is otherwise as the section says if the papers are inspected by the party calling for them see Norton Ev 250. A person is

not obliged to put in evidence the papers called for by him. Wharton Ev § 156

(2) *Malcolmed v. Abdul* 5 Bom. L. R. 380 (1903)

(3) Taylor Ev § 1817 in *Wharton v. Roledge* 5 Esp 235 Lord Ellenborough said: "You cannot ask for a book of the opposite party and be determined on the inspection of it whether you will use it or not. If you call for it you make it evidence for the other side if they think fit to use it."

(4) Wharton Ev § 156,

(5) Taylor, Ev § 1817.

document as evidence without the consent of the other party or the order of the Court

Illustration

A sues B on an agreement and gives B notice to produce it. At the trial A calls for the document and B refuses to produce it. A gives secondary evidence of its contents.

B seeks to produce the document itself to contradict the secondary evidence given by A or in order to show that the agreement is not stamped. He cannot do so.

Principle.—See Note, *post*

s 3 ('Document')

ss 56 66 (Notice to produce)

s 89 (Presumption as to documents not produced)

Taylor, Ev. § 1818, Wharton, Ev. § 157

COMMENTARY.

Documents
not pro-
duced after
notice

A party is not permitted after declining to produce a paper, to put it in evidence after it has been proved by his opponent by parol. Should he be allowed to do so, he would be able to hold back the paper, until he saw whether its parol rendering would be favourable or unfavourable to him, and thus to

it as part of his own case (1). He is in effect bound by any legal and satisfactory evidence produced on the other side (2).

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the
that
refusing to produce it (3). There is a presumption further that a document called for and not produced after notice was attested, stamped and executed in the manner required by law (4).

Judge's
power to
put ques-
tion or
order pro-
duction.

165. The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing and neither the parties nor the agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question.

Provided that the Judgment must be based upon facts declared by this Act to be relevant and duly proved

(1) Wharton Ev. § 157 Taylor Ev. § 1818, Burr Jones Ev. §§ 117 223

(2) Norton Ev. 252 where it is also stated that the document cannot be used to refresh the memory of a witness, citing Till v. Answorth Bristo 1847, Wilde C. J. MSS. As to the prevalence of a

similar rule when a party determines upon keeping back a chattel, see *Lewis v. Hartley* 7 C. & P. 405, or refusing to give inspection see Civ. Pr. Code O. XI. r. 15 Woodroffe & Amir Ali 2nd Ed. 794

(3) Burr Jones Ev. 17

(4) S. 89 *ante*

Provided also that this section shall not authorize any Judge to compel any witness to answer any question, or to produce any document which such witness would be entitled to refuse to answer or produce under sections 121 to 131, both inclusive, if the question were asked or the document were called for by the adverse party, nor shall the Judge ask any question which it would be improper for any other person to ask under section 148 or 149, nor shall he dispense with primary evidence of any document, except in the cases hereinbefore excepted

Principle — This section is intended to arm the Judge with the most extensive power possible for the purpose of getting at the truth. The effect of this section is that in order to get to the bottom of the matter before it the Court will be able to look at and enquire into every fact whatever (1) and thus possibly acquire valuable *indicative* evidence (*in post*) which may lead to other evidence strictly relevant and admissible. The Court is not however permitted to found its judgment on any but relevant statements because such a permission would lead to reliance on second hand reports would waste time and open a wide door for fraud (2). And the discretion given is exercisable subject to correction by the Court of appeal (3). See further Notes *post*

- | | |
|--|---|
| s. 3 ("Relevia") | 3 (Fact) |
| s. 62 Prov. 2 (<i>Production of child</i>) | 3 (Court) |
| s. 133 145—151 (<i>Cross-examination</i>) | s. 3 (<i>Proved</i>) |
| s. 3 (<i>Document</i>) | ss. 121—131 (<i>Privilege</i>) |
| ss. 148 149 (<i>Questions to credit</i>) | ss. 61—65 (<i>Privilege of defence</i>) |

Steph. Introd. 161—163 73 Best F. §§ 86 93 Wharton Ev. § 281 Taylor Ev. §§ 1477 93—97 103 9 Cr. Ev. 13th Ed. 115 Norton Ev. 323 312 63 Malby Ev. 114 115

COMMENTARY

The Judge may question the witness either in the manner and with the object followed by the parties or he may avail himself of the more extended power of interrogation which is given to him under the terms of this section. It has been a matter of juristic dispute whether a Judge can on his own motion put to the witness questions independently of Counsel so as to bring out points Counsel designedly or undesignedly overlook. On one side it has been urged in conformity with the scholastic view that the Judge is confined to the proof adduced by the parties. On the other side it is insisted that it is absurd for a Judge with a witness before him not to do what he can to elicit the truth. So far as concerns the *abstract principle* writers on the English Common Law repeatedly affirm the scholastic view that the Judge must form his judgment exclusively on the proof brought forward by the parties. So far as concerns the *actual practice* the Judge does not hes- itates to do so. In fact they do not hes- itate to do so in latitude.

- (1) Steph. Introd. 162 and see Best Ev. §§ 86 93
 (2) Steph. Introd. 162 163
 (3) *Suend a Krishna Mandal v Rao* 33 C. L. J. 34 (1921)
 (4) Wharton Ev. § 281 See Taylor Ev. § 1477 Roscoe Cr. Ev. 13th Ed. 115 *R v Remnant* R. & R. 136 *Coulton v Daborough* 2 Q. B. D. (1894)

316 The Court always may and often does examine a witness at the close of his examination. The Court is not bound by the same rules as to leading questions etc. The Court may put what questions it pleases and in what form it pleases and most usefully so where the examination has not been scientifically or skillfully conducted. Norton Ev. 323 As to the

allowed him with respect to the rules of forensic proof. He may ask any questions in any form and at any stage of the cause, and to a certain extent even allow parties or their advocates to do so. This, however, does not mean that he can receive illegal evidence at pleasure, for, if such be left to the jury, a new trial may be granted even though the evidence were extracted by questions put from the Bench, but it is a power necessary to prevent justice being defeated by *technicality*, to secure *indicative* evidence, and in criminal cases to assist in fixing the amount of punishment. And it should be exercised with due discretion" (1). It is this latter object (the securing of indicative evidence) which is the main ground for the enactment of this section. "It may be objected, (and indeed, Bentham's *Treatise on Judicial Evidence* is founded on the notion) that by exclusionary rules like the above [*i.e.*, rules of evidence] much valuable evidence is wholly sacrificed. Were such even the fact, the evil

evidence in question need seldom be lost to justice, for however dangerous and unsatisfactory it would be as the basis of final adjudication it is often highly valuable as indicative evidence (2), that is, evidence not in itself receivable but which is 'indicative' of better. Take the case of derivative evidence, a witness of the Court, called or secured for the purpose of being stopped by the Court, under promise of favour or any facts discovered in consequence of that confession,—such, for instance as the finding of stolen property—are good legal evidence. Again no one would think of treating an anonymous letter as legal evidence against a party not suspected of being its author, yet the suggestions contained in such letters have occasionally led to disclosures of importance. In tracing the perpetrators of crimes also conjectural evidence is often of the utmost importance, and leads to proofs of the most satisfactory kind sometimes even amounting to demonstration. It is chiefly, however, on inquisitorial proceedings—such as coroners' inquests and the like—that the Court is allowed to draw its conclusions, though even the

This therefore "is a most important section. Its provisions, though they may be in some respect not in accordance with English ideas are wholly suited to the state of things which exists in India out of the Presidency towns" (4). In his Introduction to the Evidence Act (5) Sir J. F. Stephen remarks—'Where a man has to inquire into facts of which he received in the first instance very confused accounts, it may, and often will be extremely important for

recall and examination of witnesses by the Court see O XVIII r 17 Woodroffe & Amir Ali 2nd Ed 849 Civ Pr Code s 540 Cr Pr Code

(1) Best Ev § 86

(2) In one place Bentham also calls it 'Evidence of Evidence' 3 Jud Ev 554

(3) Best Ev § 93

(4) Field Ev 6th Ed 479 480 In Norton Ev 342 it is said of this section that it merely embodies the existing law as to the power of the Judge to put questions. Sir William Markby also in his edition of the Act (p 115) is of opinion that on the construction of the section given in the text (*vide post*) every Magistrate in India possesses already all the powers of

seeking after evidence which this section gives him. See Woodroffe and Amir Ali's Civ Pr Code O XVI r 14 2nd Ed 832 [Court may of its own accord summon as witnesses strangers to suit and see O X r 4 p 748 ib Woodroffe and Amir Ali 2nd Ed 775 ib by which the Court may direct any party to a suit to appear in person for examination and O XVIII r 17 p 822 ib 2nd Ed 849 by which the Court may recall and examine a witness] and Cr Pr Code s 540 [power to summon witness and examine]. As to the examination of accused persons see Gya Singh & Malomed Sol J at 5 C W N 864 (1901)

(5) Pp 161 162

him to trace the most cursory and apparently futile report, and facts, relevant in the highest degree to facts in issue may often be discovered in this manner. A policeman or a lawyer engaged in getting up a case criminal or civil would neglect his duty altogether, if he shut his ears to everything which was not relevant within the meaning of the Evidence Act. A Judge or Magistrate in India frequently has to perform duties which in England would be performed by police officers or attorneys. He has to sift out the truth for himself as well as he can and with little assistance of a professional kind. Section 165 is intended to arm the Judge with the most extensive power possible for the purpose of getting at the truth. The effect of this section is that in order to get to the bottom of the matter before it the Court will be able to look at and inquire into every fact whatever."

And in the Select Committee the framer of the Act observed as follows — "That part of the law of evidence which relates to the manner in which witnesses are to be examined assumes the existence of a well educated Bar co-operating with the Judge and relieving him practically of every other duty than that of deciding questions which may arise between them. I need hardly say that this state of things does not exist in India and that it would be a great mistake to legislate as if it did. In a great number of cases—probably the vast numerical majority—the Judge has to conduct the whole trial himself. In all cases he has to represent the interests of the public much more distinctly than he does in England. In many cases he has to get at the truth or as near to it as he can by the aid of collateral inquiries which may incidentally tend to something relevant and it is most unlikely that he should ever wish to push an inquiry needlessly or to go into matters not really connected with it. We have accordingly thought it right to arm Judges with a general power to ask any questions, upon any facts of any witnesses at any stage of the proceedings irrespectively of the rules of evidence binding on the parties and their agents, and we have inserted in the Bill a distinct declaration that it is the duty of the Judge especially in criminal cases not merely to listen to the evidence put before him but to inquire to the utmost into the truth of the matter (1). We do not think that the English theories that the public have no interest in arriving at the truth and that even criminal proceedings ought to be regarded mainly in the light of private questions between the prosecutor and the prisoner at all suited to India if indeed they are the result of anything better than carelessness and apathy in England."

Under this section which applies to both criminal and civil proceedings the Judge may ask any question in any form as for instance a leading question (2) and he has equal liberty with regard to the substance of his question which may be about any fact relevant or irrelevant. But it is to be noted that the section only empowers the Judge to ask irregular questions in order to discover or obtain proper proof of relevant facts that is in order to discover or obtain regularly admissible evidence (3). He may not introduce into the case any irregular evidence he pleases. This is indicated by the first *Proviso* which requires that the judgment be based upon facts declared by the Act to be relevant and duly proved. So in a trial for murder where the weapon had not been found a witness might state in answer to the Judge that he had heard that the accused had secreted it in a certain ditch. This statement being hearsay would be inadmissible as evidence in the case itself but the Judge by means of it might be able to direct an inquiry which would lead to the

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 (2) Norton Ev 323

(3) See R (1885

weapon being f
 fact suggested
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It has however, been held that it is not the province of the Court to examine the witnesses, unless the pleaders on either side have omitted to put some material question or questions, and the Court should as a general rule leave the witnesses to the pleaders to be dealt with as laid down in section 138 of this Act. In the case, now cited, at a trial before a Sessions Court (1) the Judge, on the examination in chief of the witnesses for the prosecution being finished, questioned the witnesses at considerable length upon the points to which he must have known that the cross examination would certainly and properly be directed a course which it was observed must have rendered the greater part of the cross examination ineffective.

Order for
 production

The Judge is also empowered to order the production of any document or thing but this is subject to the condition in the second proviso that the Judge is not hereby authorized to compel the production of any document which the witness would be entitled to refuse to produce under sections 121—131, *ante*, if the document were called for by the adverse party. As to the production of chattels, see also the second proviso of section 60 *ante*.

Cross-Ex-
 mination

The parties have no power of cross examination without the leave of the Court upon any answer given by the witness in reply to any question of the Judge put under this section and it makes no difference whether the cross examination be directed to the witness's statement of fact or to circumstances touching his credibility. The principle that parties cannot without the leave of Court, cross examine a witness whom the parties having already examined or declined to examine, the Court itself has examined applies equally whether it is intended to direct the cross examination to the witness's statements of fact or to circumstances touching his credibility, for any question meant to impugn his credit tends (or is designed) to get rid of the effect of each and every answer just as much as one that may bring out an inconsistency or contradiction (5).

Witness
 called by
 Court

But the case dealt with by the section must be distinguished from that where the witness is called by the Court. When a party to the suit or a witness is summoned by the Court such witness is liable to be cross-examined by the parties. The provisions of this section only forbid the cross examination without the leave of the Court of any witness upon any answer given in reply to a question asked by the Judge. They apply rather to *particular questions*

(1) *Markby v. 114 115* where it is pointed out that the construction of this section is not free from difficulty. That the true construction is that given in the text appears to the authors to be indicated by the words of the first proviso. But then as Sir William Markby says it is not easy to see why the last clause of the second Proviso was inserted. This clause would be quite intelligible if the section were intended as a general relaxation of the rules of evidence but why should not a Judge who was merely hunting up evidence look at a copy in order to see whether it was worthwhile to endeavor to procure the original. It may further be observed that if that clause on

the other hand refers to the evidence to be accepted in the case itself it appears to be mere surplusage as the first proviso has already declared that the facts must be fully proved where the fact is contained in a document primary evidence of that document must as a general rule be

relevant

(2) *Steph. Intro. 73*

(3) *Cunningham Ex 381*

(4) *Aoor Bur v. R 6 C 29 (1880)*

s. c. 7 C. L. R. 385 and see Suresh v. Krishna v. Maral v. Rance Dassee 33 C. L. J. 34 (1921)

(5) *A. v. Sakharani Mukundji 11 B. M. H. C. R. 166 (1874)*

put to a witness, *already before the Court*, than to the whole examination of a witness called by the Court (1) His examination is not to be confined to such questions as the Court sees fit to put to him, but his knowledge as to the facts he states may be tested, as in the case of any other witness, by questions put by the parties (2) There is nothing in this section which debars or disqualifies a party to a proceeding from cross-examining any witness called by the Court. All that the section says is that a party to a proceeding shall not be allowed to cross-examine a witness upon an answer given by him to a question put by the Court without the permission of such Court (3) Where a witness had been summoned, but was not called, by the defence, and was thereupon called by the Court, it was held that the witness was not a witness for the defence and that the accused should have been given opportunity to cross examine him (4)

The proviso declares that the judgment *must* be based upon facts declared by this Act to be relevant (*v. ante*, ss. 5—55), and duly proved (*v. ante*, ss. 56 (1) —100) This proviso as already observed (*ante* p. 1004) indicates the construction which should be placed on the first portion the section. The answer to an irrelevant question may lead to the discovery of important relevant matter, which may be the basis of a decree, though an answer to an irrelevant question could not be so. The Judge will not be permitted to found his judgment upon the class of statements to which he may resort as *indicative* evidence, for the reason that it would tempt Judges to be satisfied with second-hand reports, would open a wide door to fraud, and would waste an incalculable amount of time (5) It may also be added that it would modify, if not entirely do away with, the admitted and declared rules of evidence to a very considerable extent (6) And it is of course intolerable that the Court should decide rights upon suspicions unsupported by testimony (7) In a trial held by a jury the jury in dealing with the evidence must not be allowed to confine his attention to irrelevant matters, but must be free to receive any information of any kind in reference to a case, whether it be relevant or not, other than such as comes before it in the way which the law recognises in the form of legal evidence (9)

(1) Field *Lv* 6th Ed 181 citing *Tarini Charan v Saroda Sundari* 3 B L R, A C 145 158 (1869), *R v Grish Chunder*, 5 C 614 (1879), and see *Gopri Lal v Manick Lal*, 24 C, 288 (1897) in which both the abovementioned cases were followed. In England it has been held that at the trial of an action the Judge has power to call and examine a witness who has not been called by either of the parties and when he does so neither party has a right to cross examine the witness without the Judge's leave which should be given to either of the parties against whom the evidence should prove adverse. *Coulson v Disborough* 2 Q B D (1894) 316. It has been also held that where after the examination of witnesses to fact on behalf of a prisoner the Judge (there being no Counsel for the prosecution) call back and examines a witness for the prosecution the prisoner's Counsel has a right to cross examine him again if he thinks it material. *R v Watson* 6 C & P 653

(2) *Tarini Charan v Saroda Sundari* 3 B L R A C 145 158 (1869) for the English rule see *Coulson v Disborough* 2 Q B D (1894), 316 *supra*

(3) *Gopal Lal v Manick Lal* 24 C 288 (1897)

(4) *Mohendra Nath v R* 29 C 387 (1902)

(5) Steph Introd 167 16

(6) If inadmissible evidence has been received (whether with or without objection) it is the duty of the Judge to reject it when giving judgment and if he has not done so it will be rejected on appeal as it is the duty of Courts to arrive at their decisions upon legal evidence only. *Jacker v I C Co* 3 Times L R 13

(7) *Sim Mohan v Saral Chand* 2 C W N 27

(8) *R v Tait Da* 4 C W N 129 (1899)

(9) *Mahalsi Sanika* 6 Bom L R 289 (1904)

The functions of a Judge with regard to evidence have been declared (1) to be of a three fold nature — (a) to exclude everything that is not legitimately evidence (2), and then when judgment is to be given, (b) to ascertain clearly what the evidence is which he has before him, and (c) to estimate correctly the probative force of that evidence (3)

However, even if the evidence on the record is in itself insufficient the Judge may properly decide the case upon the evidence such as it is if the defendant has waived his objection to its insufficiency and consented to its being taken as sufficient (4)

PROVISO
(*)

This proviso subjects the Judge, in the exercise of the powers hereby given to the provisions contained in sections 121—131, 148 and 149, *ante*. Thus a Judge can no more compel a witness to disclose a confidential professional communication (5), or question him to his credit without reasonable grounds (6) or compel a third party to produce his title deeds (7) than the parties or their agents can do. Of course it is the duty of the Judge to otherwise properly question and not to coerce the witness in any manner. So where in cross examination before the Court of Session, a witness stated that, when she was before the committing Magistrate that officer addressing her, said "Recollect or I will send you into custody," it was held that if the statements were correct, the conduct of that officer was not only most improper, but absolutely illegal and that a repetition of it would involve very serious consequences (8)

— — — — — asking irrelevant questions to relevant facts, but, if he asks being taken against the witness the witness is not bound to answer them and cannot be punished for not answering them under section 179 of the Penal Code (9)

As to the meaning of the last clause of the section, prohibiting the Judge from dispensing with primary evidence of documents except in the cases here inbefore excepted see *ante* p 1004 note (4)

(1) Norton Lx 65 see Taylor Lx §§ 23—27 As to the duty of a Sessions Judge in criminal cases see Cr Pr Code s 298

(2) As is laid down in criminal trials by s 298 of the Cr Pr Code As to the existence of a similar duty in civil cases v *ante* notes to s 5 and cases there cited as to want of objection to admissibility see the case of *Miller v Madho Das* 23 I A 106 s c 19 A 76 where it is held that an erroneous omission to object to irrelevant evidence does not make it admissible and see *Sri Raja Prakasharayan v Guru v Venkata Rao* 38 M 150 (1916) consent or want of objection in manner in which relevant evidence is brought on the record precludes objection on appeal Under the old law and almost as it were from the necessity of the thing it was indicated on more than one occasion [see Circular No 31 (Civil side) 13th October 1863] that the Courts had an active duty to perform in respect of the admission and rejection of evidence and this wholly

irrespective of objections emanating or rather failing to emanate from the parties or their pleaders Field Lx 6th Ed 487 where it is also observed that when the manner in which cases are prepared for trial in the majority of Courts of original jurisdiction in the Mofussil is considered and when it is reflected that many of the practitioners in the lower Courts have little idea of what is or what is not relevant it will be apparent that if the Courts be themselves passive the utility of the Code of evidence will seriously be impaired (3) v *ante* Introduction to Part II and cases there cited

(4) *Sietul Pershad v Junmejoy Mullick* 12 W R 244 245 (1869)

(5) v *ante* ss 126—129

(6) v *ante* s 149

(7) v *ante* s 130

(8) *P v Ishri Singh*, 8 A 672 675 677 (1886)

(9) *R v Hari Lakshman* 10 B, 185 (1885)

166. In cases tried by jury or with assessors, the jury or assessors may put any questions to the witnesses, through or by leave of the Judge, which the Judge himself might put and which he considers proper.

Power of jury or assessors to put questions

COMMENTARY.

Further, whenever the Court thinks that the jury or assessors should view the place in which the offence charged is alleged to have been committed or any other place in which any other transaction material to the trial is alleged to have occurred, the Court will make an order to that effect (1) If a juror or assessor is personally acquainted with any relevant fact it is his duty to inform the Judge that such is the case whereupon he may be sworn examined cross examined and re-examined in the same way as any other witness (2) But unless Assessors become witnesses the Judge has no power to question them before they have delivered their opinions (3)

Questions by jury or assessor

(1) Cr Pr Code s 293 see Taylor Ex §§ 504—558 Wharton Ex §§ 340—347 as to view of the locality by a Magistrate see in the matter of petition

of Lalj 19 A 307 (1897)
(2) Ib 294 A ante s 118
(3) A t added R 40 C 163 (1913)

CHAPTER XI

ON IMPROPER ADMISSION OR REJECTION OF EVIDENCE.

In his Introduction(1) to this Act, Sir James Fitzjames Stephen observes with reference to the sections concerning relevancy that "important as these sections are to make the whole body of law students and practitioners not to give rise to litigation or to nice questions of the Evidence Act, which was formerly section 57 of Act II of 1855, renders it practically a matter of little importance whether evidence of a particular fact is admitted or not. The extreme intricacy and minuteness of the law of England on the subject is principally due to the fact that under the earlier practice the improper admission or rejection of a single question and answer would give a right to a new trial in a civil case, and would upon a criminal trial be sufficient ground for the quashing of a conviction before the Court for Crown Cases Reserved (2). The improper admission or rejection of evidence in India has no effect at all, unless the Court thinks that the evidence improperly dealt with either turned or ought to have turned the scale. A Judge, moreover, if he doubts as to the relevancy of a fact suggested can, if he thinks it will lead to anything relevant, ask about it himself under section 165"(3)

Errors committed by the Court, either in matters of law or in admitting or rejecting evidence, and occasionally in matters of practice, are corrected by application to a superior tribunal. Formerly in England where evidence had been improperly admitted or rejected, a new trial was granted unless it was clear that the result would not have been affected, but this rule is reversed by

action (1)

or b
injury
evidence to the Judge at the trial and requested the latter to make a note of the

(1) At p. 73

(2) This Court is now supplemented (and in practice replaced) by the Court of Criminal Appeal.

(3) Sir William Markby (L.J. p. 117) observes: "I think these words must have been written under some misconception. As the law stands an error in the reception or rejection of evidence may have the gravest consequences. The language is perhaps misleading but doubtless Sir J. F. Stephen meant that it was practically a matter of little moment whether an error was made in the reception or rejection of some particular

item of evidence which does not really affect the decision on the merits but which item might under the earlier practice of the English Courts have been ground for a new trial or the quashing of a conviction. In other words the section by curing the ill result of slight and really immaterial errors makes their commission of no great importance and the raising of technical objections by reason of such commission ineffectual.

(4) Best L.J. § 82 *post* and see also *id.* as to the misconduct of a jury so as to defeat justice. See *Pherson v. The People*, 6th Ed. 688.

point (1) So, also, if inadmissible evidence has been received, provided it was formally objected to at the trial. But the grounds of objection must be distinctly stated and no others can afterwards be raised (2) These cases are however subject to O 39, R 6, by the terms of which new trials cannot under any circumstances be granted for the improper admission or rejection of evidence, unless the Court, to which the application is made, is of opinion that some *substantial wrong or miscarriage* has been thereby occasioned in the trial (3)

submitted to the Court of Criminal Appeal. A person convicted on indictment may appeal (under the Criminal Appeal Act) against his conviction on any ground — the leave of the Court or the Judge that it is a fit case) — alone or a mixed question — y appeal against his sentence — unless it is one fixed by law (4)

In India there is no trial by Jury in civil cases, the Judge being in all cases judge both of law and of fact, and discharging the functions of both Judge and

(1) Phipson Ex 5th Ed 653, citing *Campbell v Loader* 34 L J Ex 50

(2) *Ib* citing *Williams v Wilcox* 8 A & E 314 *Ferrand v Milligan* 7 Q B 730 *Bain v Whitehaven Ry Co* 3 H L C 1 *McDougal v Knight* 14 App Cas 194 moreover even if the specific objections prevail yet should the evidence be admissible for any other purpose a new trial will not be granted *Irish Society v Derry* 12 C & F 641 *Milne v Leisler* 7 H & N 786 See also as to objections *Burr Jones Ev* §§ 896—899

(3) See Annual Practice 1905 Not s and cases cited under Order XXXIX Rules 1—8 *Taylor Ev* §§ 1881—1882 B Best Ev § 82 *Chitty's Archbold* 730 *Roscoe N P Ev* 273 274 *Steph Dig Art* 143 It is open to a defeated party (1) to appeal in all cases (2) to move for a new trial or to set aside the verdict finding or judgment *Powell Ev* 9th Ed 703 704 See also as to the granting of a new trial *Hughes v Hughes* 15 M & W 701 704 [will not be granted if with the evidence rejected a verdict for the party offering it would clearly be against the weight of evidence or if without the evidence received there be enough to warrant the verdict] *Doe v Tyler* 6 Bing 561 [see *Wright v Tatlam* 7 A & E 330] *Crease v Barrett* 1 C M &

R 919 *Moore v Tuckwell* 1 C B 607, *Solomon v Bilton* 8 Q B D 176 the last case observed upon in *Metropolitan R Co v Wright* L R 11 App Cas 152 and *Webster v Friedberg* 17 Q B D 736 *Phillips v Martin* L R 15 App Cas 193 *R v Grant* 5 B & Ad 1081 [it is only where the evidence in question is deemed by the Court to have been admissible for the purpose for which it was tendered at the trial that its rejection forms a sufficient ground for a new trial] Lord Eldon said in *Walker v Frohisher* 6 Ves 72 that a Judge must not take it upon himself to say whether evidence improperly admitted had or had not an effect upon his mind

(4) *Steph Dig Art* 143 as to the practice in the Crown Cases reserved under 11 and 12 V c c 78 and prior to that Statute see *R Navroji Dadabhai* 9 Bom H C R 374—390 392—398 (1872) and *R v Gibson* L R 18 Q B D 537 s c 16 *Cox Cr Ca* 181 *R Crooks* 8 L T 188 *R v Clark* L R 1 C C R 54 *R v Moore* 8 T L R 78 *Roscoe Cr Ev* 12th Ed 207 *R v Brown* 224 Q B D 357 For appeal on points of law from Courts of Summary Jurisdiction see 20 and 21 Vict c 40 and 42 and 43 Vict c 49

Jury All criminal trials, however, before a Court of Session are either by jury or with the aid of assessors (1) Criminal cases in the Court of Sessions are tried by jury in those districts in which the Local Government has under the provisions of section 269 of the Code of Criminal Procedure directed that the trial of all offences, or of any particular class of offences, shall be by jury (2)

Section 167 app' but one of the many legislation respecting cannot be wholly excluded, they shall at least be prevented from materially impeding the course of judicial proceedings, and the attainment of that substantial justice which should be their only aim (4) Another application of the same principle is that contained in section 99 of the Code of Civil Procedure which enacts that no decree shall be reversed or substantially varied, nor shall any case be remanded in appeal on account of any misjoinder of parties or causes of action or of any error, defect or irregularity in any proceedings in the suit not affecting the merits of the case, or the jurisdiction of the Court Similar Criminal Procedure But de of trial is not a mere

No new trial for improper admission or rejection of evidence

167. The improper admission or rejection of evidence (6) shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient (7) evidence to justify the decision, or that if the rejected evidence had been received, it ought not to have varied the decision

Principle—See Introduction ante

s 3 (Evidence)

s 3 (Court)

Steph Dg Art 143 Taylor Ev §§ 1881—1882 B Best Ev § 82 Chitty's Archbold 730 Roscoe N P Ev 273 274 Powell Ev 9th Ed 703 704 Markby Ev, 116 117, Roscoe Cr Ev 13th Ed 199 204, Steph Introd 73 O'Keefe's Civ Pr Code loc cit Henderson's Cr Pr Code loc cit Field Ev 6th Ed 483 490 Annual Practice 1906 Notes and cases therein given and cited under XXXIX Rules 1—8

COMMENTARY.

The principle of this section (8) is in accordance with that upon which the Courts in England now act, and the section itself is a re enactment of the provisions of section 57 of the earlier Act II of 1855 The grounds upon which it is based, as also the provisions of the English law with which it is in accordance,

(1) Cr Pr Code s 268

(2) See ib s 269

(3) v post p 1011

(4) See *Goshan Tola v Rickmune* Bullab 13 Moo I A 77 83 s c 12 W R P C 32 [The Judicial Committee will not determine an appeal against a decree upon the mere fact that some evidence has been improperly admitted by the Court below It is the rule of this tribunal to do substantial justice between the parties and to see if there is sufficient evidence on the whole record to justify the conclusion to which the Court below

arrived] and as to substantial justice see also *Baboo Bodhnaran v Omrao Singh* 13 Moo I A 519 s c 15 W R P C 1 (1870) *Dal Singh v R* 44 I A 137 (1917) *Vaithiyatha Pillai v R* P C 36 M 501 (1913) *Clifford v R* P C 19 C L J 107 (1914)

(5) *Subrahman Ayyar v R* 25 M 61 (1901)

(6) Opinion of an assessor is not R v Tirumal 24 M 541 (1901)

(7) See ib at p 91

(8) Applied recently in *Kumbha v Killa* 25 Cr L J 1275 (1924)

Improper admission or rejection of evidence

have been already referred to in the Introduction to this Chapter, to which reference should well as civil cases, whether the principle enacted by it be subsequent to the passing of this Act. In so far, however, as every case must depend upon its own peculiar facts, and can therefore generally afford no precedent to be followed in another, it would serve no practical purpose to analyse in detail the cases decided under this section or section 57, Act II of 1855 but reference

Council observed as follows — 'It seems to their Lordships that giving full weight to all these objections there is still sufficient and more than sufficient proof in the unsuspected evidence given in the cause to support the decrees against which the appeal is brought. Their Lordships of course do not give to a decree founded upon evidence which has been so impeached the same weight which they would give to the finding of an Indian Court upon evidence against which no such objection can be alleged. But they are not in the position of a Court of Law in this country—before which on a motion for a new trial it is shown that evidence improper to be admitted has been admitted before the jury. The Court in that case are not Judges of fact and are unable to say what weight the jury may have given to the evidence that ought not to have been admitted. But it is the duty of their Lordships who are Judges of the

fact, has been in the admission of evidence. The improper reception of evidence is always to be deprecated if only from its tendency to provoke an appeal. (4)

(1) *R v Hurribole Chunder* 1 C 207 (1876) *R v Navroji Dadabhai* 9 Bom H C R 374 (1872) *R v Pitambar Jina* 2 B 61 65 (1877) *R v Nand Ram* 9 A 609 (1887) *Subrahman Ayyar v R* 25 M 61 75 (1901) *R v Rama Sattu* 4 Bom. L R 434 (1902) *R v Alloomiya* 28 B 129 152 (1902). The words of this section are identical with those of s 57 of Act II of 1855 but the latter Act contained no express words making it applicable to all Courts whatever [see section (1) a tel] and it might have been doubted whether all its provisions were intended to be enforced in all proceedings criminal as well as civil. *R v Navroji Dadabhai* 9 Bom H C R 374 (1872) it was however held to be applicable in criminal case in *R v Ramsuami Mudalar* 6 Bom H C R Cr Ca 47 (1869). As to the duty of the Hgh Court in reserved or certified cases see *Emp v Panchu Das* 47 C 671 (F B) s c 24 C W N 501.

(2) *R v Nujam Ali* 6 W R Cr 41 (1866) *Goshan Tota v Ruckm nee Bullub* 13 Moo I A. 77 s c 12 W R P C 32 (1869) *Maharajah Jagadendra v Bhabatar ni Das* 5 B L R App 54 (1870) s c 14 W R 19 *Mohur Singh v Ghuriba* 6 B L R 495 498 499 s c 15 W R P C 8 (1870) *Mahomed Bux v Abdoel Kureem* 20 W R 458 (1870)

Woo ia Kant v Gunga Narain 20 W R 384 (1873) *R v Amrita Gobinda* 10 Bom H C R 497 502 (1873) *R v Purbludas* 11 Bom H C R 90 97 (1874) *R v Ilubboo Mahton* 8 C 739 (1882) s c 12 C L R 233 *R v Pindharinath* 6 B 3 (1881) *R v Nand Ram* 9 A 609 610 (1887) *R v Mara* 10 A 207 223 (1888) and see also *R v Hurribole Chunder* 1 C 207 (1876) *R v Navroji Dadabhai* 9 Bom H C R 374 (1872) *R v Pitambar Jina* 2 B 61 65 (1877) *R v Ramsuami Mudalar* 5 Bom H C R Cr Ca 47 (1869) cited in preceding note and *Womesh Chunder v Chundya Churn* 7 C 293 (1881) *R v O'Hara* 17 C 642 (1890) *Wafadar Khan v R* 21 C 955 (1894) *R v Ramchandra Govind* 19 B 749 761 (1895) cited post *R v Alloomiya Husan* 28 B 129 152 (1902) *R v Rama Sattu* 4 Bom L R 434 (1902) *Kuruba v Kuli* 25 Cr L J 1275 (1924)

(3) *Mohur Singh v Ghuriba* 6 B L R 495 498 499 s c. 15 W R P C 8 (1870)

(4) See also *Raja Bansi Prasad v Ganga samy Mudaly* 6 Moo I A 232 (1855) *Lala Banhridar v Government of Bengal* 9 B L R 371 14 Moo I A 86 16 W R P C 11 *Goshan Tota v Ruckm nee Bullub* 13 Moo I A 77 s c.,

Evidence cannot be said to have been improperly admitted merely because it was admitted at an improper stage of the case, unless indeed the other party has been prejudiced by this course (1)

Civil
Cases

The words "*reversal of any decision*" indicate the applicability of the section to appeals, inasmuch as Courts of Appeal have power to reverse the decisions in respect of which appeals are preferred (2). The Code of Civil Procedure does not provide for a new trial in civil cases. But O XLVII(3) of this Code provides for a review of judgment, and O XLVII, r 8,(4) enacts that when an application for a review of judgment is granted, the Court may at once *re hear* the case or make such

fit. By such *re hearing* is meant,

re arguing and *re consideration* of

evidence, the discovery of which

the review. A review is

of granting a review is a

Judge, as distinguished from an appeal which is a hearing before another tribunal (5). Strict proof is required in review under O XLVII r 4 of the Civil Procedure Code, and it has been held by the Calcutta High Court that

'strict' here refers to the formality of the evidence in accordance with the provisions of this Act and not to its sufficiency, since the question of sufficiency of evidence is for the Court admitting the review (6). In the undermentioned

case (7) Farran, C J, said, with reference to the powers of revision: "I am myself strongly inclined to the view that when Courts in the exercise of their judicial functions decide that a document is inadmissible in evidence, having exercised their judgment upon the question of its admissibility or inadmissibility, we have no jurisdiction to interfere in the matter under section 622 (8). What the Courts do in such a case, assuming the document tendered to be erroneously rejected, is to make a mistake upon a question of law, and it does not appear to me to be material whether the mistake in law is made during the hearing of

the case. A mistake in law is not, I think, an illegality of section 622 of the Code." A

Small Cause Courts. Under the provisions of sections 38 and 39 of the latter Act, a suit decided by the Small Cause Court, and in which the amount or value of the subject matter exceeds Rs 1,000 can in certain cases be *re heard* by the High Court. Under the Provincial Small Cause Courts Act, IX of 1887, a review of judgment can be applied for, but not a new trial. As to *re trials* in criminal cases *vide post*.

Appeals in civil cases are of three kinds: (a) appeals, from original decrees or first or "regular" appeals, as to which see O XLI of the Civil Procedure Code, (b) appeals from appellate decrees or second or "special" appeals dealt with by O XLII, sections 100—103, 107—108 of the same Code (9) and

12 W R P C 32 (1869) [The Judicial Committee will not determine an appeal against a decree upon the mere fact that some evidence has been improperly admitted by the Court below. It is the rule of the tribunal to do substantial justice between the parties and to see if there is sufficient evidence on the whole record to justify the conclusion to which the Court below arrived.]

(1) *Doe v. Bover* 16 C B 805, Taylor Ex. § 387 *Gos an Tata v. Ruckminee Bullub*, 13 Moo I A, 77, 83 (1869)

(2) Field Ev 6th Ed, 487

(3) See Woodroffe's Civil Procedure

Code 2nd Ed

(4) *Id*

(5) See as to Review Civ Pr Cod O XLVII Woodroffe and Amir Ali 2nd Ed 1355—1379 and the cases cited in Civ Pr Code (the author's edition) in the notes to this Order and in Field Ev 6th Ed 487 488

(6) *Ahid Khondkar v. Mohendra Lal De* 47 C 831 (1915) per Woodroffe J

(7) *Madhavray v. Gulabhai* 23 B.L. 17* (1898)

(8) New section 115 p 458

(9) The term "special appeal" is not used in the present Code which speaks of second appeals and appeals from

(c) appeals to the Privy Council regulated by O XLV of the Code. Appeals are also permitted from certain classes of orders (O XLIII). In addition to the power of appeal conferred on suitors, the Courts themselves are possessed of certain discretionary powers by way of 'revision' (Sections 113—115) and 'review' (O XLVII) at their own instance or that of suitors (1).

In the words of their Lordships of the Privy Council in the case of *Mohur Sing v Ghuriba* (2), cited *ante* it is indicated very clearly what is the duty of a Court sitting in first appeal, or under the old Code, 'regular appeal' and therefore competent to deal with both facts and law when evidence has been improperly admitted by the Court of first instance. *It should throw aside the evidence which ought not to have been admitted, and then consider whether there still remains sufficient evidence to support the decree.* Where the evidence which is to be thrown aside is wholly irrelevant, the case is sufficiently clear. The decree can be supported upon relevant evidence only, and if after all that is irrelevant has been thrown aside there does not remain enough that is relevant to support it the decision must be reversed. The party who is thus defeated may say that, if he had known that the evidence given would have been insufficient for the purpose he could have produced other evidence that would have been sufficient. The answer to this objection is to be found in the following observations of their Lordships of the Privy Council in the case of (3) *Maharaja Koochar v Kund Lal Singh* (4). "The learned Counsel for the appellant have not strongly contended that the proper order to be made on this appeal is one remanding the case for re trial. They have rather insisted that on the materials now before their Lordships, he is entitled to have the decree made in his favour by the Principal Sudder Ameen affirmed. Their Lordships however desire to observe that in their judgment the majority of the Sudder Court was right in
 appellant had at all events
 of what he had to prove
 these issues if he had
 any to give. He advisedly declined to do so and called for the judgment of

secondary evidence of the contents of a document has been admitted without
 the rule in England is
 the time that it was
 with this it has been

appellate decree. See s 372 of the old and s 99 p 394 of the present Code. And as to the origin and history of second appeals see Field's Bengal Regulations Introduction 178—181.

(1) For above references see Author's edition of the Civil Procedure Code (2nd Ed) O XLI O XLII Ss 100—103 Ss 107—108 O XLV S 113 O XLIII. As to the Civil Appellate Courts other than High Courts in Bengal (Act XII of 1887 ss 20 21) Madras (Act III of 1873 s 13) and Bombay (Act XIV of 1869 ss 8 16 17 26) Presidencies see the Acts and sections noted in the preceding brackets.

(2) 6 B L R 495 498 499 (1870) ante p 969.

3) Field Ev 6th Ed 484 485.

(4) 8 Moo I A 199 219 s c
 1 W R P C 51.

5) See also *R v Madi b Chandra* 21 W R Cr 13 (184) where the High Court declines on appeal to receive evidence which as a matter of fact the trial below when the prisoner deliberately elected not to give evidence in reply to the case made against him and as to the admission of additional evidence in the Appellate Court see *C v Pr Code O XLI v 27* 2nd Ed 1307. *Ra Das v The Official Liquidator* 9 A 366 (1881) *Urgan v Urgan* 4 A 106 (1887) *Upendra Mohun v Gopal Chandra* 21 C 484 (1894) ante post.

held more than once by the Calcutta High Court that it is not competent to an Appellate Court sitting in regular appeal to reject the copy of a document to the admission of which by the lower Court no objection was made by any of the parties although the original was not produced or its non production not accounted for (1)

If the Appellate Court is of opinion that the rejected evidence if received ought to have varied the decision it does not follow that such Court should in every case proceed at once to reverse the decision of the lower Court. It is competent for the superior Court and in most cases it would be proper to proceed in the manner provided for by O. XLI r 27 of the Civil Procedure Code relating to the production of additional evidence in the Appellate Court (2). The Privy Council have held that an Appellate Court should not allow additional evidence which impeaches testimony without calling the impeached witness and giving him an opportunity to contradict it (3). An Appellate Court should only require additional evidence if after examining the evidence on record it perceives some defect in it (4). Where the prosecution negligently fails to produce evidence additional evidence cannot be considered necessary within the meaning of the Criminal Procedure Code section 428 and there should be an acquittal (5).

Criminal Cases

The wrongful reception or rejection of evidence is an error of law and as such may be made the ground of second appeal (6). But it has been said (7) that there is great difficulty in applying the provisions of this section to the generality of cases which come before the High Court on second appeal. For on second appeal the Court has no power to deal with the sufficiency of the evidence; it has only a right to entertain questions of law. And its duty being thus confined it seems that when evidence has been wrongly admitted by the Court below the High Court has generally speaking no right to decide whether the remaining evidence in the case other than what has been improperly admitted is sufficient to warrant the finding of the Court below. It seems that the High Court cannot decide that question without examining in detail that evidence. The only cases which the High Court can decide are those where independently of the evidence improperly admitted the lower Court has apparently arrived at its conclusion upon other grounds. Where this appears pretty clearly from the judgment a remand is unnecessary because then the error committed by the lower Court has not affected the decision upon the merits (Civil Procedure Code section 99) (8). Where on remand there is evidence to be considered, the decision of the Court of second appeal is final even if on further consideration it appears unsatisfactory (9).

(1) *Feld* 17 6th Ed 485 486
ante a 5 and cases there cited

(2) *Woodroffes* C. I. Procedure Code
2nd Ed and see *Feld* Ev 6th Ed 485
486 *Da Bala Sakla a Arshna* 38
B 665 (1914)

(3) *Jagra Koer v. K. ar Durga Pra*
sad 41 I. A. 6 (1913) cf *Jagrani K*
uar Durga Prasad P. C. 36 A. 93
(1914)

(4) *Garde Reacl Sp nng Co v*
Secre a y of State 42 C. 675 (1915)
Kr sl ama Cla ar v Naras mha Cla ar
31 M 114 (1908)

(5) *Jerem al v Vas* 36 M 457
(1911)

(6) *Mol Clandra Roy v Kal tara*

Deba (1907) 11 C. W. N. 1028 and see
Tra loh/3a Moh n Das v Kal Prasanna
Glase (1907) 11 C. W. N. 380 (d re
gard n e dence w thout g ving suffic ent
reason)

(7) *Per Garth C. J. in Womesh Chun*
ler Chundy Ch rn 7 C. 293 295 296
(1881) [*do* b t ng *Watson v Gopee Soon*
d ree 24 W. R. 1892] referred to n
Palakdjar Roy v Mannors 23 C. 179
185 (1895) *Ma ladad Khan v Abdul*
Satter 39 A. 426 (1916)

(8) *Woodroffes* Civil Procedure Code.
2nd Ed

(9) *East Ind a Ra luay Co v Changa*
Kla 42 C. 888 (1915)

The Court may, upon the hearing of a second appeal remand the case for reconsideration and a fresh decision by the lower Court (1)

The rule of the Judicial Committee of the Privy Council is never to disturb the concurrent decisions of the Courts below upon a mere question of facts unless it very clearly appears that there has been some miscarriage of justice or that the conclusion drawn by the Courts below is plainly erroneous (2) Where evidence, such as hearsay is improperly admitted, the question for the Judicial Committee is whether, rejecting that evidence, enough remains to support the finding (3)

This rule, however, does not apply to concurrent findings on the question of an ancient custom for this is a mixed question of fact and law (4) or to a case of no evidence, for this is a question of law (5)

By the constitution of the High Courts in India the Judges for the purpose of the trial of an action sit as a jury as well as Judges and the same weight is to be given to a decision of a jury in England in the Privy Council than upon a question of the facts from the probabilities attached to certain circumstances in the case that the Court below was wrong in the conclusion drawn from such evidence (6) And in the undermentioned case (7) the Council observed as follows —“This Board never heard of an appeal being instituted on the ground that witnesses had been discredited, the Court below were aware of the character of those witnesses, and besides the knowledge of their character, had the advantage of seeing their demeanour and behaviour, of which we, on written evidence have no power of judging We feel it our duty, therefore, to decide this case on the general principle that no appeal will lie from the judgment of a Court below on the ground that the Court discredited the witnesses produced to them by either party”

As already said, the Privy Council has never interfered with the order of the High Court in the exercise of its powers of revision may exercise any of the powers conferred on a Court of Appeal including the power of ordering a new trial (8, section 439) With reference to appeals in criminal cases see the Criminal Procedure Code sections 404 418, 430 407 408 410—414, 417 427, 419 431 and as to reference and revision Chapter XXXII of the same Code Section 437 contains the rule that no appeal shall lie from any order made under section 167 of the Criminal Procedure Code or alterable unless the order has occasioned a miscarriage of justice

(1) *Nasab Khan v Rughonath Doss* 20 W R 474 (1873) *Raykishore Nag v Mithoooodu Roy* 20 W R 385 (1873) see further as to second appeals cases cited in Field Ev 6th Ed 488—490 and Civil Procedure Code notes to ss 100—103 pp 397—422

(2) *Goslan Tota v Puck mee Bullub* 13 Moo I A 77 (1869) where also the rule of the P C as to the improper admission of evidence is laid down See *Ravi Veeraragavalu Bomma Detara Venkata* 41 I A 258 (1914)

(3) *Molier Singi v Gurusba* 6 B L R

P C 495 (18 0)

(4) *Palanappa Cletty v Sreenath Deasika or Pandara Sannadhi* P C 40 M 709 (1917)

(5) *Hare dra Lal Choudhuri v Haridas Deb* P C 41 C 972 (1914) 41 I A 110 see *Pal v Robson* P C 42 C 46 (1915)

(6) *Misadec Malo tied v Mahomed Khan* 6 Moo I A 27 (1854)

(7) *Sartacana v Ardecoll Knapp* 269

(8) As to trials by Jury see Woodroffe's Criminal Procedure in India

Improper advice given by the Judge to the jury upon a question of fact, or the omission of the Judge to give that advice which a Judge, in the exercise of a sound judicial discretion, ought to give the jury upon questions of fact amounts to such an error in law in summing up as to justify the High Court, on appeal or revision, in setting aside a verdict of guilty. The power of setting aside convictions and ordering new trials for any error or defect in the summing up will be exercised by the High Court only when the Court is satisfied that the accused person has been prejudiced by the error or defect, or that a failure of justice has been occasioned thereby (1).

The nature and extent of the powers of the High Court under section 26 of the Letters Patent has proved to be a question of considerable difficulty. It has been held that section 167 of the Criminal Procedure Code (1873) does not take away the power of the High Court (2), and the admissibility of evidence reserved

101 of the High Court Criminal Procedure Act (X of 1875) has power to review the whole case and determine whether the admission of the rejected evidence would have affected the result of the trial, and a conviction should not be reversed unless the admission of the evidence was the result of the trial, and that the evidence was improperly admitted (3). Where, making the whole trial initially bad, and the objection to the conviction was not limited to improper reception of evidence it was held by the Privy Council that the course pursued which was illegal could not be amended by the High Court arranging afterwards what might or might not have been properly submitted to the jury. Upon the assumption that the trial was illegally conducted it could not be suggested that there was enough left upon the indictment upon which the conviction might have been supported if the accused had been properly tried the mischief had been done. The effect of the misjoinder of charges, which was not curable under section 537, could not be averted by dissecting the verdict afterwards and appropriating the finding of guilty only to such parts of the charge as ought to have been submitted to the jury. To do so would be to leave to the Court the functions of the jury, and the accused would never have really been tried at all upon the charge arranged afterwards by the Court (4).

Though there is a prerogative right in the Crown to entertain an appeal in criminal cases, there is no absolute right of appeal to the Privy Council inherent in the person convicted and the Council will only entertain such an appeal upon the certificate of the High Court or in very exceptional cases (5).

(1) *In re Elahce Buksh* 5 W R Cr 80 (1866)

(2) *R v Navroji Dadabhai* 9 Bom H C R 358 (1872) *R v Hurribole Chunder* 1 C 207 (1876), *R v Pitarber Jina* 2 B 61, 65 (1877)

(3) *R v Pitarber Jina* 2 B 61 65 (1877) following *R v Navroji* 9 Bom H C R 35 (1872) *R v Hurribole Chunder* 1 C 207 (1876) s c 25 W R Cr 36 [Apart from s 167 of the Evidence Act the Court has power in a case under cl 26 of the Letters Patent to review the whole case on the merits and affirm or quash the conviction] *R v O'Hara* 17 C 642 (1890). In these cases it was argued for the Crown that for the Full Court to go into the merits of the case would be practically the same as sitting as Judge and Jury but it was held

that the Court had power to deal with the case on the merits as it appeared from the notes of the trial Judge and in the last case quashed and in the others up held the conviction. In the later case of *R v McGuire* 4 C W N 433 (1900) it was held that this section applied to cases heard by the High Court when exercising its powers under clause 26 of the Letters Patent. See also *Subramana Ayyar v R* 25 M 61 77 (1901), *Hrishikesh Mandal v Abadhaut Mandal* 44 C 703 (1917)

(4) *Subramana Ayyar v R* 25 M 61 96 97 (1901), followed in *Asgar Ali Biswas v R* 40 C 846 (1913)

(5) *In re Jeykissen Mookerjee* 1 W R P C 13, s c 9 Moo I A 168 *R v Eduljee Byramjee* 3 Moo I A 463 (1846) and see *Philip Einouf v Atter-*

grave injustice has been done '(1) The Privy Council has said that the prerogative right will not be exercised merely because the Privy Council would have taken a different view of the evidence, but that an error in procedure may be of a character as grave as to warrant interference, even where the accused person appears to be guilty (2)

ney General for Jersey L R 8 App Cas 504 *R v Bertrand* L R 1 P C 520 See Woodroffe's Criminal Procedure in India for later cases

(1) *Ex parte Carcow* 1897 App Cas 719 721 *Re Dillett* 12 App Cas 459 467 (1887) cited *arguendo* in *Bal Gangadhar v R* 22 B 528 (1897) in which leave to appeal was refused In the case of *Subrahmanya Ayyar* R 4 C W N 225 (1900) 25 M 61 (1901) leave to

appeal was granted and the contention set aside Act X of 1897 repeals so much of the Indian Evidence Act as relates to Act I of 1868 *Vaithnatha Pillai v R* P C 46 M 501 (1913) *Johnson v R* A C 81 (1904)

(2) *Dal Singh* R 44 I A 137 107 (1914) See on this question of appeal to the Privy Council Woodroffe's Criminal Procedure in India

SCHEDULE.

ENACTMENTS REPEALED.

[See section 2]

Number and year	Title	Extent of repeal
Stat 26 Geo III cap 57	For the further regulation of the trial of persons accused of certain offences committed in the East Indies, for repealing so much of an Act, made in the twenty fourth year of the reign of his present Majesty (intituled 'an Act for the better regulation and management of the affairs of the East India Company, and of the British possession in India, and for establishing a Court of Judicature for the more speedy and effectual trial of persons accused of offences committed in the East Indies') as requires the servants of the East India Company to deliver inventories of their estates and effects, for rendering the laws more effectual against persons unlawfully resorting to the East Indies and for the more easy proof, in certain cases of deeds and writings executed in Great Britain or India	Section 38 so far as it relates to Courts of Justice in the East Indies
Stat 14 and 15 Viet cap 99	To amend the Law of Evidence	Section 11 and so much of section 19 as relates to British India
Act XV of 1852	To amend the Law of Evidence	So much as has not been heretofore repealed.
Act XIX of 1853	To amend the Law of Evidence in the Civil Courts of the East India Company in the Bengal Presidency	Section 19
Act II of 1855 . . .	For the further improvement of the Law of Evidence	So much as has not been heretofore repealed
Act XXV of 1861 . . .	For simplifying the procedure of the Courts of Criminal Judicature not established by Royal Charter	Section 237
Act I of 1868 (1) . . .	<i>The General Clauses Act, 1868</i> . . .	Sections 7 and 8

(1) Act X of 1877 repeals so much of the Indian Evidence Act as relates to Act I of 1868

APPENDICES.

SCHEDULE.

ENACTMENTS REPEALED.

[See section 2]

Number and year	Title	Extent of repeal
Stat 26 Geo III cap 57.	For the further regulation of the trial of persons accused of certain offences committed in the East Indies, for repealing so much of an Act, made in the twenty fourth year of the reign of his present Majesty (intituled 'an Act for the better regulation and management of the affairs of the East India Company, and of the British possession in India, and for establishing a Court of Judicature for the more speedy and effectual trial of persons accused of offences committed in the East Indies') as requires the servants of the East India Company to deliver inventories of their estates and effects, for rendering the laws more effectual against persons unlawfully resorting to the East Indies and for the more easy proof, in certain cases, of deeds and writings executed in Great Britain or India	Section 38 so far as it relates to Courts of Justice in the East Indies
Stat 14 and 15 Vict, cap 99	To amend the Law of Evidence	Section 11 and so much of section 19 as relates to British India
Act XV of 1832	To amend the Law of Evidence	So much as has not been heretofore repealed.
Act XIX of 1833	To amend the Law of Evidence in the Civil Courts of the East India Company in the Bengal Presidency	Section 19
Act II of 1835	For the further improvement of the Law of Evidence	So much as has not been heretofore repealed.
Act XXV of 1861	For simplifying the procedure of the Courts of Criminal Judicature not established by Royal Charter	Section 237
Act I of 1868 (1)	<i>The General Clauses Act, 1868</i>	Sections 7 and 8.

(1) Act V of 1897 repeals so much of the Indian Evidence Act as relates to Act I of 1868

APPENDICES.

**1A —PLACES TO WHICH THE ACT HAS BEEN SPECIFICALLY
APPLIED—(contd.)**

Names of places	Notification or other authority	Where published
7 Baroda Cantonment (Baroda State)	No 162 I.B., dated the 28th January, 1913	British Enactments in force in Native States 3rd Ed., vol. 1, p. 79
8 Territories included in the Political Agency of Kathiawar	No 8944, dated the 17th December, 1912	British Enactments in force in Native States, 3rd Ed., vol. 14, p. 178.
9 Deesa Cantonment	No 5237, dated the 30th July, 1906	British Enactments in force in Native States, 3rd Ed., vol. 14, p. 335
10 Civil Station of Kolhapur	No 4803 I., dated the 9th November, 1887	British Enactments in force in Native States, 3rd Ed., vol. 14, p. 339
11 Berar	No 3510 I.B., dated the 3rd November, 1913	British Enactments in force in Berar, p. 4
12 Lands occupied by the Rajputana Malwa Railway in the Nabha and Patiala States	No 517 I.B., dated the 17th March, 1913.	British Enactments in force in Native States, 3rd Ed., vol. v, p. 18
13 Lands occupied by the Jodhpur Bikaner Railway in the Patiala State	Ditto	Ditto
14 Lands occupied by the Kalka Simla Railway in the Patiala, Bahawalpur and Keonjhar States	Ditto	Ditto
15 Lands occupied by the Ludhiana Dhuri-Jakkhal Railway in the Malerkotla, Patiala, Nabha and Jind States	Ditto	Ditto
16 Lands occupied by the Rajpura Bhatinda Railway in the Patiala and Nabha States.	Ditto	Ditto
17 Lands occupied by the Southern Punjab Railway in the Patiala and Jind States	Ditto	Ditto
18 Lands occupied by the Jullundur Doab Railway in the Kapurthala State	No 1439D, dated the 31st March, 1916	British Enactments in force in Native States, 3rd Ed., Supplement to vol. v, p. 3
19 Lands occupied by the Phagwara Rahon Railway in the Kapurthala State	Ditto	Ditto
20 Lands occupied by the Jind Pampat Railway in the Jind State	No 833 I.B., dated the 16th May, 1916	British Enactments in force in Native States 3rd Ed., Supplement to vol. v p. 4
21 Lands occupied by the Bombay Baroda and Central India Railway in the Bajana, Lakhtar, Wadhwan, Wadhwan District Thana and Patli States	No 781 I.B., dated the 9th April 1913	British Enactments in force in Native States, 3rd F.L., vol. v, p. 53
22 Lands occupied by the Bhavnagar Railway in the Bhojka Thana, Songadh Thana, Palitana and Jasdan States	Ditto	Ditto
23 Lands occupied by the Dhrangadhra Railway in the Dhrangadhra and Wadhwan States	Ditto	Ditto

APPENDICES.

APPENDIX A.

1A.—PLACES TO WHICH THE ACT HAS BEEN SPECIFICALLY APPLIED

Names of places.	Notification or other authority.	Where published
1. Civil and Military Station of Bangalore.	No 318-D, dated the 16th January, 1917	British Enactments in force in Native States, 3rd Ed., Supplement to Vol. I, p 4
2. Administered Areas in the Hyderabad State, namely, the Cantonments of Secunderabad and Aurangabad, the Hyderabad Residency Bazars, and the lands in the Hyderabad State occupied by His Exalted Highness the Nizam's Guaranteed State Railway system, by the South East main line of the Great Indian Peninsula Railway, by the broad gauge North West line of the Madras and Southern Maratha Railway, and by the Secunderabad Gadwal section of the Secunderabad Gadag Railway	No. 582-1 B, dated the 22nd March, 1913, as amended by No 399 D, dated the 18th January, 1917	British Enactments in force in Native States, 3rd Ed., vol. I, p 227
3. Administered Areas in Central India, namely, the Cantonments of Mhow, Nimnich, Nowgong, Sehore, Agar and Gun, the Indore Residency Bazars, the Gwalior Residency Area, the Sutna Agency and the Civil Lines of Nowgong	No 2365 LB, dated the 14th November, 1912	British Enactments in force in Native States, 3rd Ed., vol. I, p 110
4. Mampur (For purposes of cases in which British subjects are parties (except in cases in which no British subject other than a native of the Naga Hills, Chin Hills, or Lushai Hills districts is concerned) and in cases arising within the limits of the British Reserve)	No 535 LB, dated the 12th March, 1909	British Enactments in force in Native States, 3rd Ed., vol. IV, p 11
5. Jammu and Kashmir (Territories in which the Governor General in Council has jurisdiction)	No 260 I B, dated the 10th February, 1913	British Enactments in force in Native States, 3rd Ed., vol. I, p 372
6. Abu District	No 2221 I B, dated the 1st October, 1917	British Enactments in force in Native States, 3rd Ed., Supplement to vol. I, p 49

**1A—PLACES TO WHICH THE ACT HAS BEEN SPECIFICALLY
APPLIED—(contd)**

Names of places	Notification or other authority	Where published
7 Baroda Cantonment (Baroda State)	No 162 I B, dated the 28th January, 1913	British Enactments in force in Native States, 3rd Ed., vol. 1, p. 79
8 Territories included in the Political Agency of Kathiawar	No 8944, dated the 17th December, 1912	British Enactments in force in Native States, 3rd Ed., vol. iv, p. 178
9 Deesa Cantonment	No 5287, dated the 30th July, 1906	British Enactments in force in Native States, 3rd Ed., vol. iv, p. 335
10 Civil Station of Kolhapur	No 4803 I, dated the 9th November, 1887	British Enactments in force in Native States, 3rd Ed., vol. iv, p. 389
11 Berar	No 3510 I B, dated the 3rd November, 1913.	British Enactments in force in Berar, p. 4
12 Lands occupied by the Rajputana-Milwa Railway in the Nabha and Patiala States	No 517 I B, dated the 17th March, 1913.	British Enactments in force in Native States, 3rd Ed., vol. v, p. 18.
13 Lands occupied by the Jodhpur-Bikaner Railway in the Patiala State	Ditto	Ditto
14 Lands occupied by the Kalika-Simla Railway in the Patiala, Baghat and Keonthul States	Ditto	Ditto
15 Lands occupied by the Ludhiana-Dhuri-Jakhil Railway in the Malerkotla, Patiala, Nabha and Jind States.	Ditto	Ditto
16 Lands occupied by the Rajpura-Bhatinda Railway in the Patiala and Nabha States.	Ditto	Ditto
17 Lands occupied by the Southern Punjab Railway in the Patiala, and Jind States	Ditto	Ditto.
18 Lands occupied by the Julundur-Doab Railway in the Kapurthala State	No 1439D, dated the 31st March, 1916	British Enactments in force in Native States, 3rd Ed., Supplement to vol v, p. 3
19 Lands occupied by the Phagwara-Rahon Railway in the Kapurthala State	Ditto	Ditto
20 Lands occupied by the Jind-Punipit Railway in the Jind State	No 833 I B, dated the 16th May, 1916	British Enactments in force in Native States 3rd Ed., Supplement to vol v, p. 4
21 Lands occupied by the Bombay Baroda and Central India Railway in the Bajana, Lakhtar, Wadhwan, Wadhwan District Thana and Patli States	No 781 I B, dated the 9th April 1913	British Enactments in force in Native States, 3rd Ed., vol v, p. 53
22 Lands occupied by the Bhavnagar Railway in the Bhoilka Thana, Songadh Thana, Palitani and Jasdan States	Ditto	Ditto
23 Lands occupied by the Dhrangadhra Railway in the Dhrangadhra and Wadhwan States	Ditto	Ditto

IA.—PLACES TO WHICH THE ACT HAS BEEN SPECIFICALLY
APPLIED—(contd.)

Names of places.	Notification or other authority	Where published
24. Lands occupied by the Gondal Porbandar Railway in the Vithalgarh, Gondal and Nawanagar States.	No. 781 I B., dated the 9th April, 1913	British Enactments in force in Native States, 3rd Ed., vol. v, p. 58
25. Lands occupied by the Jaipur Railway in the Dhrol, Jalia, Nawanagar, Pal and Rajkot States	Ditto	Ditto
26. Lands occupied by the Jaisalmer Rajkot Railway in the Gadhka, Gondal, Kotdi, Sangani, Kothari, Lodhika, Rajkot, Shahpur, Virpur, Jetpur and Junagarh States	Ditto	Ditto
27. Lands occupied by the Junagarh Railway in the Bantva, Manavadar, Sardar garh and Jetpur Bilhha States	Ditto	Ditto
28. Lands occupied by the Khajuraho Amreli Chalisla Railway in the Jetpur Lunu State	Ditto	Ditto
29. Lands occupied by the Morvi Railway in the Dhrol, Gavri dad, Kothari, Morvi, Rajkot, Wankaner, Dhrangidra, Lakhtar, Nuh, Sayla and Wadhwan States	Ditto	Ditto
30. Lands occupied by the Godhra Ratlam Nagda Railway in the Jhabua, Indore, Sailana, Ratlam and Gwalior States	No. 262 I B., dated the 10th February, 1913	British Enactments in force in Native States, 3rd Ed., vol. v, p. 88
31. Lands occupied by the Nagda Ujjain Railway in the Gwalior State	Ditto	Ditto
32. Lands occupied by the Nagda Muttia Railway in the Gwalior Dewas (Senior), Dewas (Junior), Indore, Jhalawar, Kotah, Bundi, Tonk, Jaipur, Karauli and Bharatpur States	Ditto	Ditto
33. Lands occupied by the Rajputana Malwa Railway in the Alwar, Jaipur, Jodhpur, Kishengarh, Sirohi, Bharatpur, Mewar, Tonk, Gwalior, Indore, Sailana, Jaora, Ratlam, and Dhar States	Ditto	Ditto
34. Lands occupied by the Bhopal Itarsi Railway in the Bhopal State	Ditto	Ditto
35. Lands occupied by the Bhopal Ujjain Railway in the Bhopal, Gwalior, Indore, Dewas (Senior), and Dewas (Junior) States	Ditto	Ditto
36. Lands occupied by the Baran Kotah Railway in the Kotah State.	Ditto	Ditto

**1A.—PLACES TO WHICH THE ACT HAS BEEN SPECIFICALLY
APPLIED—(contd)**

Names of places	Notification or other authority	Where published.
37 Lands occupied by the Bina Guna Baran Railway in the Kotah Tonk and Gwalior States	No 262 L.B. dated the 10th February 1913	British Enactments in force in Native States 3rd Ed. vol v, p 88
38 Lands occupied by the Great Indian Peninsula Railway in the Bhopal Surwal Gwalior Kanna dhani Orchha Ditta Dholpur Samthar Alipura Garrauli Pahra and Taraon States	Ditto	Ditto
39 Lands occupied by the Bhavnagar Railway in the Wadhwan Limbdi Chudabhal Buroda and Bhavnagar States	No 783 I.L. dated the 9th April 1913	British Enactments in force in Native States 3rd Ed., vol v p 6.
40 Lands occupied by the Junagarh Railway in the Gondal and Junagarh States	Ditto	Ditto
41 Lands occupied by the Khajadia Amreli Chhalala Railway in the Baroda State	Ditto	Ditto
42 Lands occupied by the Gondal Porbander Railway in the Bhavnagar Baroda Lathi Bantva Jetpur Kotda Pitha Junagarh and Gondal States	Ditto	Ditto

1B.—PLACES TO WHICH THE ACT HAS BEEN GENERALLY APPLIED IN COMMON WITH OTHER ENACTMENTS IN FORCE IN NEIGHBOURING BRITISH DISTRICTS OR PLACES UNDER BRITISH JURISDICTION

1 British Baluchistan	British Baluchistan Laws Regulation 1913 (II of 1913) s 3	Baluchistan Code p 214
2 Baluchistan Agency Territories	No 1603 I.B. dated the 28th July 1911	British Enactments in force in Native States 3rd Ed. vol i, p. 7
3 Chittagong Hill Tracts	Chittagong Hill Tracts Regulation 1900 (I of 1900)	Bengal Code vol. i p 795
4 Districts of Hazaribagh Lohardaga Manbhum Pargana Dhalbhum and the Kolhan in the District of Singhbhum. (The Lohardaga or Ranchi District included at the time the Palamu District)	No 1394 dated 21st October 1881	Gazette of India 1881, Part I, p 504
5 Sonthal Parganas	Sonthal Parganas Settlement Regulation 1872 (III of 1872) as amended by the Sonthal Parganas Justice and Laws Regulation 1899 (III 1899) section 3	Bihar and Orissa Code, vol i p 79
6 Angul District	Angul Laws Regulation 1913 (III of 1913) s 3	Bihar and Orissa Code, vol i p 884

1B.—PLACES TO WHICH THE ACT HAS BEEN GENERALLY APPLIED IN COMMON WITH OTHER ENACTMENTS IN FORCE IN NEIGHBOURING BRITISH DISTRICTS OR PLACES UNDER BRITISH JURISDICTION—(contd.)

Names of places.	Notification or other authority	Where published
7. The Tributary Mahals of Orissa.	No 1375 I B, dated the 21st March, 1900	British Enactments in force in Native States, 3rd Ed., Vol IV, p 31 Burma Code, p 138
8. Upper Burma (except the Shan States)	Burma Laws Act, 1893 (VIII of 1893) Sch I	Burma Code, p 138
9. Arakan Hill District	Arakan Hill District Laws Regulation, 1916 (I of 1916), s 2	Supplement to Burma Code
10. Kachin Hill Tracts (as regards hill tribes)	Kachin Hill Districts Regulation, 1893, (I of 1893), s 3	Burma Code, p 265
11. Chin Hills (as regards hill tribes)	Chin Hills Regulation, 1896 (V of 1896) s 3	Burma Code, p 295
12. The Tarai of Agra	No 153, dated the 22nd September, 1876	<i>Gazette of India</i> , 1876 Part I, p 503
13. Ganjam and Vizagapatam	No 303, dated the 17th July, 1899	<i>Gazette of India</i> , 1899, Part I, p 730
14. Pargana of Maunpur	No 3267, dated the 1st April, 1899	<i>Gazette of India</i> , 1899, Part II, p 119
15. The Political States of Seraikela and Kharsawan in Chota Nagpur	No 205 I B, dated the 25th January, 1910	British Enactments in force in Native States 3rd Ed., vol iv, p 35
16. Parganas of Todgarh, Diwar, Siroth, Chang and Kot Karana	No 38J, dated the 8th March, 1872	Ditto, vol i, p 572
17. Cantonment of Deoli	No 99 J, dated the 18th June, 1875	Ditto, vol i, p 593
18. Feudatory States of Surguja, Jashpur, Udaipur, Koren and Changbhakar	No 1069 I B, dated the 3rd April, 1919	Ditto, Sup to vol iv, p 101
19. Ramandrug (in respect of persons not being subject of the Raja of Sandur)	No 1018 I, dated the 5th March, 1891	Ditto, vol iv, p 425
20. Parts of the Namwan Assigned Tract formerly administered by China	No 788 E B, dated the 2nd June 1899	Ditto vol iv, p 409
21. Kasumpti, (Simla) (Keonthal State)	No 1016 I dated the 15th May 1885	Ditto vol iv, p 443
22. Lands occupied by the Rajputana Malwa Railway in the Indore State	No 704 I B dated the 25th March 1912	British Enactments in force in Native States 3rd Ed., vol v p 7
23. Lands occupied by the Indian Midland Railway in the Panna State	Ditto	Ditto
24. Lands occupied by the Bengal Nagpur Railway in the Rewa, Khairagarh, Nandgaon, Sakti, Rugarh, Gangpur, Bamra, Kharasawan, Seraikella, Mayurbhanj Patna and Kalahandi States	Ditto	Ditto
25. Lands occupied by the Bengal Doon Railway in the Cooch Behar State	Ditto	Ditto
26. Lands occupied by the Eastern Bengal Railway in the Cooch Behar State	Ditto	Ditto

1B—PLACES TO WHICH THE ACT HAS BEEN GENERALLY APPLIED IN COMMON WITH OTHER ENACTMENTS IN FORCE IN NEIGHBOURING BRITISH DISTRICTS OR PLACES UNDER BRITISH JURISDICTION—(contd.)

Names of places	Notification or other authority	Where published.
27 Lands occupied by the Bengal and North Western Railway in the Benares State	No 1917 I B, dated the 16th September, 1912	British Enactments in force in Native States 3rd Ed., vol. v, p. 11
28 Lands occupied by the Rajputana Malwa Railway in the Bharatpur State	Ditto	Ditto.
29 Lands occupied by the Agra Delhi Chord Railway in the Bharatpur State.	Ditto	Ditto
30 Lands occupied by the Oudh and Rohilkhand Railway in the Benares and Rampur States	Ditto	Ditto
31 Lands occupied by the Rohilkhand and Kumaon Railway in the Rampur State	Ditto	Ditto
32 Lands occupied by the Rajputana Malwa Railway in the Nabha, Patiala, Dujana, Jind, Patiala, and Faridkot States.	No 515 I B, dated the 17th March, 1913	British Enactments in force in Native States 3rd Ed., Vol v, p. 13.
33 Lands occupied by the Delhi Ambala Kalka Railway in the Patiala and Kalsi States	Ditto	Ditto
34 Lands occupied by the North Western Railway in the Patiala Nabha, Kapurthala, Faridkot and Jammu States.	Ditto	Ditto
35 Lands occupied by the Southern Punjab Railway in the Bahawalpur and Bikaner States	Ditto	Ditto
36 Lands occupied by the Bara Light Railway in the Hyderabad and Miraj (Senior) States.	No 778 I B, dated the 9th April, 1913	British Enactments in force in Native States 3rd Ed., vol V, p. 35
37 Lands occupied by the Ahmedabad Parantij Railway in the Baroda, Bikaner, Than and Idar States	Ditto	Ditto
38 Lands occupied by the Bombay Baroda and Central India Railway in the Baroda and Pindia Mewar States.	Ditto	Ditto.
39 Lands occupied by the Godhra Ratlam Nagda Railway in the Baria State	Ditto	Ditto
40 Lands occupied by the Mehsana Railway in the Baroda, Katosan, and Jypur States	Ditto.	Ditto
41 Lands occupied by the Billimora Kalamba Railway in the Baroda and Ranada States.	Ditto.	Ditto.

1B—PLACES TO WHICH THE ACT HAS BEEN GENERALLY APPLIED IN COMMON WITH OTHER ENACTMENTS IN FORCE IN NEIGHBOURING BRITISH DISTRICTS OR PLACES UNDER BRITISH JURISDICTION—(contd)

Names of places	Notification or other authority.	Where published.
42. Lands occupied by the Petlad Cambay Railway in the Baroda and Cambay States.	Ditto	Ditto
43. Lands occupied by the Rajpipla Railway in the Rajpipla State	Ditto	Ditto
44. Lands occupied by the Tapti Valley Railway in the Sachin and Baroda States.	No 778 I B, dated the 9th April, 1913	British Enactments in force in Native States, 3rd Ed., vol v, p 35
45. Lands occupied by the Great Indian Peninsula Railway in the Kurnool (Junior) and Hyderabad States.	Ditto	Ditto
46. Lands occupied by the Godhra Lunavada Railway in the Lunavada State	Ditto	Ditto
47. Lands occupied by the Champaner Shrivastpur Light Railway in the Baria and Chhota Udepur States	Ditto	Ditto
48. Lands occupied by the Madras and Southern Maratha Railway in the Hyderabad, Ramdurg, Sangli, Alankot, Jamkhandi, Miraj (Junior), Savanur, Kurnool (Junior), Kurnool (Senior), Kolhapur, Miraj (Senior), Aundh and Phaltan States	Ditto	Ditto
49. Lands occupied by the North Western Railway in the Khairpur State	Ditto.	Ditto
50. Lands occupied by the Shoranur Cochin Railway in the Travancore and Cochin States	No 5096 I B dated the 27th December, 1906	British Enactments in force in Native States, 3rd Ed., vol v, p 119.
51. Lands occupied by the Travancore Branch of the South Indian Railway in the Travancore State	No 1474 I B, dated the 20th April, 1906	Ditto, vol v, p 120
52. Lands occupied by the Tinnevely Quilon Railway in the Travancore State	No 316D dated the 16th January, 1917	Ditto, Supplement to vol v, p 8
53. Lands occupied by the Palampur Deesa Railway in the Palampur State	No 779 I B, dated the 9th April, 1913	British Enactments in force in Native States 3rd Ed., vol v, p 39
54. Lands occupied by the Rajputana Malwa Railway in the Palampur, and Baroda States	Ditto	Ditto
55. Lands occupied by the Kolhapur Railway in the Kolhapur and Miraj (Senior) States	Ditto	Ditto
56. Lands occupied by the Sangli Railway in the Sangli and Miraj (Senior) States	Ditto	Ditto.

1B — PLACES TO WHICH THE ACT HAS
WITH OTHER ENACTMENTS IN
DISTRICTS OR PLACES UNDER

COMMON
BRITISH

Names of places	Notification or other authority	Where published
<p>57. Lands in the Mysore State occupied by —</p> <p>(1) The Bangalore Branch of the Madras Railway</p> <p>(2) The Mysore State Railway from and inclusive of the Bangalore railway station to the Hubli end of the Thungabhadra Bridge at Hanur</p> <p>(3) The Mysore State railway from and inclusive of the Yeswanthpur Junction railway station to the frontier of the State</p>	<p>No 507 I, dated the 6th February, 1896.</p>	<p>British Enactments in force in Native States 3rd E1, vol v, p 121</p>

2—PLACES BEYOND THE LIMITS OF INDIA TO WHICH THE ACT HAS BEEN MADE APPLICABLE BY HIS MAJESTY IN COUNCIL FOR PURPOSES OF CASES IN WHICH HIS MAJESTY HAS JURISDICTION (1)

1. Zanzibar	Zanzibar Order in Council dated the 7th July, 1897 Art 11(b) and Schedule I	Statutory Rules and Orders revised to 31st December, 1903 vol v p 87
2. Persian Coast and Islands		1907, Part
3. Somaliland Protectorate	October, 1899, Art 7 and Schedule	December 1903 vol v p 173
4. East Africa Protectorate	The East Africa Orders in Council, dated the 7th July, 1897, Art 11(b) and Schedule	Statutory Rules and Orders 1897, p 131
5. Bahrein	The Bahrein Order in Council, 1913	Gazette of India 1913, Part I, p 231
6. Maskat and Oman	The Maskat Order in Council, 1915	Gazette of India 1917 Part I, p 899

3—A LIST OF SOME NATIVE STATES IN INDIA WHICH HAVE ADOPTED THE
ACT AS THEIR LAW (2)

1	Pudukottai (Madras Presidency)	Presi	Pudukottai Regulation II of 1882	See note in Native States Lists Southern India (Madras and Mysore) E1 1884 p 20 Ditto
2	Sandur (Madras Presidency)	Presi	Introduced by the Raja	

(1) This list only contains such information as has been collected up to date and does not profess to be exhaustive

(2) In addition to the Native States that have adopted the Act it may be mentioned, that in the Kathiawar Agency rules based on the Indian Evidence Act (I of 1872) have been brought into force by Notification No. 1, dated the 5th January 1874 See Kathiawar Agency Gazette 1874 Supplement, B. 23.

3.—A LIST OF SOME NATIVE STATES IN INDIA WHICH HAVE ADOPTED
THE ACT AS THEIR LAW—*contd*

Names of places.	Notification or other authority	Where published
3 Mysore	Schedule attached to the Instrument dated 1st March 1881, transferring the Government to the Maharaja	British Enactments, Native States, Southern India (Madras and Mysore), Ed. 1899, p 57
4 Akalkot (Bombay Presidency) (1)	Notification No 3413, dated the 19th July 1880	<i>Bombay Government Gazette</i> 1880, Part I, p 658.
5 Janjira (Bombay Presidency)	Notification by the Nawab of Janjira	
6 Jath (Bombay Presidency)	Notification by the Chief of Jath dated the 5th May, 1888	
7 Kolhapur State (Bombay Presidency)	Notification by the Council of Administration on behalf of the Minor Raja, dated the 20th February 1888	Not known
8 Miraj (Junior) (Bombay Presidency)	Notification by the Joint Administrators on behalf of the Minor Chief dated the 10th August 1888	
9 Ramdrug (Bombay Presidency)	Ditto ditto dated the 17th December 1888.	
10 Sachin (Bombay Presidency)	No 2983 dated the 7th May 1887 (on behalf of the Government of the Nawab of Sachin)	<i>Bombay Government Gazette</i> , 1887, Part I, p 377
11 Sawantwadi (Bombay Presidency)	Notification No 540 dated the 10th March, 1888 by the Political Superintendent of the State (on behalf of the Government of the Chief)	Not known
12 Savanur	Notification on dated the 21st May, 1897 by the Administrator of the State (on behalf of the Minor Nawab of Savanur)	Published in the Savanur State on 25th July, 1897
13 Jamkhandi (Southern Mahratta Country)	Notification dated 1st February 1901 by the Political Agent	Not known

(1) The Act was introduced by the Governor of Bombay in council when the State was under British management

APPENDIX B

FIFTH REPORT OF HER MAJESTY'S COMMISSIONERS APPOINTED TO PREPARE A BODY OF SUBSTANTIVE LAW FOR INDIA.

REPORT.

TO 'THE QUEEN'S MOST EXCELLENT MAJESTY

WE, Your Majesty's Commissioners appointed to prepare a body of Substantive Law for India, now humbly submit to your Majesty rules of law which we have prepared on the subject of evidence

India does not at present possess an uniform law upon this subject. Within the Presidency towns the English law of Evidence is in force, modified by certain Acts of the Indian Legislature, of which Act II of 1855 is the most important

This Act contains many valuable provisions. It extends the range of judicial notice and facilitates the proof of documents, of foreign systems of law and of matters of public history. It removes incompetency to testify by reason of interest or relationship; renders parties to suits liable to be called as witnesses, and makes husband and wife competent witnesses for or against each other in civil proceedings; renders dying declarations admis-

India where the English law is not administered.

This customary law has not assisted in the preparation of a law since the enactment of the new Code of Criminal Procedure. In the Country Courts, even in criminal matters, the law of evidence except those contained in the Code of Criminal Procedure is English law as such, although they are not as the most equitable

The English practice has been moulded in a great degree by our social and legal institutions.

the other hand, evidence is admitted, which is at least as dangerous as that which is shut out. Thus parent and child cannot refuse to bear testimony for or against each other in criminal cases, while a wife cannot be asked a question on the trial of her husband unless the trial be for an offence committed against herself. In matrimonial cases the inconsistencies of the law as to the competency of the married persons to give evidence cause frequent embarrassment, and even occasional failure of justice.

In a country like India, where the task of judicial investigation is attended with pecu-

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according to the Court

The exclusion even of relevant evidence may be desirable, when the evidence is such that people are naturally inclined to attach undue importance to it, when it is such as can not be admitted without the danger of encouraging forgery, or when it is such as cannot be received, or at least cannot be extorted, without injury to interest which are even more important than the judicial investigation of truth

witness of what he has heard another person say may be, in fact (as in cases of slander), the

the rule applicable to each class.

Most of the rules for the admissibility of this kind of evidence are recognised by the English law, others are in accordance with the Indian Act, II of 1855, above referred to, or are intended to relax the English rules still further than was done by that enactment.

We have, for instance, made admissible in evidence, that which has been spoken, written, or otherwise intimated in the ordinary course of business by a person who has since died or become incapable of giving evidence, or whose presence cannot be procured, and we are only admitted because they have been made against interest will, by the effect of our rules, be excluded, unless they have been made in the ordinary course of business. The test of pecuniary interest is exceedingly difficult of application, and appears to us to be of little value as a test of truth.

We have admitted statements as to matters of reputation and of pedigree made by persons since dead or incapacitated, or whose presence cannot be procured; adding in the case of pedigree a proviso that the person who made the statement shall have had special means of knowledge. We have discarded the condition of the English law which requires that the statement shall have been made before the controversy had arisen, as we think that this circumstance affects rather the weight than the admissibility of the statement. We have allowed a limited effect, as evidence, to newspaper reports of public meetings.

The indulgence afforded to witnesses by the existing law in permitting them to refer to contemporaneous memoranda appears to us to be carried too far when copies of such memoranda are allowed to be used for the purpose, and our rules do not permit the use of copies.

Another clause of exclusion applies to documentary evidence. Unless some degree of caution were observed with regard to the authentication of writings, great facilities would be afforded for the fabrication of evidence to be required of the primary and secondary evidence where the former is procurable. lately passed by the Indian legislature for the registration of assurances, tend to the improvement of Indian documentary evidence (1).

The third case in which we have excluded testimony is, where its admission would be dangerous to the public service or inconsistent with decency or morality, with the confidence of married life, or with the freedom of intercourse between a client and his legal adviser.

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We recommend the repeal of so much of Acts II of 1855 and XIX of 1853 as remains unrescinded, except section 26 of the latter enactment which does not form part of the law of evidence.

ABSTRACT of the Proceedings of the Council of the Governor General of India assembled for the purpose of making Laws and Regulations under the Provisions of the Act of Parliament 24 & 25 Vic, cap 67

The Council met at Simla on Wednesday, the 29th October 1868

PRESENT

His Excellency the Viceroy and Governor General of India, *presiding*

His Excellency the Commander in Chief, *GOVT GEN*

The Hon ble G N Taylor

The Hon ble Sir Richard Temple *KCSI*

The Hon ble H S Maine

The Hon ble Colonel H W Norman *C.B.*

The Hon ble John Strachey

The Hon ble F R Cockerell

The Hon ble Sir George Couper *Bart, C.B.*

EVIDENCE BILL

The Hon ble Mr Maine moved for leave to introduce a Bill to define and amend the Law of Evidence. He said it would probably be sufficient to state that the Bill embodied the draft rules of law which the Indian Law Commissioners had recently prepared on the subject of evidence. There was probably no subject in which a codified law was more wanted in India and the Commissioners had fully stated in the report which had been circulated to Hon ble Members the reasons for all the changes which the Bill proposed to introduce. If he got leave to introduce the Bill he proposed to ask His Excellency the President to suspend the rules for the conduct of business and on their suspension to introduce the Bill with a view to its publication in the *Gazette*. There was no use in now dilating to any length on the technical subjects comprised in the Bill.

The motion was put and agreed to.

The Hon ble Mr Maine then asked the President to suspend the Rules for the Conduct of Business.

The President declared the Rules suspended.

The Hon ble Mr Maine then introduced the Bill.

WHITLEY STOKES

Asst Secy to the Govt of India

Home Department (Legislative)

SIMLA

The 29th October 1868

ABSTRACT of the Proceedings of the Council of the Governor General of India assembled for the purpose of making Laws and Regulations under the Provisions of the Act of Parliament 24 & 25 Vic cap 67

The Council met at Government House on Friday the 4th December 1868

PRESENT

His Excellency the Viceroy and Governor General of India, *presiding*

The Hon ble G Noble Taylor

The Hon ble H Summer Maine

The Hon ble John Strachey

The Hon ble Colonel H W Norman *C.B.*

The Hon ble F R Cockerell

GOVT GEN

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GOVT GEN

The Hon ble M J Shaw Stewart

The Hon ble Mr Shaw Stewart took the oath of allegiance, and the oath that he would faithfully discharge the duties of his office.

EVIDENCE BILL.

The Hon'ble Mr. Maine moved that the Bill to define and amend the Law of Evidence be referred to a Select Committee with instructions to report in two months. He said that the

country

evidence according to his construction of them

dence, but their usefulness consisted more in refreshing knowledge which was obtained by forensic experience than in teaching knowledge. The Commissioners would appear to be right in supposing that what was wanted for the greatest part of India was a liberalized version of the English law of evidence enacted with authority and thus excluding caprice, and superseding the use of text books by compactness and precision.

the present state of the law might be that the law of its own scientific somewhat

known to English lawyers as 'hearsay' It was not at all meant that hearsay evidence was

distinguishing those kinds of evidence from those which remained It would be presumptuous in Mr Maine to praise the Commissioners' proposals but he ventured to say that in his humble opinion, they had wisely availed themselves of the results of English experience, but had wisely modified these results upon two considerations which, they stated as follows —

"The English practice has been moulded in a great degree by our social and legal institutions and on forms of procedure, and much of it is admitted to be unsuited to the various states of society and the different forms of property which are to be met with in India"

"The English practice has been moulded in a great degree by our social and legal institutions and on forms of procedure, and much of it is admitted to be unsuited to the various states of society and the different forms of property which are to be met with in India"

Mr Maine had said that he would not comment on the details of the measure, but there was one point of detail which it was necessary to notice because, as it involved a financial question, the Select Committee would probably not like to deal with it without knowing the Bill based upon
fer to the Stamp
the Stamp Bill
f the Governor

General before the present measure If the Stamp Bill were passed last, it would control the present measure But another reason must probably be assigned for the omission in the Commissioners' Draft, which appeared to be deliberate Mr Maine found that the last paragraph of their Third Report, on the Law of Negotiable Instruments was to the following effect —

Now from the Commissioners' point of view, which was the purely juridical point of

the enforcement of penal
sacrifice of any branch of
rundered by the Executive
the fact that the stamp
duties on commercial instruments were easily levied, and did not press hardly on the people, the Government was not prepared to give up that portion of the public receipts

The motion was put and agreed to

The following Select Committee was named —

On the Bill to define and amend the Law of Evidence—The Hon ble Mr Cockerell the Hon ble Sir George Couper and the Hon ble Messrs Cardon Forbes Shaw Stewart and the Mover

The Council adjourned till the 11th December 1868

WHITLEY STOKES

Asst Secy to the Govt of India
Home Department (Legislative)

CALCUTTA

The 4th December 1868

ABSTRACT of the Proceedings of the Council of the Governor General of India assembled for the purpose of making Laws and Regulations under the Provisions of the Act of Parliament 24 & 25 Vic cap 67

The Council met at Simla on Tuesday the 6th September 1870

PRESENT

His Excellency the Viceroy and the Governor General of India K P, GCSI presiding

His Excellency the Commander in Chief GCB, GCSI

The Hon ble John Strachey

The Hon ble Sir Richard Temple KCSI

The Hon ble J Fitzjames Stephen QC

The Hon ble B H Ellis

Major Genl the Hon ble H W Norman CB

The Hon ble F R Cockerell

His Highness the Hon ble Suramade Rajahal Hindustan Raj Rajendra Sri Maharaja Dhirsaj
Siva Ram Singh Bahadur of Jeypur, GCSI

EVIDENCE BILL

At the 4th Dec 1868 Mr Strachey he added to the Select

been taken to it by
subject was one which
the practical import
procedure of every
course require the
Mr Stephen) that the
it was likely to be
the Mofussil

The law was in a state of
of Evidence Act and how
the subject caused great
concern that in Messrs.

upon the subject. This was the state of things for which the Committee would have if possible, to provide a remedy. It was one which in justice to exceedingly hard worked officials ought not to be permitted to continue.

The motion was put and agreed to.

The Council then adjourned to the 20th September 1870

WHITLEY STOKES

Secy to the Council of the Govr Genl
for making Laws and Regulations

SIMLA,

The 6th September 1870

ABSTRACT of the Proceedings of the Council of the Governor General of India assembled for the purpose of making Laws and Regulations under the Provisions of the Act of Parliament 24 & 25 Vic cap 67

The Council met at Government House on Friday the 18th November 1870

PRESENT

His Excellency the Viceroy and Governor General of India K P GCSI presiding

The Hon ble John Strachey

The Hon ble Sir Richard Temple KCSI

The Hon ble Fitzjames Stephen QC

The Hon ble B H Ellis

EVIDENCE AND CORONERS BILLS

The Hon ble Mr Stephen also moved that the Hon ble Mr Chapman be added to the Select Committee on the Bills to define and amend the Law of Evidence and to consolidate the laws relating to Coroners.

The motion was put and agreed to.

The Council adjourned to Friday the 25th November 1870

WHITLEY STOKES

Secy to the Govt of India

CALCUTTA,

The 18th November 1870

ABSTRACT of the Proceedings of the Council of the Governor General of India assembled for the purpose of making Laws and Regulations under the Provisions of the Act of Parliament 24 & 25 Vic cap 67

The Council met at Government House on Friday the 2nd December 1870

PRESENT

His Excellency the Viceroy and Governor General of India K P GCSI presiding

The Hon

ble

Francis

Steuart

Chapman

The Hon

ble

J R Bullen

Smith

The Hon

ble

F R Cockerell

The Hon

ble

J F D Inglis

The Hon

ble

D Cowie

EVIDENCE AND INSOLVENCY BILLS

The Hon ble Mr Stephen moved that the Hon ble Mr Inglis be added to the Select Committees on the following Bills —

To define and amend the Law of Evidence

To amend the Law of Insolvency

The motion was put and agreed to

The Council adjourned to Friday the 9th December 1870

CALCUTTA

The 9th December 1870

WHITLEY STOKES

Secy to the Govt of India

ABSTRACT of the Proceedings of the Council of the Governor General of India assembled for the purpose of making Laws and Regulations under the Provisions of the Act of Parliament 21 & 22 Vic cap 67

The Council met at Government House on Friday the 9th December 1870

PRESENT

His Excellency the Viceroy and Governor General of India K P GCSI presiding

Mr Inglis

Mr Bullen

Mr Cockerell

Mr Inglis

Mr Cowie

Mr Norman

Mr Robinson

Mr Stokes

Mr Stephens

Mr Bullen

Mr Cockerell

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Mr Cockerell

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Mr Norman

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Mr Cockerell

Mr Inglis

Mr Cowie

Mr Norman

Mr Robinson

Mr Stokes

Mr Stephens

Mr Bullen

Mr Cockerell

Mr Inglis

Mr Cowie

Mr Norman

Mr Robinson

Mr Stokes

Mr Stephens

The Hon ble Francis Steuart Chapman
The Hon ble J R Bullen Smith
The Hon ble F R Cockerell
The Hon ble J F D Inglis
The Hon ble D Cowie

The Hon ble W Robinson CSI

SUNDRY BILLS

The Hon ble Mr Stephen moved that the Hon ble Mr Robinson be added to the Select Committees on the following Bills —

To define and amend the Law of Evidence

To amend the Law of Insolvency

For the Limitation of suits.

The motion was put and agreed to

The Council adjourned to Friday the 16th December 1870

CALCUTTA

The 9th December 1870

WHITLEY STOKES

Secy to the Govt of India

DRAFT REPORT OF THE SELECT COMMITTEE

(The Gazette of India July 1 1871 Part V p 273)

The following Draft Report of a Select Committee together with the Bill as settled by them was presented to the Council of the Governor General of India for the purpose of making Laws and Regulations on the 31st March 1871 —

We the members of the Select Committee to which the Evidence Bill has been referred, have the honour to report that we have considered the Bill and the papers noted in the margin

From Officiating Under Secretary Home Department No 423 dated 3rd October 1868 and enclosures

From Assistant Secretary Foreign Department, No. 333 dated 12th December 1868, and enclosures.

Remarks by the Hon ble the Chief Justice Bombay (no date)

Remarks by Hon ble Justice Phear dated 8th December 1868

From Secretary to Chief Commissioner British Burmah No 5's —1 dated 1st December 1868

From Assistant Secretary to Government of Bengal Legislative Department, No 37 dated 9th January 1869 and enclosure

From Deputy Judge Advocate General of the Army dated 26th January 1869 and enclosures.

From Officiating Under Secretary Home Department, No 203 dated 1th February 1869 forwarding memorial from Mulhairs and Revenue Agents Howrah dated 4th February 1869

From Secretary to Indian Law Commissioners, dated 6th February 1869

From Chief Secretary to Government, Fort St. George No 190 dated 18th March 1869 and enclosures.

From Secretary to Government of Bombay No 371 dated 7th September 1869 and enclosures

From Secretary to Government of Bombay No 3184 dated 14th September 1869 and enclosures.

Fifth Report of Her Majesty's Indian Law Commissioners on the Bill.

From Officiating Inspector General of Police Punjab No 2657 dated 8th September 18 0

From Secretary to Government of India Home Department No. 1892 dated 18th October 1870 forwarding letter from Chief Commissioner British Burmah No 61 dated 15th August 18 0 and enclosures

This being the case we have discarded altogether the phraseology in which the English text writers usually express themselves and have attempted first to ascertain and then to arrange in their natural order the principles which underlie the numerous cases and fragmentary rules which they have collected together. The result is as follows —

Every judicial proceeding whatever has for its purpose the ascertaining of some right or liability. If the proceeding is criminal the object is to ascertain the liability to punishment of the person accused; if the proceeding is civil the object is to ascertain some right of property or of status or the right of one party and the liability of the other to some form of relief.

After a very careful consideration of the draft prepared by the Indian Law Commissioners we have arrived at the conclusion that it is not suited to the wants of this country.

We have recorded in a separate report the grounds on which this conclusion is based. They are in a few words, that the Commissioners' draft is not sufficiently elementary for the officers for whose use it is designed, and that it assumes an acquaintance on their part with the law of

two sets of rules run into each other in such an irregular way as to produce between them a result which no one can possibly understand systematically unless he is both acquainted with the principles of a system of pleading which is being rapidly abolished and with the every day practice of the Common Law of Courts which can be acquired and understood only by those who habitually take part in it. This knowledge moreover must be qualified by a study of text books which are seldom systematically arranged.

tended in support of ancient possession form the third exception to the rule which excludes hearsay. The question is whether A is entitled to a fishery. He produces a royal grant of the fishery to his ancestor. This fact the law describes as a peculiar kind of hearsay admissible by special exception. Surely this is using language in a most un instructive manner.

a particular man. He has, in each case, a present recollection of a past direct perception. Moreover, it is equally necessary to ascertain facts of each class in judicial proceedings, and they must in most cases be ascertained in precisely the same way.

Facts may be related to rights and liabilities in one of two different ways.

status involves. From the fact that *A* caused the death of *B* under certain circumstances and with a certain intention or knowledge, there arises of necessity the inference that *A* murdered *B*, and is liable to the punishment provided by the law for murder.

Facts thus related to a proceeding may be called facts in issue unless, indeed, their existence is undisputed.

2. Facts, which are not themselves in issue in the sense above explained, may affect the probability of the existence of facts in issue and these may be called collateral facts.

It appears to us that these two classes comprise all the facts with which it can in any event be necessary for Courts of Justice to concern themselves, so that this classification exhausts all facts considered in their relation to the proceeding in which they are to be proved.

writing of the letter is a motive for a crime. In short, the way in which a fact should be proved depends on the nature of the fact and not on the relation of the fact to the proceedings.

The instrument by which the Court is convinced of a fact is evidence. It is often classified as being either direct or circumstantial. We have not adopted this classification.

with reference to the nature of the fact which it is to prove but with reference to its own nature.

statement of what a

means either

- (1) words spoken or things produced in order to convince the Court of the existence of facts, or
- (2) facts of which the Court is so convinced which suggest some inference as to other facts.

We use the word 'evidence' in the first of these senses only, and so used it may be reduced to three heads—(1) oral evidence, (2) documentary evidence, (3) material evidence.

Finally, the evidence by which facts are to be proved must be brought to the notice of the Court and submitted to its judgment and the Court must form its judgment respecting them.

These general considerations appear to us to supply the groundwork for a systematic and complete distribution of the subject as follows —

I.—Preliminary

II.—The relevancy of facts to the issue

III.—The proof of facts according to their nature by oral documentary or material evidence.

IV.—The production of evidence

V.—Procedure

We have accordingly distributed the subject under these heads in the manner which we now proceed to describe somewhat more fully

I—PRELIMINARY

Under this head we have defined facts facts in issue collateral facts a document evidence proof and proved, necessary inference and presume We have also laid down in general terms the duty of the Court

Of our definitions of fact facts in issue collateral facts and evidence we need say no more than that they are re framed in accordance with the principles already stated. We may however shortly illustrate the effect of the definition of evidence

It is — — — — — ambiguity of the word as of circumstantial evidence The question is whether A layed, by statements of his correspond with his feet and that he

property in Court and by the direct oral evidence of some one who had seen it in the prisoners possession and the letter by the production of the letter itself or secondary evidence of it if the case allows of secondary evidence

direct on whatever ground the fact which it is to establish may be relevant to the issue that is to say if the fact is one which could who says he saw it if it could be heard by a fact in issue or a collateral fact These described by the phrase hearsay evidence in described by the phrase circumstantial evidence

or may evidence document by its secondary in each case

conclusive evidence the phrase necessary is not open to objection on the ground in the meaning is not what we understand by from which a particular inference necessarily follows the rest of our draft whereas conclusive

The definitions of proof proved and moral certainty require some comment The definition of 'proof' is subordinate to that of 'proved' which is that a fact is said to be proved in two cases. that is to say when the Court after hearing the evidence respecting it—

- (1) believes in its existence or
- (2) thinks its existence so probable that a reasonable man ought under the circumstances of the particular case to act upon the supposition that it exists.

which cannot be completely answered; for at bottom it is a question, not of science, but of prudence, and our definition of the word "proved" is meant to make this plain. We have, however, attached to it the negative condition that a reasonable man ought not to be morally certain of a conclusion, merely because it is probable, if other conclusions are also probable. It is easier to illustrate this principle than to state, without a prolonged abstract discussion, which would be out of place on the present occasion, the general grounds on which it rests. Our illustrations are meant to point out to Judges that they are not to convict *A* of an offence which must have been committed either by him or by *B*, unless circumstances exist which make it improbable that the offence was committed by *B*. We have not attempted to carry the matter further, as it is not the business of a Bill in this country more than in any other, it is as to the risk of error which they are a matter of prudence and practice, as of guiding, than with a view of

call attention, defined in fact. Its generality appears in chapter, the proper place to terminate questions of fact

by drawing inferences—

- (1) from the evidence given to the facts alleged to exist;
- (2) from facts proved to facts not proved,
- (3) from the absence of evidence which might have been given,
- (4) from the admissions and conduct of the parties, and generally from the circumstances of the case

We have added to these principles, which these inferences are to be drawn, as that but we rely to which there is as the alleged

the Judge in every plainest and broadest way

We have added two qualifications only to this general rule. (1) that, when the law declares an inference to be necessary, the Court shall draw it, and shall not allow its truth to be contradicted; (2) that, when the law directs the Court to presume a fact, it shall infer its existence till the contrary appears. We have treated in detail of necessary inference and presumptions in other parts of the Bill.

II—THE RELEVANCY OF FACTS

It is the duty of the Court to determine, as our opinion, belongs to this subject, obviously lies at the root to the question, it is impossible for us to think, to be found in the evidence, are not facts, and are not facts, but facts

These rules declare to be relevant—

- (1) all facts in issue;
- (2) all collateral facts, which
 - (a) form part of the same transaction;
 - (b) are the immediate occasion, cause or effect of fact in issue;

- (c) show motive, preparation, or conduct affected by a fact in issue,
- (d) are necessary to be known in order to introduce or explain relevant facts,
- (e) are done or said by a conspirator in furtherance of a common design,
- (f) are either inconsistent with any fact in issue, or inconsistent with it, except upon a supposition which should be proved by the other side, or render its existence or non-existence morally certain, according to the definition of moral certainty given above.
- (g) affect the amount of damages in cases where damages are claimed,
- (h) show the origin or existence of a disputed right or custom,
- (i) show the existence of a relevant state of mind and body,
- (j) show the existence of a series of which a relevant fact forms a part, or
- (k) show (in certain cases) the existence of a given course of business.

The remainder of the chapter throws into a positive shape what in English law forms the exceptions to the rule, excluding the various matters described as *heirly*. They relate to—

the conduct of the parties on previous occasions,
the statement of the parties on previous occasions,
previous judgments,
statements of third persons
opinions of third persons

1 In reference to the conduct of the parties on previous occasions, we embody in three sections the existing law of England as to evidence of character, with some modifications. We include, under the word 'character,' both reputation and disposition, and we permit evidence to be given of previous convictions against a prisoner for the purpose of prejudicing him. We do not see why he should not be prejudiced by such evidence if it is true.

2 Under the head of the statement of the parties on other occasions, we deal with the question of admissions, as to which we have not materially altered the existing law

We have not thought it necessary to transfer from their present position in the Code of Criminal Procedure the rules as to confessions made to the Police. This appears to us to be a special matter relating rather to the discipline of the Police than to the principles of evidence.

3 Previous judgments appear to follow naturally upon previous statements. Under this head we deal with the question of *res judicata*.

We have not attempted to deal with the question of the bar of suits by previous judg

Lal v Radhachurn, 7 Suth W R, 339

⁴ As to statements by third persons. We have made one considerable alteration in the existing law by admitting generally, statements made by third persons about relevant facts, if attended by conduct which confirms their truth or if they refer to facts independently

plained must be relevant and as no clear definition of relevancy is given by the law of England it is very difficult to say how far this rule extends.

The next exception refers to statements made by a person who is dead or cannot be found or produced without unreasonable delay or expense. We declare such statements to be relevant if they relate to the cause of the person's death or are made in the ordinary course of business or in the ordinary course of life, or if they are made in the ordinary course of the relationship between the parties.

interest of the party making them, on the ground that they ought to affect the weight rather than the admissibility of what is, at best, to use Bentham's expression, "make shift evidence."

We also provide for the admissibility of statements in public or official books (and in certain cases) of evidence given in previous judicial proceedings.

5 The cases in which the opinions of third persons are relevant are dealt with in sections forty four to fifty.

They declare to be relevant, the opinions of experts, opinions as to handwriting, opinions as to usages, and opinions as to relationship and the grounds of such opinions.

The same applies to the opinions of the

III—PROOF.

The second Chapter having decided what facts are relevant we proceed to show how a relevant fact is to be proved.

In the first place we deal with the proof of facts by direct evidence.

missioners' Draft Bill, and in part from the law of England.

We next proceed (Chapters V, VI, VII and VIII) to the question of proof by the various kinds of evidence successively, namely oral, documentary, and material. With regard to oral evidence, we provide that it must in all cases whatever, be direct. That is, it must be proved by some one who heard it, and so on. If it is the opinion of a third person, it must be proved by some one who heard it, and so on.

We have, however, provided that if the fact to be proved is the opinion of an expert who cannot be called (which is the case in the majority of cases in this country) and if such opinion has been expressed in any published treatise, it may be proved by the production of the treatise.

This provision taken in connection with the provisions on relevancy contained in Chapter II, will, we hope, set the whole doctrine of hearsay in a perfectly plain light for their joint effect is this—

- (1) the sayings and doings of third persons are, as a rule, irrelevant, so that no proof of them can be admitted
- (2) in some excepted cases they are relevant.
- (3) every act done or word spoken, which is relevant on any ground, must (if proved by oral evidence) be proved by some one who saw it with his own eyes or heard it with his own ears.

It is to be noted, that the Bill relates to the proof of facts by documentary evidence. It provides that if a document contains most of the facts of the case, it may be proved by the production of the document. There are also provisions as to the admissibility of copies of documents.

the use of the power of exposure as a means of gratifying malice. We have accordingly provided as follows:

Such questions may relate either to matters relevant to the case, or to matters not relevant to the case. If they relate to matters relevant to the case, we think that the witness ought to be compellible to answer but that his answer should not afterwards be used against him.

In or
advocate
upon him

Court and that the Court may record any such question if asked by a party to the proceedings. The records of the question of the written instructions are to be admissible as evidence of the publication of an imputation intended to harm the reputation of the person affected and such imputations are not to be regarded as privileged communications or as falling under any of the exceptions to section four hundred and ninety nine of the Indian Penal Code merely because they were made in the manner stated. Upon a trial for defamation

In the same spirit we have empowered the Court in general terms to forbid indecent and scandalous inquiries unless they relate to facts in issue as defined above or to matters absolutely necessary to be known in order to determine whether the facts in issue existed and also to forbid questions intended to insult or annoy.

We prefer this general power to the sections drawn by the Commissioners which forbid questions to married persons "which substantially amount to inquiring whether that person has had sexual intercourse forbidden to him or her by the law to which he or she is subject" and "questions regarding the occurrence of sexual intercourse between a husband

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questions relating to sexual intercourse between husband and wife we think it better to forbid indecent and scandalous inquiries in general terms than to lay down a positive rule which in possible cases might produce hardship.

Finally we deal (Chapter VI) with the question of the improper admission or rejection of evidence.

We
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Court either to look into the facts and deliver final judgment or to remit it to the

Finally we recommend that the Draft Bill together with this report should be circulated for the opinion of the Local Governments.

J. F. STEPHEN
J. STRACHAN
F. S. CHAMMAN
F. P. COCKFIELD
J. F. D. INCH
W. ROBINSON

ABSTRACT of the Proceedings of the Council of the Governor General of India, assembled for the purpose of making Laws and Regulations under the Provisions of the Act of Parliament, 24 & 25 Vic., cap 67

The Council met at Government-House on Friday, the 31st March, 1871

PRESENT.

His Excellency the Viceroy and Governor-General of India, K P, G M S I, *presiding*

His Honour the Lieutenant Governor of Bengal

His Excellency the Commander in Chief, C C B, G C S I

The Hon'ble John Strachey	Colonel the Hon'ble R Strachey, C S I
The Hon'ble Sir Richard Temple, K C S I	The Hon'ble F S Chapman
The Hon'ble J Fitzjames Stephen, Q C	The Hon'ble J R Bullen Smith
The Hon'ble B. H. Phillips	The Hon'ble F R Cockerell
Maj Genl. The Hon'ble H W Norman C B	The Hon'ble J F D Inglis
	The Hon'ble W Robinson, C S I

INDIAN EVIDENCE BILL

The Hon'ble Mr Stephen presented the Report of the Select Committee on the Bill to define and amend the Law of Evidence. He said —

"I feel that I owe an apology to your Lordship and the Council, for requesting their attention to a second speech upon a purely legal subject after the one which I delivered at the first meeting of the Council."

The position of the law as regards the admissibility of evidence by the jury is a subject of great importance, and one which has attracted the attention of the law of Evidence. The law of Evidence properly constructed would be nothing less than an application of the practical experience acquired in Courts of Law to the problem of inquiring into the truth as to controverted questions of fact, however imperfectly it may have been attained.

This is the object which has been kept in view in framing the Bill which the Committee append to their report, and which I am now to describe in a general way to your Lordship and the Council.

"I will state, in the first place, the history of the measure down to the present time."

The history of the measure down to the present time is as follows:—The Bill was introduced in the Council on the 1st of March, 1871, and was read a first time. It was then referred to a Select Committee, which reported on the 15th of March, 1871. The Bill was then read a second time, and was passed by the Council on the 16th of March, 1871. It was then sent to the Governor-General for his sanction. The Governor-General has given his sanction to the Bill, and it is now ready for the sanction of the Queen.

books with the English law upon this subject

The Bill is a very simple one, and it is not possible to tell a person who did not know the law that it was a Bill. It is a Bill which is very simple and easy to understand. It is a Bill which is very simple and easy to understand. It is a Bill which is very simple and easy to understand.

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"The report of the Committee explains very fully the scheme of the Bill, which of course is very length, and enters fully into the reasons for the Bill. I will not weary the Council by going into the details of the Bill. I will confine myself to saying that I trust all begin by studying the report, which has been presented to the Council."

and sustained attention which is necessary in order to master any important and intricate matter. It is by this standard that the Committee in general, and I, in particular, as the member in charge of the Bill, desire that it may be tried.

"With this reference to the Bill and the report of the Committee, I proceed to discuss the general question connected with the subject, and to mention a few of the leading features of the measure.

"I suppose that I may assume as generally admitted the necessity which exists for legislation on the subject of evidence in British India. It would be exceedingly difficult to say precisely what, at the present moment, the law upon the subject certainly is. To some

means easy to praise

"Legislation thus being necessary, in what direction is legislation to proceed? A gentleman, for whose opinion upon all subjects connected with Indian law and legislation I am commonly with most other people, have a great respect as I to me the other day in

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- (1) that evidence must be confined to the issue,
- (2) that hearsay is no evidence
- (3) that the best evidence must be given,
- (4) rules as to confessions and admissions,
- (5) rules as to documentary evidence

"I have two general remarks to make upon them. The first is that they are sound in substance and eminently useful in practice, and that, when properly understood they

are calculated to afford invaluable assistance to all who have to take part in the administration of justice

"The second is that I believe that no body of rules upon any important subject were ever expressed so loosely, in such an intricate manner, or at such intolerable length

"It is necessary to prove the first of these propositions, in order to justify the recommendations of the Committee that the substance of the rules in question should be introduced in the form of express law into this country. It is necessary to prove the second proposition in order to justify the attempt made in the Bill to reduce the rules to order and system. First, then, as to the proposition that the rules in question are substantially sound and do far more good than harm even in their recent confused condition. The proof of this is, I think, to be found, in a comparison between the proceedings of English Courts of Justice and those of countries which have no such rules, and between the proceedings of English Courts in which these rules are, and those in which they are not, understood and acted upon. As a preliminary remark, I think I ought to observe that the knowledge of these rules possessed by English lawyers is derived far more from the daily practice in the Courts than from theoretical study. Many English lawyers know by habit, almost

in an aggravated form. In the work to which I have already referred will be found an account of the trial of a monk named Leotade for murder. If disposed of under the English rules of evidence, it could hardly have taken more than a day or two at the most. In the

and sustained attention which is necessary in order to master any important and intricate matter. It is by this standard that the Committee in general and I in particular as the member in charge of the Bill desire that it may be tried.

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French Court, it lasted for, I think, about three weeks, and branched out into all sorts of subjects. One witness, in particular, was discovered to have seduced a girl seven years before, and letters from her to him were read to throw light on his character. He naturally wished to give his own account of the transaction, but was stopped at the point at which, had he

"It is not a matter of fact, but a matter of opinion, and it is not a matter of opinion, but a matter of fact."

forbid all Courts and Judges to act upon an to the manner in which they shall exercise (propositions too absurd to state or to discuss) guided by arguments upon the subject, and of English Courts. Moreover, the Courts of the matter and it is by degrees that a stem would grow in again in the most cumbrous ere is only of the ad retion

"It may be that some persons would like this policy, but I suppose it is one which I need not discuss."

"It is not a matter of fact, but a matter of opinion, and it is not a matter of opinion, but a matter of fact."

"If you want to arrive at the truth as to any matter of fact of serious importance, the following maxims —

"If you wish to ascertain what is to be, after he closely connected with the ly, never believe in any fact o determine, or whether it is principal fact, until you have done, have the man"

paper before you and read it for .

apart—is the true essence of the rules of evidence, and I think that no one will deny either that these rules are in themselves eminently wise, or that they are by no means so obvious and self-evident that the mere unassisted natural sagacity of judicial officers of every grade can be trusted to grasp their full meaning and to apply them to the practical questions which arise in the administration of justice, with no assistance from any express law. I do not

since I ought to add that the good which they are calculated to effect can be obtained only by erecting them into laws and rigorously enforcing them. When this is done I feel confident that experience will be continually adding to the proof of their value.

“So far, I have tried to prove the proposition that the English rules of evidence are of real solid value, and that they are not a mere collection of arbitrary subtleties which

of this proposition, if indeed it is disputed, I can only refer in general to the English text books on the subject. They form a mass of confusion which no one can understand until

ence to theoretical principles which it has never been worth any lawyer's while to investigate

“The condition of the law of evidence, as well as the condition of many other branches of the law of England, affords continual illustrations of the extraordinary intricacy and difficulty which arises from the combination of the very greatest practical sagacity with an

a general view of the law of evidence, as well as the condition of many other branches of the law of England, affords continual illustrations of the extraordinary intricacy and difficulty which arises from the combination of the very greatest practical sagacity with an

“The word ‘evidence’ is also exceedingly ambiguous. It may mean that which a witness says in Court. It may mean the fact to which he testifies, regarded as a ground-work for further inference. Notwithstanding this, the phrase ‘hearsay is no evidence,’ being emphatic and easy to recollect, stuck in the ears and in the minds of lawyers, and

language in such a peculiar manner as to call ancient deeds 'written hearsay' To talk of hearing a document is like talking of seeing a sound

"I now turn to the ambiguity of the word 'evidence,' to which I have already referred

simple and obvious distinction has thrown over the whole subject. I will content myself

"I sit
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in which
we define
myself with a reference to the report. It seemed to us that the remainder of the subject
would fall under the following general heads —

- (1) the relevancy of fact to the issues to be proved,
- (2) the proof of facts according to their nature by oral, documentary, or material evidence,
- (3) the production of evidence in Court,
- (4) the duties of the Court and the effect of mistaken admission or rejection of evidence

These heads would we think, be found to embrace, and to arrange in their natural order, all the subjects treated of by English text writers and Judges under the general head of the Law of Evidence. I will say a few words on their relation to each other and of each of them in turn

"The main feature of the Bill consists in the distinction drawn by it between the rele

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proved by the assertion of some witness that he heard them said with his own ears. English text writers throw together with these two classes of rules under the head of 'Hearsay'. They lay down the general rule that hearsay is no evidence, meaning by it that certain classes of facts called hearsay are to be treated as irrelevant to the determination of particular questions, and it is necessary to look through a long list of exceptions to that rule in order to see whether, in a particular case, a statement may or may not be proved. If you find that it can be proved, the question is, how can it be proved? And you propose to prove it by a witness who says that *B* told him that he heard *A* say so. Again you are told, 'hearsay is no evidence,' but this time the expression means not that the fact is irrelevant, but that the testimony by which it is proposed to prove the fact is improper. One extreme inconvenience of this is that the most important part of the English Law of Evidence is thrown into the most intricate and inconvenient of all possible forms, that of a very wide negative, of most uncertain meaning, qualified by a long string of exceedingly intricate exceptions.

remember, as it is to read or remember any other mere works of reference'

relevance

"She (Mary) was known to have been weary of her husband, and anxious to get rid of him."

"(By our draft, facts which show motive are relevant.)"

"The difficulty and the means of disposing of him had been discussed in her presence and she had herself suggested to Sir James Balfour to kill him."

"(Facts which show preparation for a fact in issue are relevant.)"

"She brought him to the house where he was destroyed, she was with him two hours before his death."

"(Facts so connected with the facts in issue as to form part of the same transaction are relevant.)"

"And afterwards threw every difficulty in the way of any examination into the circumstances of his end."

"(Subsequent conduct influenced by any fact in issue is relevant.)"

"The Earl of Bothwell was publicly accused of the murder."

"(Facts necessary to be known in order to introduce relevant facts are relevant.)"

"(She would not allow him to be arrested, she went on at last, unwilling to prevent him from appearing."

appearing."

"(Subsequent conduct influenced by any fact in issue is relevant.)"

"A few weeks later, she married Bothwell, though he had a wife already, and when her subjects rose in arms against her and took her prisoner, she refused to allow herself to be divorced from him."

"(Subsequent conduct Motive.)"

"A large part of the evidence consisted of certain letters which the Queen was said to have written. Mr Froude, in passages which I need not read, alleges facts which go to

show that she tried to prevent the production and to secure the destruction, of these letters. An illustration as to subsequent conduct meets the case of a person who destroys or conceals evidence.

"Finally, Mr. Froude observes 'In her own correspondence, though she denies the crime, there is nowhere the clear ring of innocence which makes its weight felt even when the evidence is weak which supports the words'.

'The letters would be evidence under the section relating to admissions and Mr. Froude's remark is in nature of a criticism on them by a prosecuting counsel'.

'From the rules which state what facts may be proved we pass to those which prescribe the manner in which a relevant fact must be proved. Passing over technical matters—such as the law relating to judicial notice, questions relating to public documents and the like—these rules may be said to be three in number, though, of course, numerous introductory rules are required to adopt for practice (*viz.*) They are these—

1. If a fact is proved by oral evidence, it must be direct, that is to say, things seen must be deposed to by some one who says he saw them with his own eyes, things heard by some one who says he heard them with his own ears.

2. Original documents must be produced or accounted for before any other evidence can be given of their contents.

3. When a contract has been reduced to writing, it must not be varied by oral evidence.

the Bill and report
importance as having
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The Hon ble Mr Robinson said that after the very full exposition of the Bill before the Council which had been given by learned and Hon ble Members it was not possible that any useful remarks should be made by one whose knowledge of this intricate part of the science of the law was as limited as his

He merely endorsed all that the Hon ble Mr Strachey had said of the probable benefit which would be conferred by the Bill on the administrators of the law

But he would venture to state here in respect to a matter with which he was more

To his mind the Bill before the Council promised to provide very effectually for this want and he thought it would be very heartily welcomed by many of the working men in the country as likely to become a simple and instructive as well as very useful manual for their own instruction and guidance and for the assistance of their subordinates

The Hon ble Mr Ingham wished to say briefly that he thought the Evidence Bill introduced by the Hon ble Mr Stephen would be of the very greatest benefit to the country

In principle it has been found necessary to put aside any of the technical rules of Evidence observed in the English Courts it was a step in the right direction

In the majority of the Municipal Courts there was nothing deserving the name of a Bar and if a Judge were to rely on the Counsel employed by the parties to bring out all the

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by a reference to a
plumes of decisions

At the present time we had no law of Evidence for India, Some Judges admitted all
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His Honour the Lieutenant Governor said that at this stage of the proceedings and at
this time of day he would confine himself to testifying to the reality of the evils which had
been described by the Hon ble Members who preceded him he would content himself by

—want to draw it out

The Hon ble Mr Stephen felt very much gratified at the terms in which Hon ble Mem-
bers had been pleased to speak of the merit of this Bill. He could hardly suppose that His
Honour was serious in the suggestions he had made at the conclusion of his speech

The Council adjourned to Thursday the 6th April 1871

WHITLFY STOKES
Secy to the Govt of India

CALCUTTA

The 31st March 1871

Govt of India assembled for
the 1st of Parliament

1871

PRESENT

His Excellency the Viceroy and Governor General of India *not present*

The Hon ble John Strachey	The Hon ble J F D Inglis
The Hon ble J Fitzmaurice Stephen Q C	The Hon ble W Robinson C S I
The Hon ble B H Ellis	The Hon ble F S Chapman
The Hon ble F R Cockerell	The Hon ble R Stewart

The Hon ble J P Bullen Smith

SUNDRY BILLS

The Hon ble Mr Stephen also moved that the Hon ble Messrs Chapman Stewart and Bullen Smith be added to the Select Committees on the following Bills —

To define and amend the Law of Evidence

Mr Stephen moved that the Bill be referred to the Select Committee on the Law of Evidence

The next Bill to which he had to refer was the Evidence Bill. He need not say anything more about it than that it was under the consideration of the Committee. He however

The Council adjourned on Friday the 15th December 1871

CALCUTTA

The 8th December 1871

H S CUNNINGHAM

*Offg Secy to the Council of the Govt Genl
for making Laws and Regulations*

SECOND REPORT OF THE SELECT COMMITTEE.

(*The Gazette of India February 1st 1872 Part I p 94*)

The following Report of a Select Committee together with the Bill as settled by them was presented to the Council of the Governor General of India for the purpose of making Laws and Regulations on the 30th January 1872 —

Second Report of the Select Committee

We, the undersigned, the Members of the Select Committee of the Council of the Governor General of India for the purpose of making Laws and Regulations, to which the Indian Evidence Bill was referred, have the honour to report that we have considered the Bill and the papers noted in the margin.

Petition from certain Barristers and Advocates of Bombay, dated 8th August 1871

From Officiating Secretary to Chief Commissioner of Coorg, No 248, dated 4th October 1871, and enclosures.

From certain pleaders of the High Court, Bombay, dated 4th October 1871

From Officiating Secretary to Chief Commissioner of Coorg, No 420 dated 9th October 1871, and enclosures

From Chief Secretary to Government, Fort Saint George, No 166, dated 21st November 1871, and enclosures.

From F J Fergusson Esq., Barrister, High Court, Calcutta, dated 8th December 1871, forwarding memorial from Barristers and Advocates, High Court, Calcutta

From Secretary to Chief Commissioner Central Provinces, No 240, dated 6th December 1871, and enclosures

From Officiating Secretary to Government of Bengal, No 6326J, dated 13th December 1871, and enclosures.

Memorial from certain members of the Madras Bar, dated 16th December 1871

1 We have made some alterations in the arrangement of the Bill

2 We have omitted the definitions of "proof" and "moral certainty" and the sections relating to inferences to be drawn by the Court as being suitable rather for a treatise than an Act

3 We have omitted the provisions relating to material evidence, and have given a new and simpler definition of the difference between primary and secondary evidence

4 We have provided that the Act shall apply to all judicial proceedings, but not to affidavits presented to any Court or officer, nor to proceedings in arbitration

5 As to the effect of an admission by one of several persons jointly tried for an offence we have omitted sec

6 We have re drawn Chapter VI, as to the exclusion of oral by documentary evidence, so as to make the sections more distinct and complete. We believe that they now represent the English law on the subject, freed from certain refinements which would not be suitable for this country

7 *Exception was taken to the Bill in several quarters on the ground that it did not sufficiently dispose of the matter of presumptions. We have re considered this subject with attention, and have provided for it as follows —*

Some presumptions have the effect of laying the burden of proof on particular persons in particular cases. These we have dealt with in sections 103 to 111 of the new Bill.

A conclusive presumption is a direction by the law that the existence of one fact shall in all cases, be inferred from proof of another. This we have provided for in sections 112 and 113

We have substituted the term 'conclusive proof' in these instances for that of 'necessary inference,' which was employed for the same purpose in the first draft of the Bill

that the difference between a presumption of law and a presumption of fact is hardly traceable for this country and likely to be accordingly, by section 114 of fact with which the Court in English law is to follow as to the exceptions are made

We have provided in the Chapter on the Bur *Gazette* that a territory has been ceded to a Native S session at the date mentioned in the notification rest questions which, as we are informed, have arisen on this subject

The subject of presumptions as to documents is a very special matter, and appears to us to belong to the subject of documentary evidence, under which head we have placed it in Chapter V

the head of presumptions the usual they

8 The Chapter on Oaths has been omitted, as they form the subject of a Bill now under discussion.

to which the person asking it is subject

10 We have amended the wording of section 166 as the Judge's power to ask questions. The section as originally drawn might have been taken to authorize him to found his judgment upon irrelevant matter such as loose rumours. The intention of the section was to give him the fullest possible power of inquiry for the discovery of relevant matter. Section 164 as now drawn makes this clear.

11 We have omitted the chapter as to the duties of Judges and Magistrates.

evidence shall be ground for a new trial or reversal of a decision

12. Subject to these amendments we recommend that the Bill be passed but we also recommend that the amended Bill be published in the *Gazette* and that this report be not taken into consideration for a month from the date of its publication

J F STEPHEN
J STRACHEY
J F DINGHIS
W ROBINSON
F S CHAPMAN
R STEWART
J R BULLEN SMITH
F R COCKERELL

The North Indian 1877

4827 ACT of the Proceedings of the Council of the Governor General of India assembled for the purpose of making Laws and Regulations under the Provisions of the Act of Parliament 14 & 25 Vic. cap. 67

The Council met at Government House on Tuesday the 30th January 1877

PRESIDENT

The Hon ble John Strachey Senior Member of the Council of the Governor General of India
president

His Honour the Lieutenant Governor of Bengal

The Hon ble Sir Richard Temple K.C.S.I.

The Hon ble J Fitzjames Stephen Q.C.

Maj Genl The Hon H W Norman C.B.

The Hon ble J F DINGHIS

The Hon ble W Robinson C.S.I.

The Hon ble F S Chapman

The Hon ble P Stewart

The Hon ble J R Bullen Smith

The Hon ble F R Cockerell

INDIAN EVIDENCE BILL

The Hon ble Mr Stephen then presented the second Report of the Select Committee

were certain sections of the Bill relating to the cross examination of witnesses by barristers n considerably altered were dealt with in the recommended would be uld he before the Com to the Council four or

The Council adjourned to Tuesday the 13th February 1872

H. S. CUNNINGHAM,

CALCUTTA

Offg Secy to the Council of the Govr Genl
for making Laws and Regulations

The 30th January 1872

ABSTRACT of the Proceedings of the Council of the Governor General of India assembled for the purpose of making Laws and Regulations under the provisions of the Act of Parliament 24 & 25 Vic cap 67

The Council met at Government House on Tuesday the 12th March 1872

PRESENT

His Excellency the Viceroy and Governor General of India *not present*

His Honour the Lieutenant Governor of Bengal

His Excellency the Commander in Chief *not present*

His Honour the Chief Justice

Q C

The Hon ble W Robinson *not present*

The Hon ble F S Chapman

The Hon ble R Stewart

n c b

The Hon ble J P Bullen Smith

The Hon ble F R Cockerell

INDIAN EVIDENCE BILL.

Report of the Select Committee on the

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"Upon this point I would specially refer to the valuable papers already referred to

that such other defects as may still be latent in it have escaped the detection of at least two highly competent and by no means favourable critics who have given the matter careful consideration. Upon some of these criticisms I will make a few remarks as I go on. I refer to them now for the sake of showing the importance of the opinions which I am about to read.

The letter of the Madras Government says —

"It is both advisable and possible so to codify the Law of Evidence as to present within the limits of a single enactment a treatise upon that law practically sufficient for ordinary purposes and it then adds

"The Draft Bill in its scheme and general arrangement appears to furnish an adequate outline of such a Code

but it is observed that the Bill in its present state is far from complete."

Mr Norton expresses the same opinion at greater length and each of these authorities agrees in the statement that the Bill is only a skeleton which will have to be completed by a greater number of judicial decisions.

Mr Norton criticises the Bill section by section and in order to show how fully he has done so he observes—

Court of India

He could hardly, I think, have submitted it to a more searching test. Further on he observes—

The process by which this Bill has been in the main built up appears to me to have been by following Mr Pitt Rivers' work on Evidence and arbitrarily selecting certain sections or portions of sections.

"He then criticises the Bill in detail and concludes by saying—

his paper which contains 103 paragraphs and extends over 14 folio pages refers to all the defects and omissions which his careful study of the subject has brought in his notice. Passing over criticisms of detail many of which are no doubt just and have been adopted I find that the only sins of omission with which he charges the Bill are the following —

1—Its provisions as to the effect of judgments are meagre

2—It does not deal fully enough with the subject of presumptions

He also suggests slight additions to or enlargements upon four sections of very subordinate importance which I will not trouble the Council by referring to

The letter from the Madras Government which describes the Bill as far from complete, specifies no omission whatever except in reference to the subject of presumptions more of which it affirms should be included in a Code aiming at completeness.

The charge of incompleteness then comes to this that the Bill does not deal fully enough with the two subjects of judgments and presumptions. I will refer to those points hereafter but I will first with your Lordships' permission say a few words on the positive

about as much truth and truth of the

Norton's own book on the subject will be found any recognition of the distinction between

the words 'fact' and 'evidence'. As to the notion that bits of Taylor have been

"As to the specific instances of incompleteness which are alleged against the Bill two only are of any importance and upon each of them I will say a few words"

"Many English writers have treated the subject in such a manner as to make it comprise the whole body of the law. Thus for instance *Starkie's Law of Evidence* deals with

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"The second section of the Code of Civil Procedure enacts that —

"The Code of Criminal Procedure enacts that a man shall not be tried again after he

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decisions have been
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to the Law of Evi
ted with it. There

are for instance cases in which insanity excuses an act which would otherwise be a crime. If a man defends himself on the ground of insanity he must give evidence of it just as he must prove the existence of a judgment barring his antagonist's right to sue if he

relies on the rights being so barred, but it appears to me that it would be as reasonable to treat the question of the effect of insanity on responsibility as a part of the Law of Evidence because in particular cases it may be necessary to give evidence of insanity as to treat the law as to the effect of a previous judgment on a right to sue as part of the Law of Evidence because, in certain cases, it may be necessary to give evidence of the existence of a previous judgment

The only questions connected with judgments, which do appear to me to form part of the Law of Evidence properly so called are dealt with in sections 40—44 of the Bill. These sections provide for the cases in which the fact that a Court has decided as to a given matter of fact relevant to the issue may be proved for the purpose of showing that that fact exists. This no doubt, is a branch of the Law of Evidence and the provisions referred to dispose of it fully.

As to the subject of presumptions my answer to the critics of the Bill is partly to the same effect, though their criticisms were perhaps better founded. I must admit that the Bill as introduced dealt less fully with the subject than was thought desirable on further consideration and some additions to it have accordingly been introduced though the general principle on which the matter was dealt with is maintained. The subject of presumptions is one of some degree of general interest. It was a favourite enterprise on the part of Continental lawyers to try to frame systems as to the effect of presumptions which would spare Judges the trouble of judging of facts for themselves by the light of their own experience and common sense. A presumption was an artificial rule as to the value and import of a particular proved fact. These presumptions were almost infinite in number and were arranged in a variety of ways. There were rebuttable presumptions and presumptions which were irrebuttable. *Præsumptio juris et de jure*, *Præsumptio juris* and *Præsumptio facti*. There were also an infinite variety of rules for weighing evidence, so much in the way of presumption and so much evidence was full proof a little less was half full and so on. Scraps of this theory have found their way into English law, where they produce a very incongruous and unfortunate effect and give rise to a good deal of needless intricacy. Another use to which presumptions have been put is that of engrafting upon the Law of Evidence many subjects which in no way belong to it. For instance there is said to be

with which it is accidentally connected to criminal law to which it properly belongs.

I will not weary the Council by going into all the details of the subject though I could with perfect ease if it would not take too long answer specifically the remarks of the Madras Government on this matter. That Government says—

Sections 102—104 contain three instances of presumptions selected from a chapter of the Law of Evidence which in Taylor's bill 111 sections. It is difficult to see why any should be inserted when so few are chosen.

In general terms the answer is this. Large parts of Mr Taylor's chapter relate to topics which have nothing to do with the Law of Evidence. Those which are of practical importance are all included in the Bill as it stands (a few were no doubt omitted in the first draft and they fall under these heads. —1st—There are a few cases in which it is expedient to provide that one fact shall be conclusive proof of another for various obvious reasons. The inference of legitimacy from marriage is a good instance. 2nd—There are several

(114) has been added to this chapter which deserves special notice. Its substance was I think implied in the original draft of the Bill but it has been inserted in order to put the matter beyond all possibility of doubt. It is in the following words—

114 The Court may presume the existence of any fact which it thinks likely to have happened regard being had to the common course of natural events human conduct and public and private business in their relation to the facts of the particular case.

Illustrations

The Court may presume—

(a) that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen unless he can account for his possession.

(b) that an accomplice is unworthy of credit unless he is corroborated in material particulars.

(c) that a bill of exchange, accepted or endorsed, was accepted or endorsed for good consideration,
 (d) that a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or states of things usually cease to exist, is still in existence.

(e) that judicial and official acts have been regularly performed;

(f) that the common course of business has been followed in particular cases;

(g) that evidence which could be, and is not, produced, would, if produced, be unfavourable to the person who withholds it;

(h) that if a man refuses to answer a question which he is not compelled to answer by law, the answer if given, would be unfavourable to him;

(i) that when a document creating an obligation is in the hands of the obligor, the obligation has been discharged.

But the Courts shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before them—

As to illustration (a)—A shop-keeper has in his till a marked rupee soon after it was stolen, and cannot account for its possession specifically, but is continually receiving rupees in the course of his business.

As to illustration (b)—A man is in possession of a document which would bear on a contract of small importance on which he is sued, but which might also injure the feelings and reputation of his family.

As to illustration (c)—A, the drawer of a bill of exchange, was a man of business. B the acceptor, was a young and ignorant person, completely under A's influence.

As to illustration (d)—It is proved that a river ran in a certain course five years ago but it is known that there have been floods since that time which might change its course.

As to illustration (e)—A judicial act the regularity of which is in question, was performed under exceptional circumstances.

As to illustration (f)—The question is, whether a letter was received. It is shown to have been posted, but the usual course of the post was interrupted by disturbances.

As to illustration (g)—A man refuses to produce a document which would bear on a contract of small importance on which he is sued, but which might also injure the feelings and reputation of his family.

As to illustration (h)—A man refuses to answer a question which he is not compelled by law to answer but the answer to it might cause loss to him in matters unconnected with the matter in relation to which it is asked.

As to illustration (i)—A bond is in possession of the obligor but the circumstances of the case are such that he may have stolen it.

As to illustration (j)—A man is in possession of a document which would bear on a contract of small importance on which he is sued, but which might also injure the feelings and reputation of his family.

the rule that an accomplice is unworthy of credit, unless he is confirmed, can be called a principle of law, the principle is a mere maxim, a maxim of Sir Barnes Peacock's.

"As I have already observed, I do not wish to trouble the Council with technicalities but I hope this explanation will show that this part of the Bill, at all events, is not incomplete."

"I may observe that many topics closely connected with the subject of evidence are

whatever ought to be investigated

"I now turn to a criticism made on the Bill by His Honour the Lieutenant Governor of Bengal, who appears to be somewhat dissatisfied with the manner in which the Bill deals with the question of relevancy, which, as he says, is a question of degree

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levant to the case before the Court without written instructions, that if the Court con- sidered the question improper, it might require the production of the instructions, and that the giving of such instructions should be an act of defamation, subject, of course, to the various rules about defamation laid down in the Penal Code. To ask such questions without instructions was to be a contempt of Court in the person asking them, but was not to be defamation.

"This proposal caused a great deal of criticism, and in particular produced memorials from the Bars of the three Presidencies."

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most important argument of all—that, in this country, the administration of justice is carried on under so many difficulties and is so frequently abused to purposes of the worst kind that it is of the greatest importance that inquiry. These reasons satisfied the sections proposed would be inexpedient, them which I think will in practice be follows —

"146. When a witness is cross examined he may in addition to the question hereinbefore referred to be asked any questions which tend

- (1) to test his veracity,
- (2) to discover who he is and what is his position in life, or
- (3) to shake his credit by injuring his character although the answer to such questions might tend directly or indirectly to criminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture

"147. If any such question relates to a matter relevant to the suit or proceeding the provisions of section 132 shall apply thereto.

"148. If any such question relates to a matter not relevant to the suit or proceeding, except in so far as it affects the credit of the witness by injuring his character the Court shall decide whether or not the witness shall be compelled to answer it and may if it thinks fit warn the witness that he is not obliged to answer it. In exercising its discretion, the Court shall have regard to the following considerations —

- (1) Such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the Court as to the credibility of the witness on matter to which he testifies.

" - - - - - remote in

- (2) Such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence
- (4) The Court may, if it sees fit, draw from the witness's refusal to answer, the inference that the answer if given, would be unfavourable

"149. No such question as referred to in section 148 ought to be asked, unless the person asking it has reasonable grounds for thinking that the imputation which it conveys is well founded.

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(c) A Jarruel is tried by an attorney or hakim that an important person said so. This is a reasonable ground for asking the witness whether he is a doctor?

(3) A plaintiff is informed by a person in Court that an important witness is a doctor. The informant is being questioned by the plaintiff and gives satisfactory reasons for his statement. This is a reasonable ground for a finding the witness is either a doctor.

() A witness of whom nothing whatever is known is selected at random in the rehearing court. There are here no reasonable grounds for the question.

(d) Awareness of whom not to do whatever is known by the person as to his mode of life and means of living given at factory anwers. This may be a reasonable ground for asking him if he is a

1.4) If the Court is of opinion that any such question was asked without reasonable grounds that it was asked by any barrister, pleader, valuer or attorney, report the circumstances of the case to the High Court or to a Justice of the Peace to whom the barrister, pleader, valuer or attorney is subject in the exercise of his profession.

141 The Court may forbid any questions or requests which it regards as indecent or scandalous although such questions or requests may have some bearing on the question before the court, unless they relate to facts in issue or to matters necessary to be known in order to determine whether or not the facts in issue exist.

10 The Court shall find any question which appears to it to be intended to annoy
 11 or which, although proper in itself, appears to the Court needlessly offensive in form

The object of these sections is to lay down in the most direct manner the duty of

think that the effect of a further subcommittee is concerned especially for themselves and that there will be admitted to be so by all honorable advocates and by the public. I cannot leave the subject without a few remarks on the memorials which the petitioners originally proposed have called forth from the British various parts of the country. As none of the bodies in question have made any further remarks on the Bills not prepared by the Committee, it is an excellent opportunity to state a few suggestions that the alterations made in the Bill have rendered the main objection which I felt to it. I need not therefore repeat the separate parts of the memorials which were directed against the consequences which they apprehended from the section which have been given up. They contain however other matters which I feel compelled to notice. I need not refer to all the memorials. The one sent in by the Calcutta Branch as for the most part proper though I confess I do not think it as well have been omitted. The memorial of the Bombay Branch is not as such a memorial as expressed more fully and less temperately and I shall record in it concerning my self to not a few of the remarks appear to me to deserve notice.

I have been in the first place general that I have read in the newspapers and
in these newspapers that it is not individually actually in draw
this Bill has led to the British Bombay memorials so many or is
the rent is made by members again I suppose me) Now I appear to con-
tinue plate the extent of the profits for better than in India In support of the
my statement the question is open to no other conclusion the following
and from the report of the Select Committee —

The English system under which the P. N. H. and the F. A. act together and pass the law respectively is independent and the type of colonial organization on which the two do not as yet exist in this country and will not for a very long course of time be introduced.

I believe I made the remarks I did suggest let me say to Lord J and the
 Council whether a charge that I feel all people will for the extension of the profession of
 Barrister at Law in India is not in the face of it absurd? I am myself Barrister for
 fifteen years standing and a Queen's Counsel of forty years standing I believe in the
 inferiority of the
 profession
 of the Barrister
 as a practical
 profession. W.

I do not propose to preserve the lion and deny the fox profess and to prevent
 food name from being used for the reason I levelled with the regular as an appro-
 priate meal for a general evil one which I have been much impressed by
 my own observations. English is likely to extend in India as the habit of cross
 examination becomes more general. I then the merits which a cross-examiner advocate
 has are explicitly defined. The remedy I will admit was to some extent inappropriate
 for me to propose for merely recognizing the existence of the evil and while
 it is elected I must get the way not to extend its use on principle.

"The real meaning of the expressions in the report (for which I am fully responsible) was, I think, so plain, that I cannot understand how the memorialists can have ascribed to them a sense which I think they could never suggest to any fair mind. The report said—

'The English system, under which the Bench and the Bar act together and play their respective parts independently, and the professional organization on which it rests, do not as yet exist in this country and will not for a very long course of time be introduced'

"Yes," say the memorialists, 'it does exist, to wit, in the Presidency towns' This is as much as if the water works of Calcutta were referred to, to contradict a statement that India is wretchedly supplied with drinking water. I make a statement about an Empire as large as Europe without Russia, and am told that it is incorrect, because there are three English Courts, and these hosts of perhaps a dozen or so English Barristers to be found at towns which complained of

the knowledge of which was confined to a knot of
regards the Mofussil, I repeat the expressions com-

Bar in England form substantially one body
great prize to which the Barristers look forward is to become Judges.

"That is not the case in India, nor anything like it. The great mass of Indian Judges
lawyers have no chance
to do so. Even in the
from that of England
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nd Calcutta memorialists
My opinion, of course, is
it can be of little import

"Passing however, from the case of English Barristers to the case of pleaders and

vant to the matter in issue, but may lead to something that is, and is not
Judges with express authority to do this that section 165 which has been so much objected
to, has been framed

"I have now referred to the main points in the Bill which have been attacked, and
as I fully explain the principles on which it was founded more than a year ago, I have only
to move that it may be taken into consideration."

The motion was put and agreed to

The Hon'ble Mr Stephen then moved the following amendments—

That, in section 8, instead of the second paragraph, the following be substituted —

thereto."

That, in section 9, line 3, after the word "which," insert the words "support or"

That, in the explanation to section 57, instead of the words "the Parliament of the United Kingdom of Great Britain, of England, of Scotland, and of Ireland," the following be substituted —

- (1) The Parliament of the United Kingdom of Great Britain and Ireland,
- (2) The Parliament of Great Britain,
- (3) The Parliament of England
- (4) The Parliament of Scotland, and
- (5) The Parliament of Ireland "

That the words "or in any other case in which the Court thinks fit to dispense with it" be added to the proviso in section 66,

That the following new section be inserted after section 157. —

And that the numbers of the subsequent sections be altered accordingly

The motion was put and agreed to

His Honour the Lieutenant Governor would ask the permission of His Excellency the President to move an amendment of which he had not given notice. He would observe that the Council had had very short notice of this Bill being brought forward and passed to-day. The amendment which His Honour intended to propose was not of much importance. It was simply to lop off a dead branch of the Bill, namely, section 150.

His Honour the Lieutenant Governor said that His Honour the President had attached weight to the amendment. It was,

His Excellency the President thought that this was a question of great importance, and that notice should have been given of the intention to move the amendment.

His Honour the Lieutenant Governor said that, as His Excellency the President was of opinion that the notice of the amendment should have been given, His Honour did not think that his amendment was of sufficient importance to delay the passing of the Bill.

The Hon'ble Mr. Cockerell felt very much inclined to support His Honour the Lieutenant

committee, but had been overruled.

His Honour the Lieutenant Governor said that he had a strong feeling in favour of the amendment, but he did not think it was of sufficient importance to delay the passing of the Bill.

The Hon'ble Mr. Stephen said that, looking to the great pressure of business before the Council, he would much rather consent to the amendment being brought on at once than that there should be an adjournment.

His Honour the Lieutenant Governor would express a strong opinion that his amendment was not of sufficient importance to call for an adjournment.

During the nature of the proposal, but he did not think it was of sufficient importance to delay the passing of the Bill.

His Honour the Lieutenant Governor then moved the omission of section 170. He had already stated, in regard to the amendment nearly all that he had to say, namely, that the section was really a dead branch, without any effect, and that it would not be necessary for him, therefore, to discuss the subject. It seemed to him that this section had been struck out of the Bill, and which was

in a very lucid manner, namely, sections 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

any advocate who held any interest from this Bill. It seemed to him that the provision was much more in the nature of a section to enable a teacher to report a boy to his parents or to one who held a moral or legal control over him. The section was of no practical effect, but to some extent disfigured the Bill, as being a fictitious shadow of a reality which had passed away, and His Honour therefore purposed to omit it.

The Hon'ble Mr. Cockerell entirely agreed with what had fallen from His Honour the Lieutenant Governor; and, in his opinion, if any provision of this kind could properly find a place in a legal enactment, it should rather be in a Bill relating to pleaders, such as the Bill on that subject, which was already before the Council. It seemed to him (Mr. Cockerell) that the Bill should be retained in this opinion.

Major General the Hon'ble H. W. Norman thought, on the whole, that the section should be retained, it might be the means of doing some good and he thought it could not do any harm.

The amendment was then put and negatived.

The Hon'ble Mr. Stephen then moved that the Bill as amended be passed. He would not trouble the Council with any further remarks.

His Honour the Lieutenant Governor said he would not like to let this motion pass without his life in dealing with every Bill, he was compelled to take this Bill a quarter in which it could be given thorough consideration and thorough sifting in a most thorough and systematic manner.

It was in the hands of a man who was so extremely free from antiquated prejudice and antiquated notions, that he hoped the Bill had been made as good as a Bill of this kind could be expected to be made in the hands of any man. His Honour had on a former occasion

and believed that a law of evidence, freed from intricacies and technicalities, had thus very

evidence, which was not to be found codified anywhere as substantive law, or otherwise, in any shape admitting of its being easily referred to by our Judges and judicial officers of all grades. His Honour could have wished that the Hon'ble Member in charge of the Bill

for it.

administration of justice in India

The Council had to thank Mr Stephen for a very great deal of admirable work, and Mr Strachey was sure that his name would long be remembered in India through this work in particular, which was now about to be completed.

The motion was put and agreed to.

The Council adjourned to Tuesday the 19th March 1872

H S CUNNINGHAM,

*Offg Secy to the Council of the Govt Genl
for making Laws and Regulations*

CALCUTTA

The 12th March 1872

ABSTRACT of the Proceedings of the Council of the Governor General of India, assembled for the purpose of making Laws and Regulations under the provisions of the Act of Parliament, 24 & 25 Vic, cap 67

The Council met at Simla on Thursday, the 15th August, 1872

PRESENT

The Hon'ble Sir John Strachey, K.C.S.I., *presiding*
His Honour the Lieutenant Governor of the Punjab
His Excellency the Commander in Chief, G.C.B., G.C.S.I.

The Hon'ble Sir Richard Temple, K.C.S.I.
Maj.-Genl. The Hon'ble H. W. Norman, C.B.

The Hon'ble Arthur Hobhouse, Q.C.
The Hon'ble E. C. Bayley, C.S.I.

The Hon'ble R. E. Egerton.

EVIDENCE ACT AMENDMENT BILL.

The Hon'ble Mr. Hobhouse moved for leave to introduce a Bill to amend the Indian

The opportunity had been taken to make corrections of few other errors, being clerical or typographical, or mere slips in drafting, but he would not now enlarge upon them, as the Bill, he hoped, would be published with a full Statement of Objects and Reasons, and would, he trusted, be referred to a Select Committee.

The Hon'ble Mr. Hobhouse then applied to the President to suspend the Rules for the Conduct of Business.

The President declared the rules suspended.

The Hon'ble Mr. Hobhouse then introduced the Bill, and moved that it be referred to Select Committee with instructions to report in a week.

The motion was put and agreed to.

The following Select Committee was named: On the Bill to amend the Indian Evidence Act, 1872—The Hon'ble Sir John Strachey, the Hon'ble Messrs. Bayley and Egerton, and the Mover.

The Council then adjourned till the 29th August, 1872.

SIMLA,

The 15th August, 1872.

WHITLEY STOKES,

Secretary to the Government of India.

ABSTRACT of the Proceedings of the Council of the Governor-General of India, assembled for the purpose of making Laws and Regulations under the provisions of the Act of Parliament, 24 & 25 Vic, cap. 67.

The Council met at Simla on Thursday, the 29th August, 1872.

PRESENT:

His Excellency the Viceroy and Governor-General of India, G.M.S.I., *presiding*

His Honour the Lieutenant-Governor of the Punjab.

His Excellency the Commander-in-Chief, G.C.B., G.C.S.I.

The Hon'ble Sir Richard Temple, K.C.S.I.
Maj.-Genl. The Hon. H. W. Norman, C.B.

The Hon'ble Arthur Hobhouse, Q.C.
The Hon'ble E. C. Bayley, C.S.I.

The Hon'ble R. E. Egerton.

INDIAN EVIDENCE ACT AMENDMENT BILL

The Hon. Mr. Hibhouse also presented the Report of the Select Committee on the Bill to amend the Indian Evidence Act 1872. He said that in considering the Bill the Committee had proceeded on the principle that under the circumstances it was no part of their duty to alter any part of the Act on the score of principle, but only to effect such alterations as they believed the draftsman would have made if his attention had been called to them. The principal reason for passing the present Bill into law before the 1st September was this —

Act I of 1872 repealed in toto a prior Act VI of 1852 and one of the sections of that Act was as follows —

tively

"Now, that was a positive enactment in the clearest possible terms purporting to confer upon certain tribunals and officers power to administer oaths *Prima facie*, if that power were not, and for that fact alone, it would be sufficient to show that the law was unconstitutional."

tioned. It was, therefore, important to leave upon the Statute book as clear extensive

of evidence

the form of it and the person who administered it must be duly qualified to do so. The second object was important because it diminished the mischief which might arise from the first. It was equally important because it was easy to say "Certainly," made by the State, and had by express legislation been the case. Besides this, the giving of false testimony of the Penal Code showed oath by duly authorized

PERSONS

He also applied to His Excellency the President to suspend the Rules for the Conduct of Business.

The President said that, in his opinion, Mr Hobhouse had shown sufficient cause for suspending the Rules in the present case His Excellency accordingly declared the Rules suspended

The Hon'ble Mr Hobhouse then moved that the report be taken into consideration

The motion was put and agreed to

The Hon'ble Mr Hobhouse then moved that the Bill be passed

The motion was put and agreed to

The Council then adjourned till the 5th September, 1872

SIMLA,

The 29th August, 1872

WHITLEY STOKES,

Secretary to the Government of India

APPENDIX C.

(See Section 13, p. 182, *ante*.)

Judgment and Decree of the Subordinate Judge of Benares referred to by the Privy Council in *Bhatto Kunwar v Kesho Pershad Misser*, 24 I A, 10, s c, 1 C. W. N, 265 (1897)

No. 184

Judgment of Baboo Mirtunjoy Mukerji, Subordinate Judge of Benares, dated 10th December, 1887

SUIT No 30 OF 1887

Kesho Parshad

Plaintiff

versus

Sheodul Tewari *alias* Bacha Tewari and Raja Ajit Singh

Defendants

Kuar had a daughter named Sadah Kuar, who was married to one Baijnath Misser, father of Ramkishen Misser. Bhawani Parshad died a bachelor.

Kesho Parshad, the plaintiff to this suit, claims to be the son of Bhondu Misser, who is alleged to have been a brother of Baijnath Misser.

It is alleged that the plaintiff is the son of the estate which came

The plaintiff claims to recover possession of it on the death of the widow of Ramkishen as his heir under the Hindu law, setting aside a deed of sale executed by Sheodul Tewari in respect of five villages forming part of the estate of Ramkishen, in favour of the other defendant.

The following is the substance of the defence made by the defendants in their written statement:—

The plaintiff is not the son of the brother of the father of Ramkishen.

He cannot also be his heir, as Ramkishen was adopted by Bhawani Tewari as his son.

The suit is barred by limitation, as Sheodul Tewari has been in adverse possession of the estate for more than twelve years next preceding the date of this suit.

Ramkishen Misser had been in possession of the estate as a trustee under the agreement of 1850, and the plaintiff therefore can have no right to claim it as his heir.

ISSUES

1. What, if any, relation the plaintiff bore to Ramkishen Misser?

2. Since when, and of which right, have the defendants been in possession of the property in dispute, and what was the nature of their possession?

3 When, if ever, had Mussammat Mitho Kuar been in possession of it, and what was the nature of her possession ?

4 *Of what right had Ramkishen Misser been in possession ?*

5 Did Bhawani Parshad Tewari revoke the Will he had made during his lifetime, and was it acted upon after his death ?

6 Does limitation bar this suit ?

7 Has the plaintiff a better right to the property in dispute than the defendants ?

8 What sort of decree, if any, ought to be granted to the plaintiff ?

JUDGMENT

the property in dispute up to 1286 Fash (1879) as would appear from the record of rights wherein her name was all along as *patnidar* until the time of the recent settlement, when her name was expunged

On the 1st issue the Court holds it proved by the evidence of the plaintiff himself, of Pahoon Misser, brother in law of Ramkishen, of Anandi Kuar, his sister and of Thakura Kuar, his stepmother, that he (the plaintiff) is the son of Bhondu Misser, brother of Bajnath Misser, father of Ramkishen Misser

On the 2nd session of the estate 4th January 1856 litigation, 1876, it was their own tion of the estate by its decision on January 1885 in possession of

of Mitho Kuar was expunged from the revenue records

On the 3rd issue I find that Mitho Kuar had been in possession of Ramkishen's share of the estate as its proprietress till 1879, up to which time she was recorded its *patnidar*

the 4th September
this express ad-
dressed evidence that
at Avadh Behari
in any share

right to the possession of the estate under it and the fact that they got possession of it under the agreement constitutes almost conclusive evidence that it was never acted upon

On the 5th issue the Court finds for the reasons given in its decision on the 4th issue that the will of Bhawani Parshad was revoked by him during his lifetime and that granting for the sake of argument that it was not so revoked it was never acted upon and that *Ramkishan and Bacha Tewari have been in proprietary possession of the estate under the agreement of 1850 adversely to the trusts if any created by the will*

On the 7th issue the Court holds that the plaintiff as son of the uncle of Ramkishan is entitled to the property in dispute in preference to the defendants there being no evidence to show that he was adopted by Bhawani Parshad Tewari.

On the 8th issue the Court holds that the plaintiff as heir of Ramkishan Misser is entitled to the reliefs sought

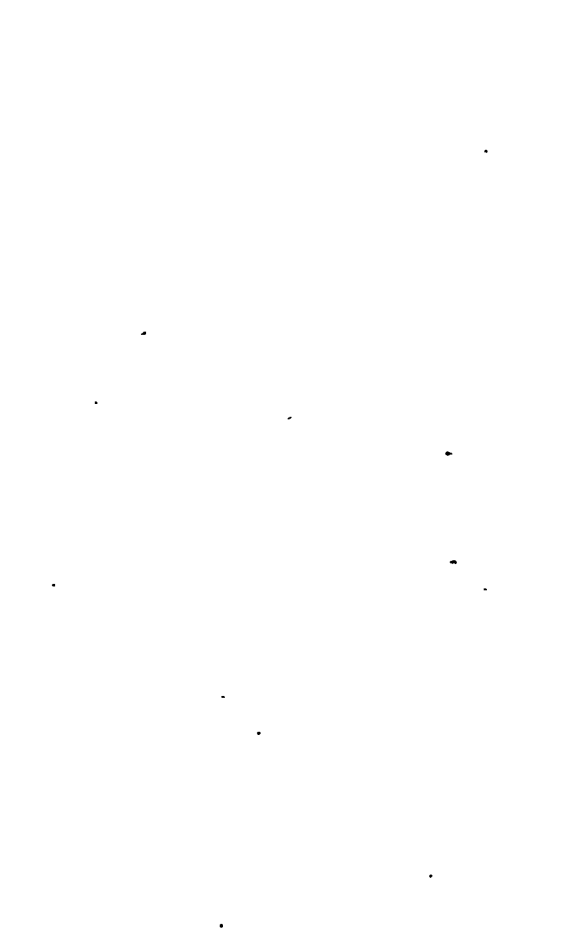
ORDER.

The suit is decreed with costs

Dated 10th December 1887

(Sd) MERTONJOY MUKERJI

Subordinate Judge



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